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A TREATISE

ON THE

LAW OF INSURANCE

OF EVERY KIND

By

JOSEPH A. JOYCE

Of the New York, California, and Connecticut Bars

Second Edition

In Five Volumes

Vol. I

THE LAWYERS CO-OPERATIVE PUBLISHING CO.
ROCHESTER, N. Y.
1917

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1917

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To My Wife
M. E. J.
THIS TREATISE WAS DEDICATED
IN THE
FIRST EDITION
"AS A TRIBUTE TO HER CONSTANT ENCOURAGEMENT"
AND
THIS SECOND EDITION
IS
REDEDICATED
TO HER
AS A PERPETUAL TRIBUTE

PREFACE TO SECOND EDITION.

In the following volumes the author has adhered to the plan adopted in the first edition as stated in the preface thereto, which also appears herein, although it may be restated here that the writer has not treated the several kinds of insurance separately, but, on the contrary, he has grouped decisions together with reference to the grounds on which the authorities have been based; where this has not been possible owing to some technical doctrine peculiar to a particular kind of insurance, as in case of abandonment and constructive total loss in marine insurance and some other instances, the subject has been treated separately under its proper heading.

In other words, the author has endeavored to make clear the unity of insurance law, which unity cannot be ignored in any authoritative treatise on insurance for its recognition is necessary to any thorough understanding of this great subject or of any kind or form of true insurance. That this is realized by the courts is evidenced by numerous learned and exhaustive opinions wherein the discussion is not limited to that of the particular kind of insurance involved, but recourse is had to authorities covering other kinds of insurance in which the same or like principles have controlled. And the writer has believed and still believes that it were futile to attempt to solve a question of insurance law without recourse to principles, and necessarily a recourse to principles means a recognition of the unity of insurance law. Therefore it has been the intention in this edition, as in the first, to bring out as clearly as possible and apply the underlying principles running through and governing this entire subject, to present whatever distinctions exist between the various kinds or forms of insurance, to follow up to a logical conclusion, to show generally and particularly this application of principles and these distinctions, to harmonize conflicting decisions as far as possible, and to formulate rules whenever it can be done.

The author has given the last five years and more of arduous exclusive application to the writing of this second edition, examining personally the adjudications since the publication of the first edition, and has added over one thousand new sections and also new material to nearly all the old sections, and he believes no point of value has been overlooked.

Various new forms or kinds of insurance concerning which there were few if any decisions when the first edition was issued have been fully treated so far as there have been authorities covering the same.

It has also been the writer's purpose to present as exhaustively as the decisions or rulings of courts and other authorities permit, all insurance questions involving war risks, including arrests, restraints, capture, seizure, contraband of war, etc., prize law in so far as it has bearing upon questions involved, a consideration of the British Proclamations or Orders in Council, etc., etc.

An appendix has been added containing certain matters which have been deemed of special importance to the profession in connection with the subjects of war risks in insurance; average; and marine insurance.

In this, as in the former edition, every effort has been made to bring this treatise up to that standard which the profession requires and which is necessitated by the technical character of the subject, and it is sincerely hoped that the profession will find that it meets its approval and use, and that the work will accomplish something towards bringing about some degree of certainty or uniformity in the law in many instances where it is now wanting.

It is believed that in this edition, as in the first, full credit has been given to all works and authorities consulted. The author also acknowledges with great pleasure the many courtesies extended to him in "The Law Library in Brooklyn," County Court House, Brooklyn, New York, by the librarian, Mr. Otto Wetzel; the assistant librarians, Mr. William Burt Cooke, Jr., and Mr. Daniel Cubberly, and the clerk, Mr. William Rosmarin.

JOSEPH A. JOYCE.

New York City, N. Y., 1917.

PREFACE TO FIRST EDITION.

In the following volumes the writer has endeavored to give the profession not only a treatise, but a working book, which will meet the needs, lessen the labors, and save the time of all lawyers interested in questions relating to insurance, and to make it alike valuable to the practitioner who has access to large libraries and to the one who has not. The writer's experience in practice, coupled with what he has learned from judges and other members of the profession, convinced him that a work covering the whole law of insurances and its practice before the courts would be favorably received. He has, therefore, attempted to prepare a work presenting, in a carefully and systematically arranged form, the principles underlying adjudged cases, the facts to which such principles have been applied, and the opinions of courts and text-writers upon conflicting questions of law. Having this purpose in view, the writer in 1889 commenced collecting the necessary material, since which time no labor has been spared in critically examining the authorities, systematically arranging them with reference to their underlying principles, and in noting as briefly and concisely as has been deemed advisable the facts of such important cases as will show the application of the governing principle therein, and the grounds of the decisions. If for other reasons than a conflict of authority it has been impossible to formulate any certain rule, the substance of the decision or decisions in point has been given. Where decisions have conflicted, the writer has endeavored to reconcile them and to state the weight of authority, and has called to his aid in numerous instances the opinions of other text-writers and of courts. It has not been the writer's plan to treat of the several kinds of insurances separately, but, on the contrary, to group decisions together with reference to the grounds on which the rulings have been based; where this has not been possible, owing to some technical doctrine peculiar to a particular kind of insurance, as in case of abandon-

ment and constructive total loss in marine assurance, the subject has been treated separately under that heading to which it belongs. This arrangement has made it possible to cover all kinds of insurances, including mutual benefit insurance. Much time and labor has been expended in arranging alphabetically the sections of some chapters, but in no instance has this been done where it has not seemed more systematic, in view of the subject matter of such chapters, and better calculated to aid the practitioner by facilitating speedy reference. It is believed that no errors exist as to the authorities relied on, for they have not only been carefully selected and fully and conscientiously examined before and during compilation, but the citations made have also been verified from the completed manuscript. Every effort has been made to bring this work up to that standard which the technical character of the subject and the wants of the profession necessitate, and to make it one of value alike in the court room and the office. It is trusted that such effort has not been unsuccessful.

A succinct account of the origin and sources of insurances has been incorporated in the form of a "Preliminary Chapter." The adjudications have been brought down to the time of going to press, and cover not only those in this country, but also numerous English and Canadian cases. The writer has freely consulted the works of Emerigon, Marshall, Arnould, Duer, and others, and has carefully endeavored to give full credit to all from whom any information has been obtained. The writer also acknowledges his indebtedness to his brother, Mr. Howard C. Joyce, for assistance rendered during a part of the time. Credit is also due Mr. Howard K. James for aid in helping verify some of the citations; and the unfailing courtesy of Mr. James H. Deering and Mr. Lloyd Conkling of the San Francisco Law Library extended to the writer is acknowledged by him with great pleasure.

If the purpose of this treatise and the choice of the plan have been fortunate and the work is otherwise meritorious, the writer is content to leave it in the hands of the profession.

JOSEPH A. JOYCE.

San Francisco, Cal., August, 1897.

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(n) Minnesota.
(o) Mississippi.
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TITLE X.

VOID AND ILLEGAL INSURANCES AND EXCEPTED RISKS AND LOSSES.

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LAW OF INSURANCE

TITLE I.

PRELIMINARY CHAPTER.

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§ I. Sources of insurance.—The principal sources of insurance law are to be found in the marine law and the customs of merchants, to be collected from ancient and modern codes or ordinances of commercial law, elementary treatises on the subject in

our own and foreign languages,[1] and the judicial decisions in the courts of this and other countries which follow the general marine law and the law of nations.[2] The origin of insurance, however, necessarily includes a reference to many of its sources, and we shall hereafter mention them in the consideration of that question.

Whatever may have been the origin of insurance, this much is true, that it is to marine law and marine insurance that we must look for a long period of time, especially in England, for the most certain developments of the system of insurance and the enunciation and regulation of the principles governing the contract.[3] Justice Park, writing in 1796, says that where insurance is mentioned by professional men, marine insurance is meant.[4] Hopkins declares that the indemnity afforded by insurance was for a long period confined to the dangers of marine insurance,[5] and Walford asserts that it is admitted by all writers that maritime casualties were the first to which the principles of assurance, as distinguished from the mutual protection idea, were applied.[6] Other authors, writing on the subject, refer it to such sources that it is through the medium of marine insurance that we must look for the fundamental principles governing the contract. Thus Emerigon[7] declares that "the ancient laws of the sea[8] are the sources which are open to them, and the same whence they should draw who wish to recur to first principles;" and, he adds, that research into the antiquity of maritime jurisprudence is necessary, since many of the ancient doctrines, though now obsolete, are still the foundation of those now in force, and that it is difficult to comprehend many rules of the modern law without recourse to the ancient.[9] As to legislative action, or particular ordinances, Marshall says these have seldom gone further than to define and sanction those principles which were already received in all commercial countries; that some have added regulations dictated by national policy or particular interest, but these are disregarded elsewhere. Although the ordinances of other countries are not in force in England, or this country, they are of authority as expressing the usage of other countries upon a contract which is presumed to be

[1] For history of insurance treatises, see 3 Kent's Comm. (13th ed.) *342, 342, 487, *487; 1 Duer on Ins. (ed. 1845) lect. ii. pp. 45 et seq.; 1 Marshall on Ins. (5th ed.) 15 et seq. See note at end of this section.

[2] 1 Duer on Ins. (ed. 1845) 19 et seq.; 1 Marshall's Ins. (5th ed.) 13.

[3] See note at end of this section.

[4] Park on Ins. (4th ed.) "Introduction," ii.

[5] Hopkins' Mar. Ins. (ed. 1867) 47.

[6] Walford's Ins. Guide (2d ed.) 4.

[7] Emerigon on Ins. (Meredith's ed. 1850) xxxi.

[8] See note 8, pp. 4, 5, to this section.

[9] Emerigon on Ins. (Meredith's ed. 1850) xli.

governed by general rules that are understood to constitute a branch of public law.[10] Referring again to Emerigon,[11] he says that while the contract of insurance, and the mode for interpreting the obligations it involves, belong to the usage of mercantile places rather than to the civil law, or what was known to Blackstone and other English writers as municipal law, yet, "though it did not become, till very late, the special object of legislation, it is not the less regulated by the general principles of justice and equity that abide in the written reason of the law." [12] He also declares that the contracts of maritime loan and insurance often depend on the same principles. This author,[13] and Marshall,[14] both give an account of the various systems and progress of marine law promulgated by the different maritime states of Europe, state at about what period laws for the regulation of the contract of insurance first began to make a part of these systems, and show that the law of insurance is a branch of the law of merchants and the marine law.[15] The French writers also assert that marine insurance, in its essential principles and leading maxims, is a part of the law of nations; [16] to these may be added the authoritative statement of Blackstone, that in "all marine causes relating to freight, average, demurrage, insurance, bottomry . . . the law-merchant, which is a branch of the law of nations, is constantly adhered to," and that "there is no other rule of decision but this great universal law" (the law of nations), "collected from history and usage, and such writers of all nations as are generally approved and allowed of." [17] Flanders [18] also declares that the maritime jurisprudence of England is founded on the law-merchant, which is a branch of the law of nations. That the foregoing should be so is reasonable, since navigation is a state matter,[19] and necessarily all maritime states would be interested in fostering and promulgating laws which would tend to encourage adventures at sea and commerce between nations. Justice Park [20] referring, from the context, to 1756,

[10] Marshall's Ins. (5th ed.) 13.

[11] Emerigon on Ins. (Meredith's ed. 1850) 1.

[12] See note at end of this section.

[13] Emerigon on Ins. (Meredith's ed. 1850) xxxi. et seq., 19 et seq.

[14] Marshall on Ins. (5th ed.) 3 et seq.

[15] See also Mr. Justice Bradley in Insurance Co. v. Dunham, 11 Wall. (78 U. S.) 1, 31, 34, 20 L. ed. 90.

[16] Emerigon on Ins. (Meredith's ed. 1850) 19 et seq.; 1 Duer on Ins. (ed. 1845) 2.

[17] Blackstone's Comm. Book iv. c. 5; Id. 4 Hammond's ed. (1890) 89; Id. Chase's 2d ed. 880.

[18] Flanders' Maritime Law (ed. 1852) 26.

[19] Emerigon on Ins. (Meredith's ed. 1850) 4, 5. See also opinion of Mr. Chief Justice Marshall, in Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1, 189 et seq., 6 L. ed. 23.

[20] See Park on Ins. (4th ed.) xliii., xliv., xlviii., xlix.

asserts "that as there have been but few positive regulations upon insurances, the principles on which they were founded could never have been widely diffused nor very generally known;" that no question had arisen upon them in the superior courts; that, as late as the 30th and 31st Elizabeth, it became a question where an action upon a policy should be tried, and speaks of a certain case [1] as the most ancient one he had ever found on insurance. He further declares that, down to 1756, there were not more than sixty decisions upon insurance, and "even those cases which are reported are such loose notes . . . that little information can be gathered upon the subject," and Marshall [2] is an authority for the statement that insurance was little litigated in the courts of Westminster till toward the close of Elizabeth's reign, speaks of the decisions of the superior courts as of nonbinding effect, and adds, that before the statute 43 Elizabeth, chapter 12, of date 1601, almost all disputes were settled by arbitration.[3]

Such being the state of the law of insurance in England in 1756, Lord Mansfield, who in that year came to the bench, where he continued till 1788, had recourse to marine law, foreign treatises and authorities, as well as to the customs and usages of merchants, for those leading principles upon which the English authorities then furnished little or no information.[4] In writing of this learned jurist, Parsons [5] says that he set a wise example in this respect, and since then the jurisprudence of England and America has done little else than adopt the usage of merchants, and given it the force of authority.[6]

As illustrations of the above we find that Brough v. Whitmore [7] refers to Lombard Street as giving a construction to policies of insurance, which the uniform practice of merchants and underwriters had made intelligible. So the Rhodian Laws, the Consolato del Mare, the laws of Oleron and Wisby, Roccus, and the Ordonnance of Louis XIV. (1681),[8] are cited in Luke v. Lyde,[9]

[1] Decided, 1588; 4 Inst. 142, *cited* in Dowdale's case, Coke's Rep. pts. 6, 46, 48; Id. (3 Frazer) 351. See note 13, p. 19, § IV. herein.

[2] Marshall on Ins. (5th ed.) 16, 17, 19.

[3] See Maylnes' Lex Mercatoria, 106.

[4] See note at end of this section.

[5] Parsons' Mar. Ins. (ed. 1868) 5.

[6] See Marshall on Ins. (5th ed.) 20; Flanders' Maritime Law (ed. 1852) 25.

[7] 4 Durn. & E. 206–9 (1791).

[8] See note 5, p. 16, § IV. herein.

"An exhaustively critical edition of the Rhodian sea law (given in vol. I. of Pardessus) by W. Ashburner, appeared in 1909 (Oxford, University Press). It contains valuable material not only on the Rhodian sea law, but on the various other sea laws in force on the Mediterranean coast." 24 Ency. Britannica (11th ed.) p. 537.

Consolato del Mare, see note 11, p. 14, § IV. herein.

Laws of Oleron. "This justly celebrated Code was originally promul-

by Lord Mansfield. This case is cited in Bork v. Norton,[10] as are also the laws of Oleron;[11] Luke v. Lyde is also cited in The Saratoga,[11a] as are likewise Roccus, Straccha, Cleirac, Pothier, Emerigon,

gated by Eleanor, Duchess of Guienne, the mother of Richard I. of England, . . . who inherited the dukedom of Guienne from his mother." This Code was improved by him "and introduced into England. Some additions were made to it by King John; it was promulgated anew in the 50th year of Henry III." Laws of Oleron (with headnote) 1 Pet. Adm. (U. S.) Append. i.–lxiii., 30 Fed. Cas. Append. pp. 1171 et seq. See also 24 Ency. Britannica (11th ed.) pp. 535, 536. Laws of Oleron are usually ascribed to Richard I., but it is declared that no satisfactory authority exists therefor. There are forty-seven articles or short regulations, for average, salvage, etc., said to have been copied from the ancient Rhodian maritime laws, or perhaps from those of Barcelona. Larned's Hist. for Ready Ref. and Topical Reading, "Oleron," p. 2398, *citing* D. Macpherson, Annals of Commerce, vol. 1, p. 358. See Harper's Book of Facts (1906) "Oleron," for brief mention only that alleged fact of these laws having been enacted by Richard I. in 1194 is "now doubted." *Compare* 24 Ency. Britannica (11th ed.) "Sea Laws," pp. 535, 536.

Wisby, Visby, or Wisbuy. "The town of Wisby, situated on the west coast of the Island of Gotland, . . . is chiefly famous from its name having become identified with a Code of maritime laws that was long of paramount authority in the Baltic. . . . The principal northern jurists and historians regard the Wisby Code or compilation, as anterior to the Code or compilation denominated the Rules or Judgments of Oleron, and as being in fact the most ancient monument of the maritime laws of the Middle Ages. But no learning or ingenuity can give plausibility to so improbable a theory." Larned's Hist. for Ready Ref. and Topical Reading, "Hansa Towns," pp. 1624–1626, *quoting* from History of the Hanseatic League (Foreign Quart. Rev. Jan. 1831), *citing* also other authorities. "Wisbuy was the ancient capital of Gothland, an island in the Baltic." "Northern writers have contended that the laws of Wisbuy are more ancient than the Role d'Oleron and have even asserted the Consolato del Mare to have been composed subsequent to them. These claims are opposed with some irritation by Cleirac, who denies their having been promulgated prior to the year 1266. In this opinion he is supported by many historical facts." Laws of Wisbuy (with brief history), 1 Pet. Adm. (U. S.), Append. lxvii.–xc., 30 Fed. Cas. pp. 1189 et seq. See 24 Ency. Britannica (11th ed.) "Sea Laws," p. 536.

Laws of Hanse Towns were founded evidently on those of the neighboring city of Wisbuy and the celebrated Role d' Oleron. They appear to have been first enacted and promulgated in the year 1597, at Lübeck, which is styled the "Mother of the Hanse Towns." 1 Pet. Adm. (U. S.) Append. xciii–cxi. 30 Fed. Cas. Append. pp. 1197 et seq.

Marine Ordinances of Louis XIV. To the genius of Colbert, the celebrated minister of Louis XIV., France is indebted for this excellent Code. The ordinances were published "by the French King in 1681." Marine Ordinances of Louis XIV. (with headnote) 2 Pet. Adm. (U. S.) Append. iii., 30 Fed. Cas. Append. pp. 1203 et seq.

[9] 2 Burr. 882, 889.

[10] 2 McLean (U. S. C. C.) 422, 426, Fed. Cas. No. 1659.

[11] See note 8, ante, under this section.

[11a] 2 Gall. (U. S. C. C.) 164, 179, Fed. Cas. No. 12,355.

Valin, and the laws of Oleron, which laws are an authority in the decisions of Walton v. Ship Neptune,[11b] and Sims v. Jackson.[12] In Davy v. Hallett,[13] Kent, C. J., relies upon Emerigon, Valin, and Pothier. So in Franklin Ins. Co. v. Lord,[14] Story, J., says the doctrines of Valin, Pothier, and Emerigon are entitled to great weight and cites from Emerigon, whose treatise is also considered in Vandenheuvel v. United Ins. Co.[15] Of the reports of Mason and Gallison, in which appear two of the above cases, Chancellor Kent[16] declares that they may fairly be placed upon a level with the best productions of English admiralty, for deep and accurate learning, as well as for the highest ability and wisdom in decision. So, in the Star of Hope[17] the court, in discussing the question of general average, cites Emerigon. Again, the Ordonnance of Louis XIV. (1681),[18] and the commentary thereon by Valin, is referred to by the court in Morgan v. The Insurance Company of North America,[19] decided in 1806. It says: "These ordinances and the commentaries on them have been received with great respect in the courts both of England and the United States, not as containing any authority in themselves, but as evidence of the general marine law. Where they are contradicted by judicial decisions in our own country they are not to be respected, but on points which have not been decided they are worthy of great consideration. I am strongly inclined to adopt the rule laid down by Valin, because I think it reasonable." This case is cited on the point decided, on the above authorities, in King v. The Delaware Insurance Company.[20] In Odlin v. The Insurance Company of Pennsylvania,[1] the court says the opinions of French jurists on the question there under consideration had no inconsiderable weight with it, and although founded upon positive ordinances, yet they were evidence of the general law of merchants upon the subject, no judicial decision and no custom appearing to the contrary. "The sea laws and state ordinances of many of the maritime countries of Europe have, with some exceptions, gradually become incorporated with the com-

[11b] 1 Pet. Adm. (U. S.) 142, Fed. Cas. No. 17,135.

[12] 1 Pet. Adm. (U. S.) 157, Fed. Cas. No. 12,891.

[13] 3 Caines (N. Y.), 21.

[14] 4 Mason (U. S. C. C.) 248, 255, Fed. Cas. No. 5,057.

[15] 2 Johns. Cas. (N. Y.) 127, 159 et seq.

[16] 3 Kent's Comm. (13th ed.) *20.

[17] The Star of Hope, 9 Wall. (76 U. S.) 203, 230, 19 L. ed. 638, per Mr. Justice Clifford.

[18] See note 8, ante, under this section.

[19] 4 Dall. (4 U. S.) 455, 458, 1 L. ed. 907, per Tilghman, C. J.

[20] 2 Wash. (U. S. C. C.) 300, 307, Fed. Cas. No. 7,788.

[1] 2 Wash. (U. S. C. C.) 312, 315, Fed. Cas. No. 10,433.

mercial law of England by a kind of tacit adoption, and are in these cases considered as evidence of the customs of merchants. These regulations are used in the British and American courts, and have frequently furnished rules of decision where the positive law of the country or former decisions upon the point had not prescribed a different one." And the court refers to Roccus, Le Guidon, Valin, Emerigon, Pothier, and the Ordonnance of Louis XIV.[2] So in Hone v. The Mutual Safety Insurance Company[3] the court considers the Ordonnance de la Marine of Louis XIV.,[4] Valin, Emerigon, Boulay Paty, and Alauzet, upon the question of reassurance. An examination of the insurance cases of England further shows that for the most part, certainly until comparatively recent times, they have concerned marine insurance;[5] and the earlier statutes of England, which legislate concerning insurance as such, relate to marine insurance.

It is, therefore, these ancient usages and customs of merchants, digested and compiled into sea laws, ordinances, and treatises, which have furnished the leading principles for the adjudication of insurance cases, and which are the sources from which Lord Mansfield, Story, and other learned jurists, have drawn in the determination of marine cases of insurance, and so marine law and marine insurance for a long period of time furnished the most certain developments of the principles governing the contract of insurance.[5a]

[2] See note 8, ante, under this section.

[3] 1 Sand. (N. Y.) 137, 145.

[4] See note 8, ante, under this section.

[5] For cases down to 1795, see Beawes' Lex Mercatoria, 302, et seq.

[5a] "Until the year 1907 the law of marine insurance was derived mainly from the decisions of the courts and the treatment of textwriters; but its leading principles are now contained in the marine insurance act 1906 (6 Edw. VII. c. 41), the full title of which is 'An Act to Codify the Law Relating to Marine Insurance' (the title of an act of Parliament is now part of the act, and may be taken into consideration for the purpose of construing it). The act came into force on the 1st of January, 1907." 1 Arnould on Marine Ins. (8th ed. Hart & Simey) sec. 1.

"*The legal principles of marine insurance,* such as those relating to fraud, concealment, misrepresentation, warranties, subrogation, agency, reinsurance, rectification of policy, and return of premium, *apply, with certain few exceptions, to all insurances,* so far as their application is not excluded or modified by the terms of the policy. . . . The main exceptions above referred to are: (1) The doctrine of constructive total loss and notice of abandonment, the rules as to adjustment of a partial loss, and the doctrine that a policy may be ratified after a loss. (2) Life insurance is not a contract of indemnity, and the principle of subrogation does not apply to it. The practice as to discovery of ship's papers is peculiar to marine insurance, and does not extend to any other cases of insurance." 17 Earl of Halsbury's Laws

§ II. **Origin of insurance generally.**—The origin of insurance is wrapped in such obscurity that an exhaustive examination of the works of the most learned authors on this subject fails to discover the exact time when insurance was first known or practised. Some of the most eminent writers contend that it was known to the ancients; others, that it had its inception in the necessities of maritime commerce, and the risks and hazards consequent thereon; although none of these fix definitely the date of its invention and first practice. It is, however, argued by other prominent writers that the present mutual insurance system had its origin in those artificial alliances or clubs, which are said to have existed from time immemorial for mutual benefit and assistance in different exigencies, in China, among the Teutons, the early Christians, and the ancient Greeks and Romans. That from these alliances or clubs sprang what were known as "guilds," between which and the Friendly Societies of England, mutual benefit societies, and the mutual insurance system, the connection can be traced. There are certainly many points of resemblance between some of the alliances or clubs and the mutual insurance system, as will be noticed hereafter; and, if mutual insurance is a lineal descendant therefrom, then the date of the earliest existence and practice of insurance can be somewhat more definitely fixed than it can upon the theory that it owes its inception to maritime commerce.

In view, then, of the preceding remarks, we will consider specifically the origin of the different kinds of insurance, placing marine insurance first, because the most replete references, legal and historical, are to that branch of the contract of true insurance, and also because that concrete idea known as marine insurance first took tangible shape, grew, and was more extensively known and practised among nations than any other kind of insurance until, perhaps, recent times. We shall next consider the origin of the mutual insurance system, and follow with the origin of the several kinds of insurance in that order which their priority of existence, coupled with their relative development and growth, as governed by the weight of authority, shall warrant.

§ III. **Origin of marine insurance.**—Whether insurance was used among the Romans is a disputed question, and one upon which there is no certain evidence.

of Eng. p. 513 (*citing* Tannebaum & Co. v. Heath, [1908] 1 K. B. 1032, C. A. 77 L. J. K. B. 634, 99 L. T. 237, 13 Com. Cas. 264, 24 T. L. R. 450–C. A., where Farwell, L. J., says: "It appears from all the cases that the right to claim discovery of ship's papers is peculiar to marine insurance"). See also Id. p. 335, as to construction of marine insurance act 1906, and extent of legal principles embodied therein. See also note 2, ante, herein.

The principal arguments adduced in its favor are: 1. Passages from Livy[6] and Suetonius,[7] implying that the government of Rome, during the Republic on two occasions, and the reign of the Emperor Claudius on one occasion, had assumed the risk of losses that might arise during the course of certain voyages, by storms or enemies. 2. That Cicero, in a letter written to the Proquæstor Caninius Sallust, at Laodicea, asks him to procure himself sureties for treasure he should be sending home.[8] 3. That the laws relating to usury in the Justinian Code and Pandects,[9] and elsewhere, specified the rate of interest granted to nautical insurance. 4. That the extensive use of bottomry and respondentia affords a strong presumption that insurance in its simpler forms was known and practised among the ancients. 5. That the nauticum fœnus, the trajectitia, or nautica pecunia, which were terms used to indicate a form of obligation connected with carriage by sea or marine adventure, wherein entered the element of risk, resembled insurance. 6. That the Romans possessed ships and commerce, and wherever foreign commerce was introduced some protection or security of the nature of insurance would be necessitated, especially in times of war, to encourage merchants to undergo the risks and hazards of adventures at sea. 7. That insurance, as a wager, was not unknown to the Romans. 8. That the above evidences, scattered through the Roman law and Roman history, if not sufficient in themselves, taken separately, are the several constituents which, aggregated, discover the existence among the Romans of the system of insurance.

Opposed to these facts and the proposition they are advanced to prove are arguments to show: 1. That the passages from Livy and Suetonius have no application to insurance; that the inference therefrom is that contractors were only to transport the stores purchased of them to their destination at the risk of the government, or, in other words, that the government became purchasers of the commodities or merchandise before embarked, and consequently the actual owner during the voyage. 2. That no inference is to be deduced from Cicero's letter in favor of the proposition, but that the reference therein has a much stronger affinity to bills of exchange than to insurance. 3. That the laws relating to usury

[6] T. Livius, lib. 23, n. 49; lib. 25, n. 3.

[7] Lib. 25, n. 21. "The origin of insurance is unknown; it has, on the authority of Suetonius, been ascribed to the Emperor Claudius, A. D. 43." Haydn's Dict. of Dates (25th ed.) p. 728. See also Harper's Book of Facts, p. 378; Id. (1906) "Insurance," where it is said: "Suetonius conjectures that Claudius, the Roman Emperor, was the first contriver of the insurance of ships, 43 A. D."

[8] Cicero, lib. 2, epis. 17.

[9] Published respectively A. D. 529, 533.

in the Code and Pandects referred only to maritime interest, the consideration given in a bond of bottomry or hypothecation, and not to premium of insurance. 4. That impignoratio embraced what is known as bottomry, hypothecation, and respondentia; that the foundation of these was merely a loan or pledge, either personal or on property. 5. That fœnus nauticum, trajectitia, or nautica pecunia were only payments for money advanced, or were terms used to indicate the loan, and as the creditor ran a risk during the voyage, and as the risks might apply to the ship or part of it, or to the cargo pledged for the payment of the debt, the rate of interest nauticum fœnus usuræ maritimæ might be higher than ordinary. 6. That there is no evidence that any premium was paid in these transactions. 7. That ancient maritime commerce was limited and exposed to a paucity of risk, and that the navigation of the Romans was for war, and not for peace or commerce. 8. That insurance is not a wager, and the knowledge of wagers among the Romans would not imply a knowledge of insurance. 9. That there is no positive information, historical or otherwise, that insurance was in use among the Phœnicians, Carthaginians, or Greek republics, and that the Roman laws, the laws of Oleron, of Wisby, and of the Hanse Towns, are silent as to insurance. It is also argued that Coke, in 1588,[10] notices the practice as a novelty.

With some or all of the above affirmative facts as the principal basis, it is deduced that insurance existed among the Romans by Emerigon,[11] Bédarride,[12] Duer,[13] Elliott,[14] and others. Gibbon[15]

[10] Rep. pt. 6, pp. 46, 48.

[11] Emerigon on Ins. (Meredith's ed. 1850) xxxii. Emerigon, the French jurist, had a well-earned reputation for skill and learning in the maritime law, and his researches as to the origin and law of insurance were laborious and exhaustive. In the early part of 1783 his work on "Marine Insurances" was published. "It is a work that has long been held in esteem in all commercial countries in Europe and America," says Meredith in the introduction to his edition of date 1850 of the work (p. xxix.), and he adds (Id., n. l.): "Estrangin (Disc., prélim., p. 32) affirms that in France it is regarded as a sure oracle in the matter of insurance; that it is cited in the tribunals as an authority having the force of law. With the Italians it is held in the highest credit," and he also refers to other authorities which show the great value of the work. Valin, the commentator of the Ordonnance de la Marine, speaks of Emerigon's learning, and Justice Park (Park on Insurance, 4th ed., xv.) refers to him as a distinguished writer, and he is cited as an authority in the courts both in England and this country.

[12] Comm. de Code de Commerce, sec. 1004.

[13] Duer on Ins. (ed. 1845) 7 et seq.

[14] Elliott on Ins. (ed. 1907) sec. 2, p. 7, where he says: "It is thus more than probable that the Romans were familiar with the practice of insurance. . . . Insurance seems to grow naturally out of an extensive

connects the usury laws with nautical insurance. Walford,[16] relying upon Hendriks,[17] does not go as far as Gibbon, but states that the contract of nautical interest or loan on bottomry or respondentia was used from very remote ages by the Greeks, Romans, and other nations as their ordinary insurance contract, and that it formed the traditionary groundwork of the insurance system; and this author quotes from Leybourn's Parnarithmologia that insurance was established by a law under Claudius Cæsar; and Maylnes[18] declares Claudius "did bring in this most laudable custom of assurances." Richards[19] has briefly declared that the practice of underwriting by individuals lays claim to great antiquity, although he adds that its origin is a matter of doubt;[20] while among those who assert that insurance was unknown to the Romans, Hopkins[1] admits that the transactions relating to interest or usury and maritime loans, above mentioned, bore a resemblance to insurance in the introduction of risk as an element in the pretium or rate of interest. He also says: "Unquestionably within the compass of the Roman law and the details of Roman history may be found scattered the several constituents which, when built together, form the system of marine insurance." So, Marshall[2] also admits that the observation of Ulpian in the Pandects gives color for insurance having been known among the Romans; that bottomry was a species of insurance, and was well understood by them; and we would add that it is generally conceded that bottomry and respondentia were well understood by the ancients; and the American Cyclopedia says it is possible that insurance was common among merchants centuries before it was recognized by law.[3] Again, in answer to the negative argument of silence of the Roman laws and Roman jurists on this subject, Duer,[4] by an exhaustive course of reasoning, and Meredith,[5] in an excellent short note, show that this argument is

commerce, and it is almost impossible to believe that without its protection the flourishing commerce of Tyre, Carthage, Corinth, Athens, Rhodes, and Alexandria could have been successfully carried on through so many ages."

[15] Decline and Fall (Milman's ed. 1860) vol. 4, 368.

[16] Walford's Ins. Guide (2d ed.) 3.

[17] Assur. Mag. vol. ii.

[18] Lex Mercatoria (ed. 1622) 146. As to bottomry being commencement of marine insurance, see Martin's History of Lloyds & Marine Ins. pp. 3 et seq. See also Haydn's Dict. of Dates (25th ed. 1911) p. 728; Harper's Dict. of Facts, p. 378.

[19] Richards on Ins. (ed. 1892) sec. 5, p. 5.

[20] See Id. (3d ed.) sec. 9, p. 12, where it is said: "Loans on bottomry are of ancient date, and from this maritime usage the earliest forms of insurance may have developed."

[1] Hopkins' Mar. Ins. (ed. 1867) 6, 9, 10.

[2] Marshall's Ins. (5th ed.) 5 et seq.

[3] 9 American Cyclopedia, 314.

[4] Duer on Ins. (ed. 1845) 7 et seq.

[5] Emerigon on Ins. (Meredith's ed. 1850) xxxiii. n. a.

not conclusive, and that notwithstanding there is, says the former, a fair presumption, and the latter, an extreme probability, that insurance was known to the Romans. That insurance is of great antiquity is further evidenced by the works of Bacon,[6] and also by the preamble to the earliest English statute on insurance, of date 1601,[7] in both of which it is spoken of as a usage which had existed "time out of mind."

In support of some or all the propositions for the negative above mentioned and of the claim that insurance was unknown to the Romans, are Marshall,[8] Park,[9] Hopkins,[10] Parsons,[11] and the American Cyclopedia.[12]

Richards [13] says the practice of marine underwriting probably started in the 12th or 13th century. Hunter [14] speaks of maritime loans pecunia trajectitia, and says Justinian fixes in them the maximum of interest. Ortolan [15] defines trajectitia or nautica pecunia as a loan or pledge during a voyage, and asserts that on account of the risk a higher rate of interest was allowed. The same author also says the Justinian Code fixed the rate of interest for maritime loans,[16] and Justice [17] speaks of money lent to sea or upon the sea as fœnus nauticum, pecunia trajectitia, usura maritima, and translates fœnus nauticum, naval interest, and gives as a reason that "there seems to be such a difference between the fœnus nauticum of the Rhodians and our bottomry that the latter would not be a proper term for the other."

From an examination of the authorities and of the arguments on both sides we are strongly inclined to the belief that there are many traces of the existence among the Romans of the contract of insurance, and we are more especially led to this conclusion by reason of the learning and laborious researches of Emerigon and the great value of his work on insurance, as also by the arguments adduced in favor of the proposition by Meredith, Duer, and others, as well as by the admissions of those of the opposite view. But we are unable to determine to what degree of perfection the system

[6] Bacon's Abridgment (4th ed.) 598, 599.

[7] 43 Eliz. c. 12.

[8] Marshall's Ins. (5th ed.) 2 et seq.

[9] Park on Ins. (4th ed.) iii. et seq.

[10] Hopkins' Mar. Ins. (ed. 1867) 2–16.

[11] Parsons' Mar. Ins. (ed. 1868) 1 et seq. See 1 Parsons' Maritime Law, c. 1.

[12] 9 American Cyclopedia, 314.

[13] Richards on Ins. (ed. 1892) sec. 5, p. 5; Id. (3rd ed.) sec. 9, p. 12.

[14] Hunter's Roman Law, 472, note.

[15] Ortolan's Roman Laws (Mears' ed. 1876) 258.

[16] Id. 300, n. 1658.

[17] Justice's Treatise on the Sea (ed. 1705) iii. 259, and see Id. 255.

may have attained, or to conjecture that it existed in any other than a most simple form, because of the absence of positive proof thereon.

§ IV. Adoption of marine insurance in modern times.—As to marine insurance in modern times, although there is no certain evidence as to the exact time and place of its adoption, nor as to the exact period of its introduction into the several countries of Europe, nevertheless it is generally agreed that the best evidences of its first recognition, or, as some writers say, of its invention, point to Italy and the latter part of the 12th or the beginning of the 13th centuries as the place and time.[18] So Emerigon,[19] speaking of the Ordonnance de la Marine, says: "It was principally for the contract of insurance that the framers of the Ordonnance had recourse to the laws of the middle ages," etc. It is supposed by some that insurance was invented by the Jews, who found a refuge in Italy after their exile from France by Philip Augustus, A. D. 1182,[20] and that the merchants in northern Italy saw its success and extended its use.[1] Justice Park,[2] however, says that if the Lombards were not the inventors, they were the first who brought the contract to perfection and introduced it to the world. But Emerigon [3] declares that it may be that the contract only from that time acquired a name and particular form, but that the policy or instrument is another matter from the contract. Hopkins [4] considers that the idea may not be rejected, but that it is conjectural only, and adds that it is possible the Florentines received the germ of the system from the Jews, although insurance was in general use in Italy, A. D. 1194, four years earlier than even the date of the Florentine Republic, and Marshall [5] rejects the narra-

[18] Marshall's Ins. (5th ed.) 7 et seq.; 1 Duer on Ins. (ed. 1845) 28; 1 Parsons' Mar. Ins. (ed. 1868) 2; 9 America Cyclopedia, 314. See 8 Americana "Insurance; Marine," Id. 2 Suppl. (1911), p. 668. "Marine insurance was in use at the beginning of the 15th century." Haydn's Dict. of Dates (25th ed.) "Insurance," p. 728.

"Villani, a 14th century Florentine historian, speaks of marine insurance as having originated in Lombardy in 1182." 14th Ency. Britannica (11th ed.) p. 674.

[19] Emerigon on Ins. (Meredith's ed. 1850) xxxi.

[20] Anderson fixes the date of banishment of the Jews as A. D. 1143. 1 History of Commerce, 82.

[1] 1 Duer on Ins. (ed. 1845) 33; Walford's Insurance Guide (2d ed.) 5, 6; Jacobs' Law Dict. title "Insurance."

[2] Park on Ins. (4th ed.) xxvii.

[3] Emerigon on Ins. (Meredith's ed. 1850) 2.

[4] Hopkins' Mar. Ins. (ed. 1867) 17 et seq.

[5] Marshall's Ins. (5th ed.) 2, 3. See also Emerigon on Ins. (Meredith's ed. 1850) 10, 11; 14th Ency. Britannica (11th ed.) p. 674 (*quoted* from in first note under this section); Harper's Book of Facts (1906) "Insurance."

tive as improbable. He further declares that the word "assecuratio" is a barbarism adopted in Italy about the 12th or 13th century. It also appears that the word "policy" or "polizza" is of Italian derivation, and signifies a note or memorandum in writing, or note or bill of security, creating an evidence of a legal obligation,[6] although Lord Mansfield declares that "policy" is derived from a French word which means a promise.[7] The Ordonnances of Wisby[8] are said to mention the contract of marine insurance.[9] As to the date of these Ordonnances there is much doubt, one writer placing it as early as 1250.[10] Others declare that it is more ancient than the Consolato del Mare, which was recognized at Rome in 1075,[11] while some refer its date to a period near 1288, and others to a time anterior to or about 1320.[12] Marshall,[13] however, criticizes Cleirac's version of the laws of Wisby, which version mentions insurance, and says Maylnes's translation does not mention it. He further asserts that the earliest ordinance on the subject of insurance is that of Barcelona, which he considers must have been published about the year 1435, differing herein from Emerigon,[14] who fixes its date as 1484. It is also said that a "Cham-

[6] 1 Duer on Ins. (ed. 1845) 29; Angell on Fire and Life Ins. (2d ed.) 3, sec. 4; Marshall's Ins. (5th ed.) 228.

"*The earliest form of policy known* is that given in the Florentine statute of 1523." 14th Ency. Britannica (11th ed.) p. 674. For form of "Marine policy, established by statute of Florence, January 28, 1523," see Richards on Ins. (3rd ed.) p. 766.

[7] *Cited* in Good v. Elliot, 3 Durn. & E. 703, 12 Eng. Rul. Cas. 389.

[8] "The Ordonnances made by the merchants and masters of the magnificent town of Wisby, a city of Sweden, in the Island of Gotland, formerly the most renowned fair and market in Europe, but at this day almost in ruins:" Emerigon on Ins. (Meredith's ed. 1850) xxxviii. See note 8, pp. 4, 5, § I. herein.

[9] 9 American Cyclopedia, 314; Emerigon on Ins. (Meredith's ed. 1850) xxxviii. 160, n. b; Flanders' Maritime Law (ed. 1852) 21; Park on Ins. (4th ed.) xxxiii.

[10] 9 American Cyclopedia, 314.

[11] But see Reynolds' Maritime Law (ed. 1852) 12, which asserts that the Spaniards claim paternity of the Consolato del Mare, and that it was promulgated in the Catalan tongue about the middle of the 13th century. Meredith, however, in his introduction to Emerigon's Insurance (ed. 1850) xiv. says that the oldest copy of this Ordonnance exists in the Catalan tongue, which is taken to be a translation from a long lost and unknown original, and that the age of the Ordonnance ranges from a period anterior to 1075 to 1150, or 1220; but Emerigon, who translated a large portion of it, says it was recognized as law in Rome in 1075. See also next note.

[12] Emerigon on Ins. (Meredith's ed. 1850) xxxv., xxxviii., 157, n. a. 160, n. b, and authorities cited; 9 American Cyclopedia, 314; Flanders' Maritime Law (ed. 1852) 11, 12, 21, 28; 3 Kent's Comm. (13th ed.) 13; Park on Ins. (4th ed.) xxxii. et seq.; 1 Smith's Mercantile Law (Macdonell & Humphrey's ed. 1890) lxviii.

[13] Marshall's Ins. (5th ed.) 12 et seq.

[14] Emerigon on Ins. (Meredith's

ber of Assurance" was established in the city of Bruges as early as 1310.[15] Hopkins[16] cites Bédarride, commentator on the French Code de Commerce, as asserting that the insurance system "takes no place in legislature till the 14th century." While Duer[17] declares that no certain inference arises that the existence of insurance is owing to express legislation. An early document, of date 1411, refers to insurance as an established practice, recites that a dangerous custom of the inhabitants and citizens of Venice to insure foreign vessels had been introduced, and prohibits such insurances.[18] Although Hopkins[19] asserts that the attempt is fruitless to ascertain the exact time when insurance was first introduced and practised in England; although Anderson[20] and Maylnes[1] both declare that insurance was in use in England earlier than upon the Continent, and even though Marshall[2] supposes that insurance must have been in use in that country long before the middle of the 15th century, yet we can safely say that the most certain indications of its first use in England point to its introduction there by the Lombards or Italians from Lombardy, who settled in London somewhere about the 13th century.[3] In this connection it is also noted that policies issued at Antwerp in 1620 refer to insurances made in Lombard Street, London.[4] In view of the above facts it can be reasonably concluded that marine insurance came into general use as a system or contract as early as the 12th or 13th centuries, although there is much which points to an anterior date for its existence and use.

Passing over the growth of insurance in other foreign countries, except to notice that the Ordonnance of Louis XIV., established

ed. 1850) xxxix.; see Park on Ins. (4th ed.) xxxiv.; Griswold's Fire Underwriters (ed. 1872) 10; 2 American Cyclopedia, 303, 304; Walford's Insurance Guide, (2d ed.) 3; 1 Smith's Mercantile Law (Macdonell & Humphrey's ed. 1890) lxviii.

[15] Richards on Ins. (ed. 1892) 6, sec. 5; Id. (3rd ed.) note to sec. 9, p. 12; Griswold's Fire Underwriters (ed. 1872) 10.

[16] Hopkins' Mar. Ins. (ed. 1867) 19.

[17] 1 Duer on Ins. (ed. 1845) 33.

[18] Hopkins' Mar. Ins. (ed. 1867) 20.

[19] Hopkins' Mar. Ins. (ed. 1867) 28.

[20] 2 History of Commerce, 109, 203.

[1] Maylnes' Lex Mercatoria, 105.

[2] Marshall's Ins. (5th ed.) 7.

[3] Angell on Fire and Life Ins. (2d ed.) 4, sec. 4; Maylnes' Lex Mercatoria, ed. 1622, 146; 1 Duer on Ins. (ed. 1845) 33; Griswold's Fire Underwriters (ed. 1872) 13; Park on Ins. (4th ed.) xlii. See Marshall's Ins. (5th ed.) 6, 7; 1 Smith's Mercantile Law (Macdonell & Humphrey's ed. 1890) lxviii.; Insurance Co. v. Dunham, 11 Wall. (78 U. S.) 1, 32, 20 L. ed. 90; 13 New Inernat. Ency. (1908) p. 64.

[4] Walford's Ins. Guide (2d ed.) 5; Griswold's Fire Underwriters (ed. 1872) 13; see also Justice's Treatise on the Sea (ed. 1705) appendix and forms; Angell on Fire and Life Ins. (2d ed.) sec. 4; 1 Duer on Ins. (ed. 1845) 33.

in 1681, contains lengthy regulations concerning insurances, as does also the Guidon de la Mer, of date somewhere between 1556 and 1584,[5] we find in England that in 1512 a Venetian merchant effected insurance there on property from Candia, capital of the island of Crete; that in 1548 and 1558 insurance is mentioned in England;[6] that in 1560 or 1561 Guicciardini an Italian historian, speaks of the commerce between England and the Netherlands, and the insuring their merchandise from losses at sea.[7]

The earliest English statute on insurance is the 43 Elizabeth, chapter 12, of date 1601, by virtue of which commissioners consisting of the judge of admiralty, the recorder of London, two doctors of the civil law, two common lawyers, and eight merchants, or any five of them, were appointed to hear and determine causes arising upon policies of assurance in the city of London. The powers of these commissioners were, however, so limited and the statute so defective, that the act 13 and 14 Car. II., chapter 23, was passed in 1662, enlarging their powers and otherwise attempting to remedy the defects of the prior enactment. But a judgment of the commissioners was held no bar to an action at law;[8] "prohibitions to restrain them were issued, and the court fell into disuse."[9]

[5] Of date 1578, says Griswold: Griswold's Fire Underwriters (ed. 1872) 9. Written not long before the 15th century, says Marshall: Marshall on Ins. (5th ed.) 15. While Meredith fixes the date somewhere between 1556 and 1584: Emerigon on Ins. (Meredith's ed. 1850) 157, n. a.

For a translation on the sea laws of the Rhodians, the Romans, of Oleron, of the Hanse Towns, and the sea laws of the French of 1681, see Justice's Treatise on the Sea, also Maylnes, also translations with headnotes as follows: Laws of Oleron (47 articles) 1 Pet. Adm. (U. S.), Append. i.–lxviii. 30 Fed. Cas. Append. pp. 1171 et seq.; Laws of Wisbuy, 1 Pet. Adm. (U. S.) Append. lxvii.–xc., 30 Fed. Cas. Append. pp. 1189 et seq.; Laws of Hanse Towns, 1 Pet. Adm. (U. S.) Append. xciii.–cxi. 30 Fed. Cas. Ap. pend. pp. 1197 et seq.; Marine Ordinance of Louis XIV. 2 Pet. Adm. (U. S.) Append. iii., 30 Fed. Cas. Append. pp. 1203 et seq. As to the Rhodian and other ancient sea laws see also 24 Ency. Britannica (11th ed.) p. 537. See also note 8, pp. 4, 5, § I. herein.

[6] Walford's Insurance Guide (ed. 1867) 5; Richards on Ins. (ed. 1892) sec. 5; Id. (3rd ed.) sec. 7, p. 12.

[7] 1 Parsons' Mar. Ins. (ed. 1868) 10; 2 Anderson's History of Commerce, 108, 109; Hopkins' Mar. Ins. (ed. 1867) 29. See Marshall's Ins. (5th ed.) 7.

[8] Carne v. Moye, 2 Sid. 121 (1658); 3 Blackstone's Com. c. vi. 75 (Hammond's ed. 1890) p. 102.

[9] 1 Smith's Mercantile Law (Macdonell & Humphrey's ed. 1890) lxix.; 4 Bacon's Abridgment (4th ed.) 251; Bendyr v. Oyle, Sty. 166, 172 (1649) case of life assurance. Prohibition granted to court of assurance on ground that it had jurisdiction only on such contracts as related to merchandise; Dalbye v. Proudfoot, 1 Show. 396 (1692). Rule to show cause why prohibition should not be

The statute 6 George I., chapter 18, of date 1719, under pretense of remedying certain alleged evils arising by reason of "many particular persons," insurers, becoming bankrupt and otherwise failing to meet their losses, granted to two companies the monopoly of marine insurance and lending money on bottomry. The statute did not extend to private persons, and also contained some other exceptions. However, the statute 5 George IV., chapter 114, of date 1824, repealed so much of the prior act as restrained other corporations from underwriting, but did not otherwise abridge the rights or privileges of the two companies which had been enlarged by other enactments, especially that of the 11 George I., chapter 30, of date 1724, by virtue of which the right to plead the general issue was granted.[10] This privilege would, however, seem to be impliedly abrogated, or at least so far abrogated as to be of little or no practical value by the changes resulting in the present system of pleading in England.[11] The other statutes affecting these companies were those of 7 George I., chapter 27, passed in 1720, and that of 8 George I., chapter 15, enacted the next year under the first of which a large proportion of the sum which each company had agreed to pay was remitted each company, and under the latter they were excepted from liability to certain costs and damages. In 1746, the statute 19 George II., chapter 37, provided that any insurance made on ships or on "any goods, merchandises, or effects laden, or to be laden, on board any such ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer," should be void, with certain exceptions. This act further prohibited reassurance, unless the insurer be insolvent, become a bankrupt, or die. In 1864 the 27 and 28 Victoria, chapter 56, amended the last act by providing that reassurance of sea risks might lawfully be made.[12]

granted was issued: Park on Ins. (4th ed.) xliv., xlv., xlviii.

[10] See Carr v. Royal Exch. Assur. Co. 31 L. J. Q. B. 93; 1 Best & S. 956; 17 Earl of Halsbury's Laws of England, p. 339; 5 Id. p. 620, and note 17 under § VII. herein. "First marine insurance, the Royal Exchange and the London Insurance," 1720, Harper's Book of Facts (1906) "Insurance."

[11] See 5 and 6 Vict. c. 97, sec. 3; 22 Earl of Halsbury's Laws of England, pp. 417 et seq.

[12] *As to illegal insurance companies, formed soon after 1824; necessity of companies being registered under companies acts*, see §§ IV. 178, herein; 5 Earl of Halsbury's Laws of Eng. p. 617.

The insurance statutes in England in force in 1889 were: 1745–46 (E. S.) 19 Geo. II. c. 37 (marine); 1774 (E. S.) 14 Geo. III. c. 48 (life); 1774 (E. S.) 14 Geo. III. c. 78, sec. 83 (fire); 1787–88 (E. S.) 28 Geo. III. c. 56 (marine); 1854–55, 18 & 19 Vict. c. 119, sec. 55 (emigration); amended, 26 & 27 Vict. c. 51; 35 & 36 Vict. c. 73; 36 & 37 Vict. c. 85;

Passing from these statutory regulations in England to the adjudicated cases, we find in that country no reported decision prior

38 & 39 Vict. c. 66; 39 & 40 Vict. c. 80; 1862, 25 & 26 Vict. c. 63, sec. 55 (merchant shipping); 1866 (I.) 29 & 30 Vict. c. 42 (life); 1867, 30 & 31 Vict. c. 23 (inland revenue); 1867, 30 & 31 Vict. c. 144 (assignment of life); 1868, 31 & 32 Vict. c. 86 (marine); 1870, 33 & 34 Vict. c. 97 (stamps); 1876, 39 & 40 Vict. c. 6 (marine); 1880 (S.) 43 & 44 Vict. c. 26 (life, married women); 1881, 44 & 45 Vict. c. 12, sec. 44 (inland revenue); 1881 (E. I.) 44 & 45 Vict. c. 41, sec. 14 (fire); 1882 (E. I.) 45 & 46 Vict. c. 75, sec. 11 (married women's property); 1884, 47 & 48 Vict. c. 62, secs. 8, 11 (marine life); 1887, 50 & 51 Vict. c. 15, secs. 5, 6 (marine); 1889, 52 & 53 Vict. c. 42, sec. 20 (accident). See also act 1892, 55 Vict. c. 39. From Chronological Table and Index, Statutes (11th ed.) title "Insurance." That these statutes were not greatly changed in 1895 appears from Chronological Table and Index of Statutes (13th ed.) covering the years 1235–1895. In 1906 the marine insurance act of that date (6 Edw. VII. c. 41) in effect January 1, 1907, repealed the following acts: 19 Geo. II. c. 37 (whole act); 28 Geo. III. c. 56 (whole act so far as relates to marine insurance) and 31 & 32 Vict. c. 86 (whole act—the policies of marine assurance act 1868). For other statutes see: employers liability ins. company's act 1907 (7 Edw. VII. c. 46); marine ins. (gambling policy) act 1909 (9 Edw. VII. c. 12) and the assurance companies act 1909 (9 Edw. VII. c. 49) in effect July 1, 1910, except sec. 36, which went into effect on passage of the act. This last statute repealed the following life assurance company's acts: 33 & 34 Vict. c. 61 (1870); 34 & 35 Vict. c. 58 (1871); 35 & 36 Vict. c. 41 (1872). Said last act of 1909 also repealed the trade union amdt. act 1876, sec. 7(m) (39 & 40 Vict. c. 22); also employers liability ins. co.'s act 1907 (7 Edw. VII. c. 46). 2 Butterworth's 20th Cent. Stat. (1900–1909) "Insurance," pp. 394, 427, 428, 430, 446, 476. Under the savings clause of the marine ins. act of 1906, the stamp act 1891 (54 & 55 Vict. c. 39) or revenue acts in force; the companies act 1862 (25 & 26 Vict. c. 89) and amendts. thereto; the provisions of statutes not expressly repealed; and the rules of the common law, including the law merchant, not inconsistent, to apply. Id. p. 423. See also 15 Chitty's Stat. Eng. pp. 881 et seq.; 17 Earl of Halsbury's Laws of England, "Insurance." "Before 1907 three statutes only (all now repealed) relating to life insurance companies were in force, most of these provisions are re-enacted with more or less modification by the assurance companies act of 1909." Id. p. 513. See note 18, § IVa. herein.

As to marine insurance act of 1906, embodying some but not all the legal principles of marine insurance, see 17 Earl of Halsbury's Laws of Eng. p. 335.

The assurance companies act 1909 (7 Edw. VII. c. 49) entitled "An Act to Consolidate and Amend and Extend to Other Companies Carrying on Assurance or Insurance Business the Law Relating to Life Assurance Companies, and for Other Purposes Connected Therewith," applies to all companies, corporate or unincorporate, not being registered under the acts relating to friendly societies or to trade unions, who carry on within the United Kingdom assurance business of all or any of the following classes: Life assurance business, including granting of annuities; fire insurance business; accident insurance business; employers' liability insurance business; and bond investment business; subject as re-

to 1588,[13] and the number of cases down to the middle of the 18th century are comparatively few.[14]

We have mentioned the earliest grant to insurance companies in England, and it may be stated here that in the United States it appears that a marine insurance office, which did underwriting under Lloyds system, was established in New York in 1754; and that in 1794 the Insurance Company of North America and the Insurance Company of the State of Pennsylvania were the first corporations that undertook marine underwriting.[14a] In New York the first general statute in relation to marine insurance was passed in 1849.[14b]

§ IVa. Marine insurance continued: origin of Lloyds.—A consideration of the origin of marine insurance would not be complete without a mention of Lloyds, which may be referred in the beginning to the date 1688, in which year appears the earliest notice thereof. In 1692 Lloyd removed his coffeehouse to Abchurch lane, London, which became the resort for underwriters and merchants,[15]

spects any class of assurance business to the special provisions of this act relating to that class. The act (with exception of sec. 36 which came into operation on passage of act) went into operation July 1st, 1910. See 5 Earl of Halsbury's Laws of Eng. pp. 620 et seq.; 2 Butterworth' 20th Cent. Stat. p. 430.

[13] 4 Inst. 142; *cited* in Dowdale's case, Coke's Rep., pt. 6, 46, 48, Id. 3 Frazer, 351. Crane v. Bell, 7 Coke's Inst. (part 4) cap. 22, p. 139, sometimes cited to this point as of an earlier date, was a case where, according to Coke, a promise was made at Dartmouth that a ship should pass safely without taking and surprising, etc., which ship was after taken by the Spaniards super altum mare: Held, not determinable in admiralty for that albeit the taking was upon the high seas, and yet the promise was made upon the land and the action was at common law. This case is, however, incorrectly reported except as to the words "that the promise was made upon land and within the body of a county." 6 Publications of Selden's Soc., pp. lxxviii.; see also Id. pp. 129, 229. The first libel upon a policy of insurance is Cavalicant v. Maynard, in 1550, Id. p. lxxiii. The case of Emerson v. Sallanova, which was a claim upon an indemnity given against the withdrawal of a safe conduct by the King of France 1545, is thus briefly mentioned in 11 Id. p. lxvi. as having been litigated in admiralty, although not elsewhere mentioned in said volumes.

[14] See Park on Ins. (4th ed.) xliii.

[14a] 13 New Internat. Ency. (1908) p. 64.

As to legislation, statistics, etc., marine insurance (1912) see New International Year Book, pp. 333, et seq.; Id. (1911) pp. 360 et seq.; Id. (1910) pp. 376 et seq.; Id. (1909) pp. 374, 375; Id. (1908) pp. 361 et seq.; Id. (1907) p. 400 et seq.; 2 Suppl. Americana (1911) "Insurance Marine," p. 668. As to history of marine, see 8 Americana (1905) "Insurance-Marine." As to increase of marine insurance in United States from 1880 to 1889, see Harper's Book of Facts (1906) "Insurance."

[14b] N. Y. Laws 1849, c. 308, p. 441. For wording of this act, see note at end of § 5 herein.

[15] Martin's History of Lloyds & Marine Ins. p. 57; 16 Ency. Bri-

marine insurance having been carried on for a long time prior thereto by individual merchants,[16] in Lombard street. The name "Lloyds," therefore, was identified with the underwriters and insurance, and so became known throughout the insurance world.[17] The name had become so attached to the house as a resort of underwriters that it clung to them when they removed in 1774 to the Royal Exchange, where, with the exception of a period from 1838 to 1844, they permanently located an office for carrying on their business. This society was incorporated by an act passed in 1871.[18]

tannica (11th ed.) "Lloyds," pp. 833, 834. See also 14 Id. "Insurance," subhead "Lloyds," p. 661, as to the practice of insurance at Lloyds being the earliest which was successful as business, etc. See also 11 New Internat. Ency. (1903) "Lloyds," p. 398, 12 Id. (1908) "Lloyds," p. 368.

"In the time of William III. and of Queen Anne, Lloyd's Coffeehouse, at the corner of Abchurch lane, in Lombard street, became the celebrated resort of seafaring men and those that did business with them. There, and subsequently in Pope's Head Alley, and ultimately on the west side of the old Royal Exchange, at this coffeehouse congregated the underwriters of London. . . . Lloyd's underwriters now meet and carry on their business in spacious rooms over the Royal Exchange." 1 Arnould on Mar. Ins. (9th ed. Hart & Simey) sec. 77, p. 101; Id. (6th ed. Maclachlan's) pp. 148 et seq.

"The Austrian Lloyds, an association for general commercial and industrial purposes, was founded at Trieste, by Baron Bruck, in 1833. It has regular communication between Trieste and the Levant, by means of a fleet of steamers carrying the mails, and publishes a journal." Haydn's Dict. of Dates (25th ed.) p. 835, "Austrian Lloyd's." See 11 New Internat. Ency. (1903) p. 398; 12 Id. (1908) p. 368.

[16] As to insurance being carried on by individuals, see Richards on Ins. (ed. 1892) sec. 5, pp. 5, 7; Id. (3d ed.) sec. 9; Griswold's Fire Underwriters (ed. 1872) 11, 35; 13 Ency. Britannica, 180; Hopkins' Mar. Ins. (ed. 1867) 32; Reynolds' Life Ins. (ed. 1853) 3. But the statute of 1719, 6 George I., chapter 18, would warrant the inference that corporations had carried on insurance as a business long before its date, although Walford's Insurance Guide (2d ed.) 10, speaks of the two companies as the first marine corporations. See further on first point §§ 325 et seq. herein.

[17] As to Lloyds; competition and conflict within England, ending in 1720 in compromise and monopoly, see 6 Insurance Times (New York 1873) pp. 201–203.

[18] 34 Vict. c. 21; see also schedule of act for fundamental rules of society.

For many years prior to its act of incorporation in 1871, Lloyds had existed as a voluntary incorporation in the nature of a club consisting of underwriters, insurance brokers, merchants, and others, for the purpose of effecting marine insurance and for other purposes. In 1863, under the by-laws then in force, Lloyds was a voluntary association, governed by certain by-laws, under which a person once admitted a member could not be excluded from membership except in the case of his bankruptcy or insolvency. The association consisted of (1) underwriting members (2) nonunderwriting members, (3) annual subscribers and (4) none but merchants, shipowners, bankers, traders, underwriters, and insurance agents were eligible as members of Lloyds or annual subscribers. The

Their affairs are managed by a committee appointed from their members, which appoints agents who are located in all the principal ports of the world. It is the duty of these agents to keep the society constantly informed of all matters of importance relating to the departure and arrival of ships, losses, casualties, and general shipping and insurance information,[19] and these accounts

practice of the underwriting members was to underwrite policies of marine insurance for the benefit of various owners of property, both members of the association and outsiders, but the policies with outsiders could only be effected through the agency of insurance brokers who were either members of or subscribers to the association. The association as such incurred no liability on the policies underwritten by its members. In 1871 (34 & 35 Viet. c. xxi.; entitled "An Act for Incorporating the Members of the Establishment or Society Formerly Held at *Lloyds Coffee House,* in the *Royal Exchange,* in the City of *London* for the Effecting of Marine Insurance, and Generally Known as *Lloyds* and for other purposes"). The society was incorporated by act of Parliament, all the rights of the committee on behalf of the members being vested by the act in the corporation. Lloyds v. Harper (1880) 16 Ch. D. 290, 1 Eng. Rul. Cas. 686, C. A.

In 1871 an act was passed "granting to Lloyds all the rights and privileges of a corporation sanctioned by Parliament." 16 Ency. Britannica (11th ed.) "Lloyds," pp. 833, 834. See also 14 Id. "Insurance" subhead "Lloyds," p. 661; 11 New Internatl. Ency. (1903) p. 398, 12 Id. (1908) p. 368.

"The peculiar value of such a policy" (Lloyds) lies in the fact that great care is exercised in the election of members of the society, and that each member is required on election to deposit securities of the value of at least £5,000 to cover his engagements." Arnould on Mar. Ins. (9th ed. Hart & Simey) sec. 10, p. 17. See Lloyds v. Harper [1880] 16 Ch. D. 290, 1 Eng. Rul. Cas. 686, C. A.; 17 Earl of Halsbury's Laws of England, p. 339, note i.

"Lloyds is supported by subscribers who now pay annually 5£ 5s." Haydn's Dict. of Dates (25th ed.) p. 835.

"The members are of two classes, underwriting members who pay an entrance fee of £100 and are required to deposit securities to the value of £5,000 to £10,000 as a guaranty of their engagements, and nonunderwriting members who pay a fee of 12 guineas. Subscribers pay an annual subscription of 5 guineas, but no entrance fee, and have no voice in the management of the affairs of the association." 11 New Internat. Ency. (ed. 1903) "Lloyds," p. 398; 12 Id. (1908) "Lloyds" p. 368.

[19] *Lloyds Agents*—"The association appoints agents in all the principal parts of the world, whose duty is to forward regularly to Lloyds accounts of all departures from and arrivals at their ports, as well as of all losses and casualties and general information relating to shipping and insurance, but *these agents are appointed by the corporation of Lloyds, and are not agents of the underwriters* (Wilson v. Salamandra Assurance Co. of St. Petersburg [1903] 8 Com. Cas. 129)" 88 L. T. 96, 9 Asp. M. C. 370; Id. N. S. 370. 17 Earl of Halsbury's Laws of England, p. 339, note i.

"By the derelict vessels (report) act 1896, masters of British ships are required to give notice to Lloyds agents of derelict vessels, which information is published by Lloyds." 16 Ency. Britannica (11th ed.)

are forwarded by the agents and posted up in Lloyd's rooms.[20] The information, thus daily received and posted, is methodically compiled and at once published in a newspaper known as the "Shipping and Mercantile Gazette," which incorporates therein what was formerly "Lloyds List," and is easily available by means of numbered columns and indexed volumes.[1] As to the subjects of insurance undertaken at Lloyd's, it is asserted by eminent authority of recent date that there is scarcely any risk that cannot be insured

"Lloyds," pp. 833, 834. See also 14 Id. "Insurance," subhead "Lloyds," p. 661.

[20] These rooms at Lloyds over the Royal Exchange are: the underwriting rooms where the "slips" are submitted; an apartment where the latest telegrams are exhibited for the information of members, and a large reading room containing tabulated and alphabetically arranged volumes of information. 1 Arnould on Mar. Ins. (9th ed. Hart & Simey) sec. 77, p. 102.

"The books kept here contain an account of the arrival and sailing of vessels, and are remarkable for their early intelligence of maritime affairs," Haydn's Dict. of Dates (25th ed.) p. 835.

[1] Arnould on Mar. Ins. (9th ed. Hart & Simey) sec. 77, p. 102.

As to "Lloyds Written Lists," "Lloyds Books," and "Lloyds Printed Lists," see 1 Parsons' Mar. Ins. (ed. 1868) 12; Hopkins' Mar. Ins. (ed. 1867) 33; Richards on Ins. (ed. 1892) sec. 6; Griswold's Fire Underwriters (ed. 1872) 14, et seq., 10; 1 Arnould on Mar. Ins. (Perkins' ed. 1850) 83, 84, *82, *83, sec. 50; Id. (Maclachlan's ed. 1887) 148-51; 14 Ency. Britannica (9th ed.) 741, title "Lloyds" Century Dict. 3490, "Lloyds."

As to "Lloyds News," "Lloyds Lists," and "Lloyds Registry of Shipping," their origin and history, see Martin's History of Lloyds & Marine Ins. pp. 76, 104–120, 324–354.

"Lloyds Registry is an independent association for the classification of shipping" 9 Americana (1904) "Lloyds;" see also 11 New Internat. Ency. (ed. 1903) p. 398; 12 Id. (1908) "Lloyds," p. 368.

"Lloyds Register of British and Foreign Shipping is a society whose primary object is the classification of vessels. It is managed by a committee composed of merchants, shipowners, and underwriters, elected at the principal ports of the country. . . . Lloyds Register maintains a large and highly skilled staff of surveyors at the principal ports of every country." 7 Nelson's Ency. (1907 "Loose Leaf" ed.) p. 362. See also 11 New Internat. Ency. (1903) "Lloyds," p. 398.

"A register of ships began about 1764; and the terms 'A.I.' etc. were used about 1775. Two societies (underwriters and merchants) were united and one register issued Oct. 1834. Jubilee celebrated, Oct. 31, 1884. . . . Lloyds have many signalling stations. First annual issue of their 'Universal Shipping Register' published here May, 1886." Haydn's Dict. of Dates (25th ed.) p. 835. "Earliest copy extant" is dated 1764–65–66, 11 New Internat. Ency. (1903) "Lloyds," p. 398. See also Id. as to classification of vessels. See 12 Id. (1908) "Lloyds," p. 368.

"By Lloyds signal station act 1888, powers were conferred on Lloyds to establish signal stations with telegraphic communications" 16 Ency. Britannica (11th ed.) Lloyds," pp. 833, 834. See also 14 Id. "Insurance," subhead "Lloyds," p. 661.

against by that corporation, and that almost all insurances in the United Kingdom are framed on Lloyd's policy.[2]

§ IVb. Marine insurance: summary.—We have traced, so far as the main facts enable us, the origin of marine insurance, as well as its adoption in modern times down to the date of the earliest reported English case, also to that of the earliest English statute, mentioned, in addition, the statutes in England, down to the present time, relating to the subject, together with a brief statement of some other facts bearing upon its growth in that country, and have also considered the origin and history of Lloyds in England. From the dates which we have given the sources of the law are easier of access to those who wish to recur to principles, and will be referred to hereafter, as far as necessary in treating of the law governing the contract.

§ IVc. Lloyds associations in United States: American Lloyds.—As we have before stated, a marine insurance office was established in the United States in 1754 in New York, which did underwriting under Lloyds system.[3] A case was also decided in South Carolina in 1802, upon a policy issued in 1777 by the South Carolina Insurance Company, which was formed by several subscribers or members upon lines somewhat similar to the plan of some of the later Lloyds associations or underwriters in the United States. And in a case decided in New York, in 1806, the United Insurance Company were insurers on the cargo and freight, and S. and twenty-two others were separate underwriters on the ship under a policy issued in 1798.[4] It was not, however, until the latter part of the nineteenth century that associations designated as "American Lloyds" and also by various names using the word "Lloyds" as a part thereof, organized in any number in this country. But for a number of years thereafter they were before the courts principally, though not exclusively, upon the question of their right to do business which was opposed under state insurance laws. As long as they were not under supervision or control of the insurance departments they flourished, and this seems to have been especially true in New York, where they were expressly exempted for a time, and were so favored that they were in 1892 granted certain privileges.[5]

[2] 17 Earl of Halsbury's Laws of England, pp. 340, 512; *examine* 14 Ency. Britannica (11th ed.) 661.

[3] § IV., at end of section.

[4] United Ins. Co. v. Scott, 1 Johns. (N. Y.) 106.

[5] The general provisions of the New York Insurance Laws of 1892 (Ins. Laws N. Y. 1892, c. 690, sec. 57. Approved May 18, 1892. In effect Oct. 1, 1892) were expressly made not applicable "to any individual or

A case was, however, determined in 1898 in that state, wherein the protection afforded by the statute of 1892 was denied a Lloyds association. It was as follows: Certain individuals had, about six months prior to October 1, 1892, organized thirty different Lloyds associations identical in form, except that the names differed, with one attorney and a general manager for the whole. The original organization was not made for the bona fide purpose of conducting the insurance business through the thirty different organizations, but for the purposes of sale to purchasers to be found. Such original associators were not actually engaged in business, and were not within the protection of the statute, and an assignee or transferee, in 1894, of the rights of the original associators, said original associators having then resigned and so suspended business, was held to take no better right than the assignor, and so was unlawfully engaged in transacting the business of insurance, and was not within the statutory exception.[6] This case was cited in a decision rendered in 1910, where four individuals

partnership or association of underwriters known as Lloyds, or as individual underwriters which, at the time of the passage of this chapter, is lawfully engaged in the business of insurance within this state, and not required by law to report to the superintendent of insurance or the insurance department, or subject to their supervision or examination, nor to any such association, notwithstanding any change hereafter made therein by the death, retirement, or withdrawal of any such underwriters, or by the admission of others to such association."

The N. Y. Laws of 1894, c. 684, sec. 57, changed the words in the law of 1892; "at the time of the passage of this chapter" is lawfully to the words: "on the first day of October, 1892 was" lawfully. This law went into effect May 12, 1894.

Lloyds associations were so favored in New York "that those which on October 1, 1892, were lawfully engaged in the business of insurance were granted certain privileges, and exempted from supervision by the insurance department, and not required to report thereto, 'notwithstanding any change made therein by death, retirement, or withdrawal of any such underwriters, or by the admission of others to said association'" Laws 1892, c. 690, 57, Laws 1894, c. 684. The privileges conferred upon such Lloyds companies, and not before especially referred to, are described as consisting 'of an exemption from the conditions and prohibitions prescribed and provided by section 54 of said chapter 690, Laws 1892, whereby they may transact the business of fire insurance and issue policies in the state of New York without being possessed of the capital required of a fire insurance corporation doing business in this state, and invested in the same manner, and without a certificate to the effect that they have complied with all the provisions which a fire insurance corporation doing business in this state is required to observe, and that the business of insurance specified therein may be safely intrusted to them.'" Balli v. White (1897) 47 N. Y. Supp. 197, 203, 21 Misc. 285, 292, per McAdam, J.

[6] People v. Loew, 52 N. Y. Supp. 799, 23 Misc. 574, 44 N. Y. Supp. 42, 19 Misc. 248, 26 Civ. Proc. 132.

claimed "to own a sort of charter or franchise to do business as individual underwriters, under the name" of the New York & New England Underwriters at Lloyds of New York City, "which they used as merchandise, granting rights to do business thereunder to successive individuals, preferably, apparently, those who are financially irresponsible. These four so-called owners do not underwrite themselves, and in the contract with or licenses to others carefully protect themselves against any liability upon insurance losses." [7]

It is noteworthy, that Lloyds rapidly decreased in numbers in that state from one hundred and twenty-five companies in 1895 to seven companies in 1904 owing to their having been made subject, to a certain extent, to the insurance department.[8]

[7] In re Hotchkiss, 123 N. Y. Supp. 511, 138 App. Div. 877, per Scott, J.

[8] See 7 New Internat. Ency. (1908) p. 640, where it is also said that "during the last few years, however, Lloyds have been appearing in considerable numbers under the lax provisions of the Illinois insurance law." See also 10 Id. p. 685.

On restriction on insurance by unincorporated associations or individuals; Lloyds associations, see note in 25 L.R.A. 238.

Advance in state supervision over Lloyds in New York, since the above favoring and exempting statutes of 1892 and 1894 appears from the following enactments:

N. Y. Laws 1902, c. 297 (in effect April 2, 1902), amended the preceding laws by requiring every such association lawfully engaged in the business of insurance in that state on April 1, 1902, to file on Sept. 1, 1902, with the superintendent of insurance a verified copy of its original articles of association or copartnership agreement, with any amendments, stating where its principal office was located, the kinds of business in which engaged, and the name or names under which it was or had been doing business.

N. Y. Laws 1903, c. 471 (in effect May 7, 1903), further amended said insurance laws by requiring such individual partnership or association of underwriters to file annually a verified statement of its affairs with the superintendent of insurance.

N. Y. Laws 1905, c. 566 (in effect May 19, 1905), further amended said insurance law by inserting therein two new sections, requiring (sec. 138) every such individual or partnership, etc., to create and maintain a reserve fund equal to its liabilities. It also (sec. 139) contained provisions as to change of name; as to similar names; establishment of branches under different names; changes in subscribing underwriters or their attorneys in fact; false or fraudulent reports; right of attorney general to enjoin; also certain exceptions as to attorneys in fact or agents; failure to comply with requirements a misdemeanor. These two new sections (secs. 138, 139) were made applicable (sec. 162) to every individual or partnership or association of individuals known as Lloyds or as individual underwriters then authorized to do marine insurance business in the state as defined (sec. 150) and to every agent or attorney in fact for the same.

N. Y. Insurance Law, Consol. Laws 1909, c. 33, sec. 57 (as amended by Laws 1909, c. 240, sec. 48, in effect April 22, 1909), contains the same provision or exemption as the above law of 1892, as amended by the Law of 1894, and also requires such asso-

In Alabama under the Civil Code of 1907, Lloyds are permitted to transact insurance business, other than life, upon the same terms and conditions as other companies regularly organized, but if they are without paid up cash capital they are required to make a deposit.[9] In Louisiana, under the statute of 1902, a deposit, etc., is required of Lloyds associations.[10] In Maine under the statute of

eiation to file annually a verified statement of its affairs with the superintendent of insurance. Secs. 142, 143, 162, are same as secs. 138, 139, 162, of above Laws of 1905. N. Y. Laws 1910, c. 638 (in effect June 24, 1910), amends c. 33, Laws 1909 (constituting Consol. Laws 1909, c. 28), by adding new article (art. 10, Lloyds and Inter-insurers) which provides (sec. 300) that notwithstanding sec. 54, c. 28, Consol. Laws, 1909, "persons, partnerships, or associations which on Oct. 1, 1892, were lawfully and actually engaged in the business of insurers as Lloyds or inter-insurers or individual underwriters, may, after Jan. 1, 1911, continue to do the business of insurers in this state, provided" they then became authorized to engage in the business of insurance as Lloyds or inter-insurers. Agents, subagents, and representatives of such persons, etc., were included. Noncompliance with provisions of article constituted a misdemeanor. Sec. 301 required (a) an application for a certificate; (b) a verified statement of condition; (c) an agreement providing for personal service of process; (d) "such other matters as the superintendent of insurance may prescribe." An examination of the financial condition of such persons, etc., and the granting of a certificate of authority was also provided for. Sec. 302 contained provisions (a) as to filing original verified certificate of articles of association, copartnership agreement, or inter-insurance contract, with amendments; (b) as to changing name; (c) as to establishing branches; (d) as to similar names; (e) as to reserve fund; (f) as to investment of assets; (g) requiring each underwriter to be worth in his own right not less than $20,000 above all liabilities. Provisions were also made as to change of location of principal office; as to change in underwriters, inter-insurers, or attorneys in fact; and as to deposits and liability in reports. Sec. 303 specifies what other sections of the chapter are applicable.

N. Y. Laws 1911, c. 502 (in effect July 1, 1911) sec. 300, changed the clause in the Law of 1910 as to obtaining the certificate, under sec. 301 thereof, to obtaining a license under secs. 304, 305, of Laws 1911, Laws 1911 only amended sec. 302 of Laws of 1910, by adding the words "licensed under the preceding section" to the headline. It also added the words, "who claim that they were lawfully and actually doing the business of insurance in this state as Lloyds or inter-insurers on October 1, 1892." Otherwise provisions of Law of 1911, sec. 302, were same as Laws 1910, sec. 302. Laws 1911, c. 502, added two new sections; sec. 304 being general provisions affecting Lloyds and inter-insurance associations organized after July 1, 1911, and sec. 305 being provisions for the admission of Lloyds and inter-insurers associations domiciled in other states. Said Law of 1911 also provided for the forwarding of process by the superintendent of insurance.

[9] 2 Ala. Code (Civ.) 1907, sec. 4568 (2592) Id. 4563 (2587).

[10] Wolff's Const. & Rev. Laws La. 1904, p. 884 (acts 112, 1902, p. 181.

1903,[11] Lloyd's associations, for the purpose of transacting marine insurance business, were granted all rights, powers, privileges, etc., under the Massachusetts laws[12] these associations are authorized to transact insurance business, other than life. The Minnesota Statute also contains provisions as to Lloyd's associations.[13] In Tennessee, in 1896, companies on Lloyd's plan, "whereby each associate underwriter becomes liable for a proportionate part of the whole amount insured by policy," were authorized to do business, but were required to make deposit "where they have not an actual paid-up cash capital."[14]

In Mississippi in 1910 a law was enacted entitled "An Act to Raise Revenue and to More Clearly Define what are Insurance Companies in This State and to Place a Tax and Bring a Class of Companies, Associations, and Organizations under Supervision of the Insurance Department, Heretofore Claiming Exemption,"[15] and it included within fire and marine insurance companies or corporations "all corporations, partnerships, individuals, associations, or organizations, known as Lloyds, engaged in placing, writing, or soliciting any and all kinds of fire and marine insurance." Said statute of 1910 authorized such corporations, etc., known as Lloyds, to solicit, sign, issue, deliver, and to execute policies of insurance, contracts, and guaranties against loss by fire, water, lightning, or tornado, etc. It also made it unlawful for any corporation, partnership, individual association, known as Lloyds, to solicit insurance, make such contracts and guarantee against loss by fire, water, lightning or tornado: rate or classify risks, etc., except upon authority of the commissioner and compliance with the law.[16]

Another reason given for the early failure of so many of these associations was that it was not due to the practice of individual underwriting in itself, but that the ostensible reserve for the protection of the policy holders was usually of little or no value.[17] And

[11] P. 471, c. 49, sec. 1.

[12] Rev. Laws 1902, 1908, p. 1211 (R. L. 118, sec. 86), sec. 91, *cited* in Opinion of the Justices, 196 Mass. 603, 85 N. E. 545, upon point of excise tax against "Individuals" and "a person" as well as corporations.

[13] Minn. Rev. Stat. Suppl. 1909, Annot. p. 592, sec. (1647—) 1 (Minn. Laws 1913, c. 534, secs. 1–4, pp. 772–3.)

[14] Shannon's Annot. Code Laws 1896 (p. 766), sec. 3298.

[15] Chap. 103, Laws 1910, p. 76, amending Code 1906, chap. 69. "Inter-insurance contracts to be reported under oath once a year—Taxation of same."

[16] See State v. Alley, 96 Miss. 720, 51 So. 462, 39 Ins. L. J. 629. In this case an organization of inter-insurers claimed that they were not doing insurance business in the state, and that they were not an "insurance company, corporation, partnership, association of individuals," within Code 1906, sec. 2559. See § 336a herein.

[17] 10 New Internat. Ency. (1908) p. 685.

there would seem to be no reason why such practice of individual underwriting should not be successful, even though subject to lawful state supervision intended to protect the insured.

The plan of insurance or the system upon which these associations carry on their business, and the distinction between the English Lloyds and the Lloyds in the United States, will be hereinafter fully considered.

§ IVd. Inter-insurance: reciprocal insurance: inter-indemnity contracts.—The contract of inter-insurance involved in a Mississippi case, decided in 1910, is declared to be the first of its kind ever reviewed by any court.[18]

In Missouri a case was decided in 1912, in which it appeared that in 1906 certain copartnership firms and individuals organized, under the name of "The Printers' and Publishers' Reciprocal Underwriters at Printers' Exchange," for the purpose of insuring each other's business establishments. One hundred and seven different concerns in different cities became members of the association.[19]

In California a statute was passed in 1911 entitled "An Act Defining Certain Classes of Contracts for the Exchange of Indemnity, Prescribing Regulations Thereof, and Fixing a License Fee," and it provided that "individuals, partnerships, or corporations may exchange reciprocal or inter-insurance contracts providing indemnity among each other from fire loss or from other damage to their property in accordance with" the provisions of the act.[20]

[18] State v. Alley, 96 Miss. 720, 51 So. 462, 39 Ins. L. J. 629, per Mayes, J. As to inter-insurance: Its legal aspects and business possibilities, see Article by Mr. Robert J. Brennen, in 58 Cent. Law Jour. pp. 323–329.

[19] Isaac H. Blanchard Co. v. Hamblin, 162 Mo. App. 242, 144 S. W. 880.

On contracts by which individuals or firms undertake to indemnify each other as insurance, see note in 47 L.R.A.(N.S.) 297.

Inter-indemnity contracts not to constitute insurance business in Missouri. This covers making of contracts between individuals, firms, or corporations providing indemnity among each other from casualty or other contingency, or from fire loss or other damage to their own property. Mo. Laws 1911, p. 301. See Mo. Laws 1913, p. 382; Mo. Laws 1915, p. 321.

[20] Cal. Stat. 1911, c. 669 (in effect July 1, 1911), Stat. & Amdts. to Codes of Cal. 1911, p. 1279; Id. (extra session 1911, p. 111) chap. 22 (approved Dec. 24, 1911). Plans known as reciprocal or inter-insurance or interindemnity contracts between firms and corporations not affected by Cal. Stat. 1913, c. 177, sec. 24, p. 325; Id. sec. 2, p. 321.

Tex. acts 1909, p. 311 (Herron's Sayle's Tex. Civ. Stat. Suppl. 1908–1910, Lit. 58, c. 17, sec. 17), does not apply "to purely co-operative inter-insurance and reciprocal exchanges carried on by members thereof solely for the protection of their own property, and not for profit."

Inter-insurance: See Laws Me. 1913, p. 172, c. 135; Laws Minn. 1913, p. 671, c. 464.

§ V. Origin of mutual insurance system.—The mutual insurance system is claimed to be of very ancient origin. This claim is based upon the assumption that there is an analogy between it and the Friendly Societies of England; that between the latter and the guilds there is a great similarity, and, to go one step farther, the origin of guilds is attempted to be traced to those artificial alliances or clubs which existed in ancient times, in China, among the Teutons, the German tribes of Scandinavia, the ancient Greeks and Romans, and the early Christians, for mutual protection and assistance in various exigencies, and for other purposes. The effort, however, to discover the origin of guilds, as well as of the word "guild" itself, has been productive so far only of disagreement.[1] It is not necessary, though, to inquire here as to the origin of guilds or of the word "guild." It is sufficient that the essence of the guild was mutual protection or benefit, social, political, or pecuniary. We may also note that guilds are said to be mentioned in the laws of Ina and Alfred.[2] While Brentano[3] speaks of the guilds shown by the Judicia Civitatis Lundoniae, the statutes of the London guilds reduced to writing in King Athelstan's time,[4] and says one might call these guilds "assurance companies against theft," owing to their regulations against violence, especially of theft; and guilds have also been defined as "the mutual assurance societies of the poorer classes."[5] The Fortnightly Review[6] states that the "Fraternitié," or "Bretherede," of "St. James at Garlekhith, London," begun in

[1] Lambert's Two Thousand Years of Guild Life, and see bibliographic note appended thereto; 11 Ency. Britannica, 259, "Guilds;" 9 Id. 780, "Friendly Societies;" 12 Id. (11th ed.) "Gilds;" 11 Id. (11th ed.) "Friendly Societies," p. 217. Brentano on Guilds and Trades Unions; Old Guilds and New Friendly Trades Societies, 6 Fortnightly Review, N. S. Oct. 1869, p. 391; Workmen's Benefit Societies, Quarterly Review, Oct. 1864, p. 318; Bacon's Benefit Societies and Life Ins. (ed. 1888) sec. 10, Id. (3rd ed. 1904) secs. 6, 10; see Cyclopedia of Fraternities (1899) pp. 112 et seq.; Walford's Insurance Guide (2d ed.) 3.

[2] Ina, Ini, or Ine, 688 A. D. to 726 A. D.; Alfred, 871 A. D. to 901 A. D. See Lambert's Two Thousand Years of Guild Life, 43; Walford's Ins. Guide (2d ed.) 3.

[3] Brentano on Guilds, etc. 11.

[4] 925 A. D. to 941 A. D.

[5] Bacon's Benefit Societies and Life Ins. (ed. 1888) sec. 10; Id. (3rd ed.) sec. 10.

As to Saxon Guilds, see Francis' Annals of Life Assurance (ed. 1853) pp. 27 et seq. See also chapters on Medieval Guilds of England (1887) pp. 113 et seq.; Jack's Introduction to History of Life Assurance (ed. 1912) sub-title "The Gild System," pp. 15–149.

As to Guild's Sick Clubs under German laws prior to 1911, see Boyd's Workmen's Compensation (ed. 1913) sec. 581; as to same under German Code of 1911, see Id. sec. 601.

[6] Vol. 6, N. S. or Vol. 12, O. S. Ludlow's article on Old Guilds, etc. Oct. 1869, p. 394.

1375, provided for relief in sickness, for old age, for burial, arbitration clauses, and relief under false imprisonment. The same author[7] asserts that "the whole vast group of Friendly Societies scarcely looks back beyond the first act which authorized the formation of such bodies toward the close of the last century, 1793,[8] and if the existence of a Friendly Society here and there can be established in the earlier years of the century, it is reckoned a matter worthy to be recorded." Notwithstanding this assertion, there is authority for stating that the system of Friendly Societies in England may be traced to within a few years of the suppression of religious guilds in the 16th century, since the last recorded guild was in 1628, and Friendly Societies existed in 1634, and although there is no directly connecting link between the two, yet it may reasonably be believed that the latter are an outgrowth of the former.[9] Numerous acts have been passed in England containing provisions in relation to these societies.[10]

[7] Id. 391. See article by same writer on Guilds and Friendly Societies, 21 Contemp. Rev. 553, 737.

[8] The act was 33 Geo. III. c. 54; repealed 1855, 18 & 19 Vict. c. 63, sec. 1; latter act repealed 1875, 38 & 39 Vict. c. 60, sec. 5, but see sec. 7; this act amended 1876, 39 & 40 Vict. c. 32; last act repealed 1887, 50 & 51 Vict. c. 56, sec. 17.

[9] 9 Ency. Britannica, 780, "Friendly Societies;" 11 Id. (11th ed.) "Friendly Societies," pp. 217, 221. *Examine* 12 Id. p. 14, and see Bibliography, 12 Id. p. 17; see also 6 Ludlow on Old Guilds and New Friendly Trade Societies, Fortnightly Review, N. S. Oct. 1869, p. 391; Workmen's Benefit Societies, Quarterly Review, Oct. 1864, p. 318; 16 Am. & Eng. Ency. of Law, 19; Bacon on Benefit Societies and Life Ins. (ed. 1888) 16, 17.

[10] For synopsis of Friendly Society statutes prior to 10 Geo. IV. c. 56, see 4 Crabb's Dig. & Index (of English Stat. ed. 1847) p. 257; Id. Part II. p. 653.

As to the acts relating to Friendly Societies which were in force in 1889, see: (1833) 3 & 4 Will. IV. c. 14, sec. 25; (1854) 17 & 18 Vict. c. 56; (1860) 23 & 24 Vict. c. 137; (1863) 26 & 27 Vict. c. 87, secs. 60, 68; (1870) 33 & 34 Vict. c. 61, sec. 2; (1875) 38 & 39 Vict. c. 60; (1877) 40 & 41 Vict. c. 13, secs. 16, 17; (1882) 45 & 46 Vict. c. 72, sec. 21; (1883) 46 & 47 Vict. c. 47; (1884) 47 & 48 Vict. c. 43, sec. 4; (1887) 50 & 51 Vict. c. 56; (1888) 51 & 52 Vict. c. 15, sec. 6; (1889) 52 & 53 Vict. c. 22. Acts were also passed in 1819, 1829, 1834, 1846, 1850, 1855 and 1876. These acts, from 1819 to 1850, inclusive, as well as the act of 1793 (already noted), were repealed by act of 1855 (18th & 19th Vict. c. 63, sec. 1), but as to acts of 1829 and 1834, see 17 & 18 Vict. c. 56, and 6 & 7 Will. IV. c. 32 (1836), and as to acts of 1846 and 1850, see 17 & 18 Vict. c. 56. The act of 1855 was repealed by act of 1875 (38 & 39 Vict. c. 60), which was amended in 1876 by 39 & 40 Vict. c. 32, which in 1887 was repealed by 50 & 51 Vict. c. 56, sec. 17; Chronological Table and Index of Statutes (11th ed.) title "Friendly Societies." As to statutes in force in 1895, see Id. (13th ed. 1235–1895). See Bunyon on Ins. (ed. 1854) 176, 177. As to the assurance companies act, 1909 (9 Edw. VII. c. 49, sec. 36); the Friendly Soc. act 1896 (8 Edw. VII. c. 32), amd'g

The purpose of Friendly Societies under the English insurance corporation act of 1892 was mainly by voluntary subscriptions, with or without donations, for relief in sickness or other infirmity, in old age, widowhood, or orphanhood, for payments on birth or death, for payments in distress, to seekers for employment, and in case of damage or shipwreck at sea, for endowments and for insurance of tools against fire, and these societies include under the act every such corporation not required by law to be licensed for the transaction of insurance, and if the contract it offers to undertake is a contract of insurance, the society is an insurance corporation.[11]

In so far, then, as the object of guilds and Friendly Societies is mutual benefit and assistance, pecuniary and otherwise, there are many points of resemblance in them to the mutual insurance system, even if there were no other connecting link.[12] Taking this analogy as a basis, then, upon the question of priority between this system of insurance and marine insurance, there is more direct and certain evidence in favor of the mutual system. Thus, Hopkins,[13] who gives credit therefor to a paper read [14] before the Institute of Actuaries, in 1864, notices to some extent a Latin inscription on a marble slab found at Lanuvium, an ancient town in Latium, a short distance from Rome, dated during the reign of Hadrian, A. D. 117–138. This inscription shows that the club was ostensibly for the worship of Diana and Antinous, but in reality it was to provide a sum at death of a member for burial. There was also an entrance fee provided. It was constituted under a decree of the Roman senate and people, granting it the privilege of assembling and acting collectively. It met not more than once a month; whoever omitted payment for a certain number of months had no claim on the society for his funeral rites, although he should have made a will. No claim was allowed by the club to any patron, patroness, master,

act 1896 (59 & 60 Vict. c. 25, sec. 2), and the collecting society and industrial assurance companies act 1896 (59 & 60 Vict. c. 26, which consolidated the enactments relating to Friendly Societies and industrial assurance companies), see Butterworth's 20 Cent. Stat. of England, pp. 243; 2 Id. p. 446. As to present statutes of England, see also 15 Earl of Halsbury's Laws of England, pp. 119–204; Chitty's Statutes of Eng. see note 12, pp. 17, 18, § IV. herein.

[11] Act 1892, 55 Vict. c. 39; Hunters' insurance corporation act 1892, 12, 13.

Friendly Societies—statistics showing membership, funds, etc. 1897–1907, in United Kingdom, see Webb's New Dict. of Statistics (ed. 1911), pp. 292 et seq. See also as to Friendly Societies, Jack's Introduction to History of Life Assurance (ed. 1912), pp. 223 et seq.

[12] As to development of the insurance idea from the early guilds, Germany, see Boyd's Workmen's Compensation (ed. 1913) sec. 30.

[13] Hopkins' Mar. Ins. (ed. 1867) 7–11.

[14] By M. N. Adler.

mistress, or creditor except he were named in a will, and no funeral rites could be had by one who had inflicted death upon himself. The resemblance between this club's system and that of the modern benefit society is noticeable. Hopkins remarks that it is "probably the nearest approximation on record to the insurance system during the Roman period, and as containing the feature of a present payment for a larger deferred sum," but he adds that it differs from insurance in some important respects. There also existed in the third century, at Alexandria, a Christian brotherhood for nursing the sick.[15] Other instances might be mentioned, but the above are sufficient to show that this system may claim more positive evidence of an anterior date when compared with marine insurance in this respect than can the latter.

We have already noted the granting by statute, in England in 1719, monopolies to two companies for insuring sea risks and loaning money on bottomry. It appears that while these monopolies existed, clubs or associations of shipowners were established in many of the seaports of England for the insurance of ships of their members, being in fact mutual insurance clubs.[16] These clubs, however,

[15] Brentano on Guilds and Trades Unions, 9.

[16] Marshall on Ins. (5th ed.) 35.

Origin and history of mutual insurance clubs. "In 1719 two companies, the London Assurance Company and the Royal Exchange Assurance Company, were incorporated with the exclusive right of making marine insurances in their corporate capacity. This monopoly gave rise to shipowners' clubs for the mutual insurance of their own vessels. In such clubs each member is both assured and insurer; he is insured as to his own property in the club by all the other members in proportion to their respective properties in it, and he is at the same time an insurer in the proportion of his own property in the club for the property of each of the others, their mutual agreement being the consideration of the contract. By reason of the monopoly of the two insurance companies above mentioned, it was essential to the legality of the mutual insurance clubs that their members should be liable individually, only, each for his own proportion and not jointly, or one for others of them. Moreover the managers of the club had no right of action against a member for premiums or for his contributions to losses paid. . . . The monopoly granted to the two insurance companies was taken away in 1824, and thenceforth until 1862 no restriction was placed on the formation of mutual associations or joint stock companies to carry on the business of marine insurance. But the companies act of 1862 (25 & 26 Vict. c. 89, sec. 4, repealed and re-enacted by the companies [consolidation] act, 1908 [8 Edw. VII., c. 69] sec. [1] 2) produced the result that, as a marine insurance association is a company for the acquisition of gain within the meaning of that act, it is when consisting of more than twenty members, an illegal association unless registered as a company. Mutual insurance associations are now, therefore, always registered under the companies acts, usually as a company limited by shares or as a company limited by guaranty. . . . In general, it is now the association itself which is the insurer, and the assured's right of action is against

while they may still retain their mutual feature, are obligated to be registered in order to carry on the business of insurance.[17] There are many reported cases in which such clubs or associations were interested, and in which various questions, including that of their legality, the subscription to the policy, its validity, the liability of members, etc., are considered.[18] The premiums on insurance in these clubs, so far as their liability could be called premiums, were merely nominal, the absence of regular premiums being one feature of their organization, the liability of each member being based upon the expenses and their contributions to losses.[19] Hopkins,[20] speaking of mutual insurance clubs or societies, says their nature is that of benefit societies. He distinguishes the protection they afford from insurance properly so-called, and adds, "their resemblance to true assurance consists in the protection mutual clubs give against similar losses and contingencies subject to local rules and usages, and in their attaching their 'rules' frequently to the common form of the policy with some necessary modifications." In this connection we notice a statement of Guicciardini, before referred to, of date 1560 or 1561, that a vast commerce existed between England and the Netherlands, and that the merchants had "fallen into a way of insuring their merchandise from losses at sea by joint contribution." This passage is cited by Anderson and also

the association and not against the other members." Earl of Halsbury's Laws of England, Vol. 17, pp. 504, 505 and notes; 4 Id. pp. 405 et seq.

[17] See the companies' act 1862; 25 & 26 Vict. c. 89; 30 & 31 Vict. c. 26, sec. 9; 7 & 8 Vict. c. 110. See also last preceding note herein, and § IV. herein for English statutes.

As *to illegal insurance companies in England—necessity of being registered under companies' acts* 1862–1908, see 17 Earl of Halsbury's Laws of England, pp. 339, 340 and notes.

[18] Reed v. Cole, 3 Burr. 1512 (1754); Harrison v. Miliar, 7 Term Rep. 340 (1796); Lees v. Smith, 7 Term Rep. 338 (1797); Dowell v. Moon, 4 Camp. 166 (1815); Strong v. Harvey, 3 Bing. 34 (1825); Mead v. Davison, 3 Ad. & E. 303 (1835); Turpin v. Bilton, 5 Man. & G. 455 (1843); London Monetary Advance and Life Assn. v. Smith, 3 Hurl. & N. 543 (1858); Bromley v. Williams, 32 L. J. Ch. 716 (1863); Turnbull v. Woolfe, 9 Jur. N. S. 57 (1863); In re London Mar. Ins. Assn. (Smith's case) L. R. 4 Ch. 611 (1869); In re London Mar. Ins. Assn. (Andrews' case) L. R. 8 Eq. 176 (1869); Re Arthur Average Assn. L. R. 10 Ch. 542 (1875); Marine Mutual Ins. Assn. v. Young, 43 L. T. N. S. 441 (1880); Re Padstow Total Loss Assn. L. R. 20 Ch. D. 137 (1882); Lion Assn. v. Tucker, L. R. 12 Q. B. D. 176, 53 L. J. Q. B. 185 (1883); Ocean Iron Steamship Ins. Assn. v. Leslie, 6 Asp. Mar. Rep. N. S. 226 (1887); Jones v. Bangor Mut. Shipping Ins. Soc. Lim. 6 Asp. Mar. Rep. N. S. 456 (1889).

[19] See Marshall on Ins. (5th ed.) 35; Hopkins' Mar. Ins. (ed. 1867) 405.

[20] Hopkins' Mar. Ins. (ed. 1867) 391, 392.

by Hopkins, who speaks of it as being a meager account of insurance.[1]

Mr. Justice Bradley [2] says the earliest form of the contract of insurance was that of mutual insurance. Griswold [3] says mutual insurance was earliest in use.[4] and Richards [5] asserts that back in Anglo-Saxon times there is evidence of attempts among friendly guilds to guarantee protection against fire and other calamities by mutual contribution,[6] and that in 1710 the earliest mutual and stock company was organized in London.[7] Other companies had, however, formed prior thereto on the mutual plan; thus, in 1686, the "Friendly Society for Insuring Houses from Fire" was formed; in 1696 the "Amicable Contribution for the Assurance of Houses and Goods from Fire" was organized, and the policy of this company is said to contain the germ of perpetual insurance, and to throw some light upon the decisions of the courts upon successive losses,[8] and in 1706 the "Amicable Society for a Perpetual Assurance Office," a life company, was founded. The scheme was mutual, and provided for a fixed rate of contribution, which was the same for all members, the ages of whom were limited from twelve to fifty, afterward changed to forty-five, and a certain sum was distributed each year among representatives of deceased members. The plan was, however, changed in 1734, so as to fix more definitely the sum to be paid at death, but it was not until 1807 that the company began rating members according to age and other circumstances.[9] Coming to the United States, the earliest insurance company was

[1] 2 Anderson's History of Commerce, 109; Hopkins' Mar. Ins. (ed. 1867) 29.

[2] Insurance Co. v. Dunham, 11 Wall. (78 U. S. 1) 32, 20 L. ed. 90.

[3] Griswold's Fire Underwriters (ed. 1872) 74, 84.

[4] See also Walford's Insurance Guide (2d ed.) 198.

[5] Richards on Ins. (ed. 1892) sec. 8; Id. (3rd ed.) sec. 12, p. 16.

[6] See also Walford's Insurance Guide (2d ed.) 3, 13.

[7] See also 13 Ency. Britannica, 180, 182; 11 Id. (11th ed.); Griswold's Fire Underwriters (ed. 1872) 24; Walford's Insurance Guide (2d ed.) 25.

[8] Griswold's Fire Underwriters (ed. 1872) 20, 23. See § VI. herein.

[9] Richards on Ins. (ed. 1892) sec. 9; Id. (3rd ed.) sec. 13; Hopkins' Marine Ins. (ed. 1867) 392, 393; 13 Encyclopedia Britannica, 180-82; 9 American Cyclopedia, 424 et seq.; Bliss on Life Ins. (ed. 1872) secs. 1, 2; Reynolds' Life Ins. (ed. 1853) 4, 5; Walford's Insurance Guide (2d ed.) 25; Harpers Book of Facts (1906) "Insurance" Amicable Society was oldest English company established at Sergeants Inn London. See Historical Sketch of the Corp. for Relief of Widows, etc., by John Wm. Wallace (Phila. 1870) p. 12. Amicable Society incepted at beginning of 1705, obtained charter on July 25, 1706, Jack's Introduction to History of Life Assurance (ed. 1912) p. 234.

the "Philadelphia Contributionship for the Insurance of Houses from Loss by Fire," organized on the mutual plan in 1752.[10]

As to fraternal societies in the United States, including such associations as rely upon benefit features for relief and aid in case of sickness, etc., or what are known as Friendly Societies in England, in fact including all kinds of benefit and mutual insurance associations, their history may, it seems, be started at a period beginning within the last half of the nineteenth century.[11]

[10] Griswold's Fire Underwriters (ed. 1872) 36 et seq. See § VI. herein. For the history of mutual companies and their plans of organization in New York, and the statutes relating thereto down to and including that of 1849, see opinion of Denio, C. J., in White v. Haight, 16 N. Y. 310. As to date of organization of mutual companies in United States to 1845, see Jack's Introduction to History of Life Assurance (ed. 1912) p. 245.

[11] 11 Ency. Britannica (11th ed.) p. 221.

For History of Missouri State legislation as to fraternal beneficiary associations (lodge system), see State (ex rel. Supreme Lodge K. of P.) v. Vandiver, 213 Mo. 187, 204 et seq., 111 S. W. 911; Kern v. Supreme Council Amer. Legion of Honor, 167 Mo. 471, 479 et seq., 67 S. W. 252.

The assessment plan or system of insurance:—A new form of benefit organization, said to have come into existence about 1870, assessments being levied when a member dies; but this plan not having proved successful, assessments were then levied in advance of death. "There are about 200 mutual benefit insurance companies or organizations in the United States conducted on the 'lodge system.' . . . This form of insurance may be called co-operative, and has many elements which make the organizations practising it stronger than the ordinary assessment insurance companies having no stated meetings of members." 11 Ency. Britannica (11th ed.) p. 222. See also Id. as to the advantages and disadvantages of these systems.

Assessment system made its appearance about 1865 as an insurance business aside from fraternal organizations, and has rapidly extended. Harpers Book of Facts (1906) "Insurance."

History, etc., Assessment companies were started in the United States over thirty years ago. 8 Americana (1905) "Insurance-life-assessment." Plan of meeting cost of life insurance by assessments was first used in United States about 1867 by local bodies. Id.

In the United States, "Three acts passed in 1907 relative to assessment life insurance, deserve special mention, namely, those of Iowa ('07 c. 83), Wisconsin ('07, c. 447), and Minnesota ('07, c. 318). The Iowa and Wisconsin acts seek to place assessment life insurance upon a safer basis, by forbidding all such societies, other than fraternal beneficiary associations, from transacting any business in the state, unless they shall value their assessment policies or certificates of membership as yearly renewable term policies, according to the standard of valuation of life policies prescribed by the laws of the states." Year Book of Legislation, Vol. 10 (New York State Library, Legislation Bulletins 37–39) p. 323; Review of Legislation on Insurance, 1907–1908, by S. Huebner. See also 9 Id. p. 366.

For history of legislation as to assessment insurance companies in Missouri, see Aloe v. Fidelity Mutual Life Assoc. 164 Mo. 675, 681 et seq. 55 S. W. 993.

When policy is on assessment plan

In New York, fraternal beneficiary societies, orders or associations were recognized by the act of 1883,[12] and in 1889 [13] their formation and regulation, as a separate and distinct class, was first provided for.[14] In 1881, however, an act [15] entitled "An Act Concerning Charitable Benevolent and Beneficiary Associations, Societies, and Corporations," was passed in that state, relating to associations and societies issuing certificates to members, promising to pay, upon disease, sickness, or other physical disability, relief or aid, etc., to such member, or to others dependent upon him, or beneficiary designated by him, where such money, relief, or aid, etc., were derived from admission fees, dues, and assessments, etc. This statute was, however, not applicable to life insurance companies; that is, only certain societies and associations were subject to the provisions of the act.

The earliest benefit assurance case in the United States appears to be of date 1871,[16] and the next decision seems to be of date 1875.[17]

While, therefore, the idea of mutual protection or mutuality as a principle of insurance is of very ancient origin, yet it has not approximated to true insurance until within a comparatively short time,[18] and it furnishes no adjudications in this country until recent years. It appears, then, that the principle of mutuality or reciprocity had been applied to protection against various emergencies certainly before marine insurance came into general use, if not before it had been used at all, and that even in England it became the basis of incorporation of several life and fire companies before marine insurance had assumed any proportions as an organized system, and thus, also, before marine insurance decisions commenced, under that eminent jurist, Lord Mansfield, from 1756, to make that marked progress which they then did in establishing leading principles of insurance. Whatever defects may have exist-

and not an endowment policy, see Haydel v. Mutual Reserve Fund Life Assoc. 104 Fed. 718, 44 C. C. A. 169.

[12] Chapter 175.

[13] Laws of 1889, c. 520, p. 717.

[14] Report of Board of Statutory Consolidation, N. Y. vol. 3 (1907) p. 2950. Such societies are now governed by Consol. Laws, Laws 1909, c. 33, art. 7, secs. 230 et seq. which latter is repealed, and a new art. 7, secs. 230–249, added by Laws 1911, c. 198, p. 448; secs. 242, 245, am'd Laws 1913, c. 410.

For history of fraternal development; the growth of the system; the requirements for soundness and permanence, set forth in a series of articles, see The Fraternal Monitor (Rochester, N. Y.) in 31 pages.

[15] Laws 1881, c. 256.

[16] Wetmore v. Mutual Aid & Benevolent Life Ins. Assoc. 23 La. Ann. 770.

[17] Maryland Mut. Ben. Soc. v. Clendinen, 44 Md. 429, 22 Am. Rep. 521.

[18] See Tabor's Three Systems of Life Ins. 11, 120 et seq.

ed in the infancy of the assessment system or mutual system of insurance, great strides have been made toward placing the same on a scientific basis, so that now some of the largest and most successful companies are mutual companies.[19]

§ Va. Origin of cattle insurance societies.—It is proper to mention here the origin of cattle insurance societies, which in their constitution and management resemble Friendly Societies. They were introduced during the panic caused by the cattle plague, and were established and regulated under the Friendly Societies act of 1875.[20] Their purpose is to provide, by insurance against loss of neat cattle, sheep, swine, horses, and other animals by death from disease or otherwise.[1] In New York the first general law which provided for insurance upon the lives of domestic animals was passed in 1853.[2] It is noteworthy, however, that in 1873 it was declared in a New York periodical that every attempt or trial that had been made to introduce or conduct "live stock insurance" or "cattle" insurance in the United States had proved an utter failure, and had resulted in the downfall of the companies who had endeavored to create this class of insurance.[3] But coming down to 1889 we find that the laws of that state [4] provided for the organization and regulation of co-operative or assessment companies for insurance of domestic animals, and these are now regulated by statute,[5] the Laws of 1912 providing for insurance upon the lives of horses, cattle and other live stock.[6]

[19] See Tabors' Three Systems of Life Ins. 24; Richards on Ins. (ed. 1892) secs. 7, 9, p. 14.

[20] 38 & 39 Vict. c. 60, sec. 8, subd. 2. See Friendly Society act 1896 (59 & 60 Vict. c. 25); sec. 8 (2); 15 Earl of Halsbury's Laws of England, p. 125, sec. 233.

[1] Rapalje & Lawrence's Dict. 179; 15 Earl of Halsbury's Laws of England, p. 125. "Cattle insurance societies" are among the class of Friendly Societies capable of registration "The expression 'other animals,' it is conceived, includes only animals ejusdem generis." Id. p. 125. On animal insurance, see note in 44 L.R.A.(N.S.) 569.

[2] Laws N. Y. 1853, c. 463, p. 887.

[3] 6 Insurance Times (New York, Dec. 1873) p. 859.

[4] Laws N. Y. 1889, c. 454.

[5] Consol. Laws, N. Y. Laws 1909, c. 33, art. 8, as am'd by Laws 1910, c. 318, p. 564; Id. c. 637, sec. 70, subdiv. 8, p. 1702; Laws 1911, c. 324, sec. 70, subd. 8, p. 758. See Report of Board of Stat. Consol. N. Y. vol. 3 (1907) p. 2950.

[6] Laws N. Y. 1912, c. 232, p. 444 (in effect April 9, 1912). The Laws of 1912, c. 231, p. 444, provide for insurance upon the lives of horses, cattle and other live stock, or against loss by theft of any such property or both, but this amendment is disregarded in the above amendment, c. 232.

A company authorized to issue policies against accidents to individuals may likewise issue policies against accidents to live stock. In re Pennsylvania Casualty Co. 36 Pa. Co. Ct. p. 635 (Opinion of Att'y Gen.).

§ VI. Origin of fire insurance.—Although life assurance may claim an earlier date for its origin, yet the idea of security in case of fire seems to have followed more closely upon marine insurance than the adoption of life insurance. It is said that efforts were made among the early Saxon guilds to guarantee protection against fire, and we have seen that Friendly Societies offer this indemnity in some measure. It is also said that insurance was applied to fire risks as early as 1609; that there is a recorded proposal made in 1635 for the establishment of a fire insurance company; and in 1670 there is a record of a company formed at Edinburgh for "Friendly Assurance against Fire." But it was not, however, till after 1666, when the great fire in London occurred, that the idea of fire insurance assumed in England any organized shape as a system and the earliest office for insuring property was opened in 1667, in London, on the plan of individual underwriting. In 1680 a proprietary company, the "Fire Office," formed in London. In 1681 the corporation of London opened books for securing and entering subscriptions, for fire insurance, although the scheme was dropped, but in that year there was also a joint stock company organized for protection against fire losses. Then came in 1686 the "Friendly Society for Insuring Houses from Fire." But the first regular office which is said to have transacted any business was the "Amicable Contribution," organized in 1696. The Hand in Hand, however, appears to date back to 1696 as the first or oldest regular office in London, founded in that year. In 1710 the first mutual and stock company, "The Sun Fire Office," was formed, while the Union is declared to have been the second fire office, under date 1714. Passing down to the two companies, the Royal Exchange and London Assurance, chartered in 1720, we find that they added fire risks to their scheme of insurances.[7]

In the United States fire insurance took an early start, since an agency or fire office is said to have existed in Boston in 1724. It is stated, however, that the Sun, an English company, at Boston, 1728, was the first insurance company. But the earliest fire company organized here was the Philadelphia Contributionship of date 1752, incorporated 1768; although it is asserted that the first fire policy was issued at Hartford, Connecticut, in 1794, by a company designated as the Hartford Fire Insurance Company, which organized subsequently, in 1810.[8]

[7] See authorities cited next following note.

[8] Reynold's Life Ins. (ed. 1853) 2; Griswold's Fire Underwriters (ed. 1872) 19–48; 13 Encyclopedia Britannica, 161 et seq.; 14 Id. (11th ed.) pp. 657, 660; Richards on Ins. (ed. 1892) sec. 8; Id. (3rd ed.) sec. 12, p.

In New York, as we have stated elsewhere, the earlier statutes consisted of charters to individual companies, etc., and in that state the first general statute relating to the incorporation of fire insurance companies was passed in 1849.[9] This was followed by another enactment in 1853,[10] and these Laws now form Article Nine of the Consolidated Laws [11] as amended by inserting a new article to be Article Nine.[12] In 1857 a law was passed in that state authorizing the formation of town mutual fire insurance companies.[13] County and town co-operative companies were first authorized in 1879 [14] for the purpose of co-operative insurance against loss or damage by fire or lightning, and also by Laws of 1880,[15] which were consolidated by Laws of 1886,[16] and now form Article Nine as amended of the present general law.[17]

It is noteworthy that the first fire companies also undertook to extinguish fires.[18]

The above facts show that fire insurance, as a systemized plan, cannot date its growth from a date anterior to 1666 in England, nor does it appear to have become an organized system in this coun-

16; Walford's Insurance Guide (2d ed.) 3, 13, 14; Hopkins' Mar. Ins. (ed. 1867) 47, 48; Jacobs' Law Dict. title "Insurance, v." Harper's Book of Facts (1906) "Insurance."

List of oldest existing fire assurance companies, see 7 New Internatl. Ency. (1908) pp. 638–9.

It is claimed in "A History of The Insurance Company of North America of Philadelphia," published in that city, that said company is "the oldest fire and marine insurance company in America;" that it "began business as an association in 1792. Incorporated 1794."

As to legislation, history, etc. fire insurance, see New International Year Book (1912) pp. 333 et seq.; Id. (1911) pp. 360 et seq.; Id. (1910) pp. 376 et seq.; Id. (1909) pp. 374–5; Id. (1908) pp. 361 et seq.; Id. (1907) pp. 400 et seq.

As to increase of fire and tornado insurance in United States, from 1880 to 1889, see Harper's Book of Facts (1906), "Insurance."

As to Underground or Wildcat Insurance:—Incorporation of insurance companies, both stock and mutual, without cash deposit or its equivalent; conduct of business through United States mails, etc., see 31 Reports of American Bar Assoc. (1907) p. 654; 33 Id. (1908) pp. 529–531; discussion of, Id. p. 51; draft of act on, Id. p. 534. *As to meaning of "wildcat" insurance* company when used with reference to the standing of another insurance company, see Wells v. Payne, 141 Ky. 578, 133 S. W. 575.

[9] Laws N. Y. 1849, c. 308, p. 441.

[10] Laws N. Y. 1853, c. 466, p. 904.

[11] Consol. Laws (Laws N. Y. 1909, c. 33) secs. 260–280.

[12] Laws 1910, c. 328, sec. 2.

[13] Laws N. Y. 1857, c. 739, p. 574, repealed by Laws 1862, c. 347, sec. 1, p. 559. But companies in existence at the time of such repeal were excepted from effect thereof, and were continued in existence by subsequent amendments of original act.

[14] Laws N. Y. 1879, c. 287, p. 378.

[15] Chapter 362, p. 540.

[16] Chapter 573, p. 801.

[17] See Report of Board of Stat. Consol. N. Y. vol. 3 (1907) p. 2949.

[18] 13 Ency. Britannica, 166; Walfords Insurance Guide (2d ed.) 25.

try prior to 1752. It is also said that there was no organized system of insurances against losses of houses by fire in England, outside of London and Westminster, until the organization of the Sun Fire Office above mentioned, and that there were no insurances against losses of goods by fire prior to that time, and that the insurances issued by this office were contracts only between it and the persons insuring, the loss being confined to the contracting parties only.[19]

§ VIa. Boards of fire or marine underwriters.—It is said that it is a matter of common knowledge that, prior to any legislation on the subject, associations called "boards of underwriters" (either fire or marine) existed in various cities. These were voluntary associations, composed exclusively of those engaged in that particular line of business. Their general object was consultation and co-operation in matters affecting their common business.[20]

An act to incorporate the New York Board of Fire Underwriters was passed May 9, 1867,[1] the purpose being: "To inculcate just and equitable principles in the business of insurance; to establish and maintain uniformity among its members in policies or contracts of insurance, and to acquire, preserve, and disseminate valuable information relative to the business in which they are engaged." Said corporation has power to provide a fire patrol with a competent superintendent to discover and prevent fires, with suitable apparatus to save and preserve property or life at and after a fire; with other powers to enable them to act with promptness and efficiency, etc.: but they are not permitted to interfere with firemen in their duties, and are subordinate to the fire commissioners. Power is also given to require a statement to be furnished, semiannually, by all corporations, associations, underwriters, agents, or persons engaged in the business of fire insurance in the city of New York, of the aggregate amount of premiums received for insuring property in said city. A penalty is provided for failure of fire associations, etc., to make said statement. The corporation created by this act was also given the general powers, and was subject to certain restrictions under the then Revised Statutes.[2]

[19] Lynch v. Dalzell, 3 Bro. Par. Cas. 497.

[20] Childs v. Firemens Ins. Co. 66 Minn. 393, 35 L.R.A. 99, 69 N. W. 141, per Mitchell, J., *citing* 13 Ency. Brit. "Insurance;" Ency. Ins. U. S. 1894, 1895.

[1] Laws N. Y. 1867, c. 846, p. 2113.

[2] As is declared in a comparatively recent case, the purpose of the corporation is to exercise supervision concerning the business of fire insurance in the city of New York. It has the power to require a statement to be furnished semiannually by all corporations, associations, and persons respecting the aggregate amount of premiums received for insuring property in the city of New York, in order to make a ratable assessment to supply funds for the maintenance of its business of super-

In Illinois a statute was passed in 1874 entitled "An Act to Enable Boards of Underwriters Incorporated by or under the Laws of Illinois to Establish and Maintain a Fire Patrol.[3]

§ VII. Origin of life insurance.—It is asserted by some writers that life insurance had its beginning in the 16th century.[4] Life insurance is said to claim a very ancient origin. Meredith [5] asserts that the Ordinance of Wisby mentions insurance upon life. As we

vision. Amongst other things it maintains a fire patrol for the purpose of minimizing loss by fire. New York Board of Fire Underwriters v. Higgins (1909) 130 App. Div. 78, 114 N. Y. Supp. 506, aff'd (1910, without opinion) 198 N. Y. 634, 92 N. E. 1093, per Houghten, J., a case where attorneys in fact or agents of an incorporated association known as the "United States Lloyds," doing business in the city of New York, were held liable for the penalty created by said law of 1867 for failure to furnish said board of fire underwriters a semiannual report of the aggregate amount of premiums received for insuring property in said city.

When company is engaged in business of insuring property in city against fire within above statute. See New York Board of Fire Underwriters v. Higgins (1909) 130 App. Div. 78, 114 N. Y. Supp. 506, aff'd (1910, without opinion) 198 N. Y. 634, 92 N. E. 1093.

As to board of fire underwriters in Minnesota under Laws 1895, c. 175, c. 178, see Childs v. Firemen's Ins. Co. 66 Minn. 393, 35 L.R.A. 99, 66 N. W. 141, deciding that the Minneapolis Board of Fire Underwriters and the Merchants Board of Fire Underwriters were not boards of fire underwriters within the meaning of the above statute of 1895.

Fire insurance patrol is neither a public corporation nor a public charity. Coleman v. Fire Ins. Patrol of New Orleans, 122 La. 626, 21 L.R.A. (N.S.) 810, 48 So. 130.

[3] Act was approved March 28, 1874, in force July 1, 1874. Hurd's Rev. Stat. (Ill.) 1912, p. 2351, Rev. Stat. Ill. 1874, p. 1087, c. 142; Myers ed. 1895, p. 1519; Starr & Curtis's Annot. Stat. p. 2437.

As to boards of fire underwriters, etc., see also 2 Burns's Annot. Ins. Stat. (Rev. 1908) pp. 518, 519, sec. 4853 (4959)—sec. 4856 (4962) (1877 sec. p. 21, in force March 14, 1877); Mass. Laws 1874, c. 61; Wis. Laws 1876 (Sanb. & B. Annot. Stat.) secs. 1922 et seq.

Insurance Patrol New York Corps was organized in 1835; controlled by insurance companies through board of fire underwriters, 8 Americana (1905) "Insurance Patrol."

Fire insurance patrol of New Orleans is not a public charitable organization, and is liable for its servants negligence in so driving its patrol wagon as to collide with a city truck and cause injury. Rady v. Fire Ins. Patrol, 126 La. 273, 52 So. 491.

As to fire prevention bureau, see Wolff's Const. & Laws La. 1904, p. 900 (act 183, 1902, p. 350).

"An Act to Incorporate the 'New York Underwriters Guild'" was passed May 9, 1867, Laws N. Y. 1867, c. 847, p. 2118, giving power to New York fire insurance companies, not less than five, to associate together for the purpose of guarantying the contracts of insurance which either of them may lawfully make.

[4] See 14 Ency. Britannica (11th ed.) "Insurance," pp. 658, 665, Harper's Book of Facts (1906) "Insurance."

[5] Emerigon on Ins. (Meredith's ed. 1850) 160, n. b.

have already stated, there is much disagreement as to the date of this Ordinance, it being placed anterior to 1075, and as late as 1320.

It is said that about the time of the division of the Roman Empire,[6] a table was in existence by which annuities could be valued,[7] and this is noteworthy in this connection since annuities are based upon the principles of life contingency upon calculations made by means of the mortality tables,[8] although an annuity transaction is the very reverse of a life transaction, it being to the interest of a life company that the insured should live, but contra in the case of an annuitant.[9]

The Guidon de la Mer, of date somewhere between 1556 and 1584, mentions life assurance as a long-established and familiar custom in certain countries. Saccia, in De Commerciis, in an edition of 1620, which is not the earliest, refers extensively to the contract, and gives a form of policy then in use. France and several other countries prohibited insurances on lives. Although it was forbidden in France from an early period, and such assurances were void upon the proposition that "man cannot be estimated at a price," and that "the life of man is not an object of commerce, and it is odious that his death should form matter of mercantile speculation;" and although such contracts were considered mere wagers by Emerigon, yet at Naples, Florence, and other places life assurances were permitted; and even in France "all navigators, passengers, and others" were permitted to insure the freedom of their persons; that is, the liberty of persons and not the persons were permitted to be insured by fixing in the policy a definite sum to be paid as a ransom, or to stipulate generally that the insurers should procure the freedom of the person. It is also conjectured that insurance was employed during the Middle Ages in assuring the personal liberty of pilgrims to the Holy Land. However, insurance on life has been permitted in France since 1820.[10] It is to the year 1706, though, that we must look for the first definite scheme of life as-

[6] This date is variously fixed at A. D. 305, 364, 395. See Montesquieu's Grandeur and Decline of the Romans, Baker's Notes (ed. 1882) 358, et seq., 368, et seq.; Gibbon's Decline and Fall, vol. 2, 529, vol. 3, 127, 165; Smith's Gibbon, 98, e. 8; 14 American Cyclopedia, title "Rome," 408; 8 Chambers' Encyclopedia, title "Rome," 793; 6 Historians' History of the World, pp. 535 et seq.; Id. pp. 433 et seq.

[7] Walford's Insurance Guide (2d ed.) 15.

[8] 13 Ency. Britannica, 161, 14 Id. (11th ed.) p. 665 et seq.

[9] Walford's Insurance Guide (2d ed.) 25.

As to rents or annuities, see Jack's Introduction to History of Life Assurance (ed. 1912) pp. 165–187.

See note at end of § 7 herein.

[10] Emerigon on Ins. (Meredith's ed. 1850) 157 et seq., and notes a and b; Bliss on Life Ins. (ed. 1872) secs. 1, 2. Life assurances were forbidden in France by the Ordonnance of Louis XIV., of date

surance, which was that of the amicable company already noted, which society changed its system in 1734, and again in 1807, which last lease of corporate life was based more upon the scientific principles of true insurance than it had before possessed.[10a] It is probably upon the basis of the establishment of this company that Hopkins declares that life insurance did not take its rise before the 18th century. The progressive step taken by the Amicable in 1807 was the rating of new members "according to age and other circumstances." This plan, however, had been anticipated by the Royal Exchange and London Assurance Companies, chartered in 1720; while the Equitable, started in 1762, is said to have "possessed from the outset all the essential features of a life assurance office." [11] It is unnecessary to pursue our investigations further as to foreign countries other than England, and there we find that Maylnes,[12] in the edition 1622, mentions assurance upon life, although earlier and later dates for such an assurance are given, it being asserted that the first life policy of which there is any positive information was made in London, in the Royal Exchange, on June 18th, 1583,[13] by several underwriters acting individually,[14] while 1697 has also been fixed as the earliest recorded date of an insurance upon a life.[15] However, the first life company had its birth in 1698 by the Mercers, as a widow's fund, an annuity scheme, and this was quick-

1681; in the Netherlands by the Ordonnance of Philip II. of 1570; by the civil statutes of Genoa, of 1588; by the Amsterdam Ordonnance of 1598, and by the Rotterdam Ordonnances of 1604 and 1635; Reynold's Life Ins. (ed. 1853) 10; Walford's Insurance Guide (2d ed.) 22; Bunyon's Life Assurance (ed. 1854) 7. The last author says life assurance was not reintroduced in France till the latter part of the 18th century.

[10a] See § V. herein, and notes.

[11] Bliss on Life Ins. (ed. 1872) secs. 1, 2; 13 Ency. Britannica, 169, 180, 182; 14 Id. (11th ed.); Hopkins' Marine Ins. (ed. 1867) 32, 33, 47, 48; Richards on Ins. (ed. 1892) sec. 9; Id. (3rd ed.) sec. 13; Reynolds' Life Ins. (ed. 1853) 2, 4, et seq.; 9 American Cyclopedia, 424; Walford's Insurance Guide (2d ed.) 24, 25; Jacobs' Law Dict. title "Insurance, v.;" 33 Geo. III., c. 14 (1793). See Jack's Introduction to History of Life Assurance (ed. 1912) p. 236; 12 New Internat. Ency. (1908) p. 224. In 1762, Equitable Assurance Society of London, began to rate members according to age. Harper's Book of Facts (1906) "Insurance."

The first meeting of the Equitable for assurance of life and survivorship was held at the White Lion in Cornhill in 1762, when only four assurances were effected and in the next four months the members did not exceed thirty. Francis' Annals of Life Assurance (ed. 1853) p. 108.

[12] Maylnes' Lex Mercatoria, 149.

[13] 14 Ency. Britannica (11th ed.) p. 658.

[14] 12 New Internat. Ency. (1908) p. 224. Policy insured life of William Gibbons for 12 months.

[15] Francis' Annals of Life Assurance (ed. 1853) p. 56. Policy issued on life of Sir Robert Howard.

ly followed in 1699, when a "Society of Assurances for Widows and Orphans" was formed.[16]

In 1774, it having "been found by experience that the making insurances on lives or other events wherein the assured shall have no interest hath introduced a mischievous kind of gaming, for remedy whereof," etc., says the preamble, an act was passed in England,[17] prohibiting insurance on lives or any other event or events, wherein the person to be benefited should have no interest, "or by way of gaming or wagering." The act further provided that the name of the beneficiary should be inserted in the policy.[18] In the

[16] Bliss on Life Ins. (ed. 1872) secs. 1, 2; 13 Encyclopedia Britannica, 180, 182; 14 Id. (11th ed.) p. 658; Reynolds' Life Ins. (ed. 1853) 3 et seq.; Walford's Insurance Guide (2d ed.) 24; 9 American Cyclopedia, 424 et seq.; Haydn's Dict. of Dates (25th ed.) "Insurance." The Independent & West Middlesex Co. is claimed to have been founded in 1696, 9 Dublin Review (1840) p. 86.

"Reference is usually made to the Amicable Society as the earliest institution for the assurance of lives: but the Mercers company, in 1698, commenced a scheme for granting life annuities to the nominees of the assurers, in place of paying down a fixed sum" Francis' Annals of Life Assurance (ed. 1853) p. 56. See note 9, p. 34, § V. herein.

See further as to the "Mercers," Jack's Introduction to History of Life Assurance (ed. 1912) p. 233; 12 New Internatl. Ency. (1908) p. 224.

At close of 18th century, there were eight companies in Great Britian and Ireland, Harper's Book of Facts (1906) "Insurance."

It appears that there were 105 assurance companies registered, 44 exclusively life companies being in London, between June 1845 and December 31st, 1851; that the life insurance institutions in operation in the United Kingdom in February, 1852 were about 180 in number, and that from 1844 to 1852, no fewer than 241 new insurance offices were projected or nearly one every twelve days. See "abstracts of all the documents registered by London life assurance companies from act 7 and 8 Vict. Cap. 110 (Sept. 5, 1844, to Feb. 5, 1852) "with alphabetical index of names" of London life assurance institutions, by Robert Christie. See Historical and statistical account of different systems of life assurance by Alfred Burt (London, 1849).

See article: "Prospectuses of New Life Assurance Companies (various) and "necessity of legislation for life assurance," 9 Dublin Review (1840).

Endowment insurances increased in the United Kingdom, in amount from less than three per cent of the total life business in 1870, to nearly twenty-five per cent in 1900. Webb's New Dict. Statistics (ed. 1911) "Insurance," pp. 337 et seq.

Tontine insurance history of, see Jack's Introduction to History of Life Ins. (ed. 1912) pp. 211 et seq.

[17] 14 Geo. III., c. 48. As to wager policies; gambling act of 1774. See 17 Earl of Halsbury's Laws of England "Insurance," pp. 514 et seq. As to gambling insurances, see Jack's Introduction to History of Life Assurance (ed. 1912) pp. 196–205.

[18] Life insurance statutes will be noted hereafter under their appropriate heads.

As to bubble life companies and list of assurance projects of South Sea era, see Francis' Annals of Life Assurance (ed. 1853) pp. 63, 81.

United States a charter was granted in 1759 to "the Corporation for the Relief of Poor and Distressed Presbyterian Ministers, and of the Poor and Distressed Widows and Children of Presbyterian Ministers;" and in 1769 there was incorporated "the Corporation for the Relief of Widows and Children of Clergymen of the Protestant Episcopal Church,"[19] and in 1784 a society for the benefit of Episcopal clergy was established in New Jersey.[20] But the Pennsylvania Company for Insurance upon Lives and Granting Annuities was the first general life company. It was chartered in 1812, in Philadelphia.[1] Reynolds, however,[2] says that life insurance was introduced here by a company formed in 1814, followed by another company in 1815, both of which added life to marine and fire risks,[3] and that it was not till 1818 that a corporation was formed in the United States having for its sole object the insurance of lives.[4]

[19] Historical Sketch (of the last named corporation) by John Wm. Wallace, Phila. 1870; Id. p. 14 (clerical life annuity). See also 9 American Cyclopedia, 424 et seq.; Richards on Ins. (ed. 1892) sec. 9; Harper's Book of Facts (1895) p. 380; Id. (1906) "Insurance;" 12 New Internatl. Ency. (1908) p. 225.

[20] 12 New Internatl. Ency. (1908) p. 225.

[1] Harper's Book of Facts (1906) "Insurance;" 12 New Internatl. Ency. (1908) p. 225.

[2] Reynolds' Life Ins. (ed. 1853) 7, 8.

[3] Viz.: The Dutchess County Insurance Company, chartered in 1814, and the Union Insurance Company in 1815.

[4] Viz.: The Massachusetts Hospital Life Company, Boston. See also Harper's Book of Facts (1906) "Insurance;" 12 New Internat. Ency. (1908) p. 225.

As to life insurance companies organized in the United States to date 1845, see Jack's Introduction to History of Life Assurance (ed. 1912) p. 244.

As to "old-line" insurance companies in United States from 1830 to 1867, see list with date of charters, Harper's Book of Facts (1906) "Insurance."

As to life insurance in United States, 1880–1905, covering number of companies; number of policies; insurance in force; assets; and surplus, see 12 New Internat. Ency. (1908) p. 225.

As to history, legislation, statistics, etc., life insurance, see New International Year Book (1912) pp. 333 et seq. Id. (1911) pp. 360 et seq.; Id. (1910) pp. 376 et seq.; Id. (1909) pp. 374–5; Id. (1908) pp. 361 et seq.; Id. (1907) pp. 400 et seq.; 2 Suppl. Americana (1911) "Insurance;" 8 Americana, "Insurance, life, statistics."

As to history of legislation in Missouri upon subject of life insurance, see brief of counsel for appellant in Logan v. Fidelity & Casualty Co. 146 Mo. 114, 115, 47 S. W. 948 (but brief not given in S. W.). See also Aloe v. Fidelity Mutual Life Assoc. 164 Mo. 675, 681 et seq., 55 S. W. 993, 29 Ins. L. J. 679.

In New York the first general law relating to the incorporation of companies "to make insurance upon the health or lives of individuals and every insurance appertaining thereto or connected with health or life risks, and to grant, purchase, or dispose of annuities," was enacted in 1849. Laws 1849, c. 308, p. 442. The next general law which provided for the incorporation of life and health insurance companies in that state was

At the beginning of the present century but few cases of value on life insurance had been reported in the English books,[5] while the earliest life case in the United States was decided in Massachusetts.[6] Life assurance, therefore, did not assume any great importance, either in a legal aspect or as a business, until within a comparatively few years. In fact, it is asserted that its growth did not become marked in the United States till as late as 1843 or perhaps 1858.[7]

§ VIIa. History of industrial insurance.—The system of industrial insurance, or insurance issued upon life for small sums with weekly or other short periodical payment of premiums,[8] seems to relate back in its origin to the early guilds, burial societies, or clubs.[9] It is said to be the business of the burial societies over again on a large scale, occupying a position between the friendly society as to its objects, and the ordinary life assurance office as to its organization. A Parliamentary Report in 1853 gave it impetus by drawing attention to the insufficiency of the protection afforded the working class by burial clubs and friendly societies.[10]

The collecting societies and industrial assurance companies act of England of 1896[11] consolidated the enactments relating to Friendly societies and industrial assurance companies.[12] In that

passed in 1853. Laws 1853, c. 463, p. 887. See also Laws 1912, c. 232, sec. 70, subd. 1. See § 9 (V.) herein. The earliest statutes consisted of charters to individual companies. See Report of Board of Stat. Consol., N. Y. vol. 3 (1907) pp. 2949, 2950.

[5] Jacobs' Law Dict. title "Insurance," which is apparently compiled from Justice Parks' work on Insurance (ed. 1802) notes only twelve cases, while Comyn's Digest (4th ed.) published in 1800, notes only four cases. In 1649 the case of Bendye v. Oyle, sty. 166, 172, was a life case, although no principle of life insurance was involved, it being only a question of prohibition to the court of commissioners. For insurance cases to 1795, see Beawes' Lex Mercatoria, 302 et seq.

[6] Lord v. Dall, 12 Mass. 115, 7 Am. Dec. 38.

[7] 9 American Cyclopedia, 424 et seq.

[8] See Definition, § 7b herein. "The German term for it, 'insurance of the people' (volksversicherung), is an apt one." Jack's Introduction to History of Life Ins. (ed. 1912) p. 239. It is also called family insurance of laboring people (14 Ency. Britannica [11th ed.] p. 671), and "family insurance at retail." (8 Americana, "Insurance: Industrial"). See article by Louis D. Brandeis (now Justice of United States Supreme Court), in Bullock's Selected Articles on Compulsory Insurance (1912) p. 43.

[9] As to guilds, "the mutual assurance societies of the poorer classes," burial societies, friendly societies, etc., see § V. herein. See 8 Americana "Insurance: Industrial."

[10] Jack's Introduction to History of Life Ins. (ed. 1912) p. 239.

[11] 59 and 60 Vict. c. 26. As to English statutes on this subject, see § V. herein.

[12] See also the assurance companies act 1909 (9 Edw. VII. c. 49, sec. 36) 2 Butterworth's 20 Cent. Stat. p. 446;

country the first company formed was the Prudential Assurance Company in 1848, although it did not undertake industrial insurance until 1854. The Industrial and General was founded in 1849, and in 1852 the British Industry Life Insurance Company was organized.[13] In the United States, in 1873, the Insurance Times of New York urged that companies be established in that state to carry on the business of industrial life insurance,[14] and the system is said to have been introduced here in 1876.[15]

In 1873, however, "the Widows and Orphans Friendly Society" was organized by a special act of the legislature of New Jersey approved April 3. In 1875 its name was changed to "the Prudential Friendly Society," by another special legislative act, and on March 30, 1877, by a certificate pursuant to a statute then in force it again changed its name to "the Prudential Insurance Company of America." In 1907 the company had outstanding three classes of policies: (1) industrial policies; (2) ordinary policies; (3) deferred dividend policies.[16]

Earl of Halsbury's Laws of Eng. See English Statutes given under sec. § V. herein.

[13] 8 Americana, "Insurance: Industrial;" Jack's Introduction to History of Life Ins. (ed. 1912) p. 239.

[14] 6 Insurance Times (N. Y. 1873) p. 83.

[15] 14 Ency. Britannica (11th ed.) p. 671.

"*The most simple and primitive form of industrial insurance* is found in the numerous mutual benefit associations which exist everywhere and under many forms. Some of these are aided by the employers, and others are supported entirely by the contributions of the members." Henderson's Industrial Insurance in the United States (ed. 1911) p. 63.

"*Systems and Schemes of Industrial Insurance.* (1) The workingmen have themselves created organizations for insurance . . .; local mutual benefit societies, with or without aid from employers, national brotherhoods or fraternals, and trades unions with local branches. (2) Employers have promoted the movement by various methods; local societies of employees, insurance departments of great firms or corporations. (3) Private insurance companies which sell sickness and accident insurance to workmen, 'industrial insurance companies' collecting small premium weekly or monthly, and furnishing chiefly funeral benefits. . . . (4) Organizations of municipal, state, and Federal employees for pension funds, as those of teachers, firemen, policemen," etc. Henderson's Industrial Insurance in United States (ed. 1911) p. 308. The Appendix contains regulations of several important schemes of insurance drawn up by actuaries with legal advice.

As to industrial insurance generally. See Dryden on Life Insurance, etc., as follows: (1) The inception and early problems of industrial insurance. (2) The first quarter century of industrial insurance in the United States. (3) The social economy of industrial insurance. (4) The practice of industrial insurance.

[16] See Blanchard v. Prudential Ins. Co. 78 N. J. Eq. 471, 472, 79 Atl. 733, per Howell, V. C. (s. c. on appeal 80 N. J. Eq. 209, 83 Atl. 220).

In 1875 the Prudential Insurance Company of America, then a small corporation in New Jersey known as

§ VIIb. History of workmen's industrial insurance: state insurance: compulsory insurance: workmen's compensation.—Within very recent times there has been an extended and comprehensive movement in this country for the purpose of providing, upon some specific basis, compensation for industrial accidents, non-fatal and fatal, also for sickness, disability, etc., suffered by employees, and a number of states have enacted statutes embracing what are generally designated as workmen's industrial insurance, state insurance, compulsory insurance, and workmen's compensation. Inasmuch, however, as these statutory provisions, except where they provide for insurance which is not compulsory, either express or implied, as we have stated elsewhere,[17] relate rather to economic or sociologic conditions than to the principles governing the contract of insurance, or, at the most, create new remedies or are but an evolution of the employers' liability principle, covering the law of master and servant, we shall only briefly notice here and only in the appended notes the history of the development of this class of compensation or insurance.[18]

the Widows & Orphans Friendly Society, changed its name to the Prudential Friendly Society. This was followed by the John Hancock Mutual Life Insurance Company of Boston, the Germania Life Insurance Company of New York, which did not follow up the business, and the Metropolitan Life Insurance Company of New York. 8 Americana "Insurance: Industrial."

The Prudential Insurance Company of America, organized in New Jersey, conducted, under a decision in 1903 (Russell v. Prudential Ins. Co. 176 N. Y. 178, 98 Am. St. Rep. 656, 68 N. E. 252), two classes of insurance, one known as the "industrial" and the other "ordinary insurance." Under the former plan small policies were issued, upon which weekly payments were made; under the latter large policies were issued, the premiums being payable annually, semi-annually, or quarterly.

[17] See § 7d herein.

[18] *Progress of Employers' Liability and Workmen's Compensation.* See New Internatl. Year Book (1912) pp. 209–212; Id. (1911) pp. 238–243; Id. (1910) pp. 232–235; Id. (1909) p. 229; Id. p. 409 Id. (1908) p. 228; Id. (1907) p. 246.

On the constitutionality application and effect of the federal employers' liability act, see notes in 47 L.R.A.(N.S.) 38, L.R.A.1915C, 47. On workmen's compensation acts generally, see note in L.R.A.1916A, 23 and notes following.

As to "Recent European legislation with regard to compensation for industrial accidents," including compulsory insurance instituted by Germany in 1883, followed by Austria, Norway, Finland, and the workmen's compensation act in England in 1897, followed by Denmark, Italy, and France in 1898, by Spain in 1900, by Holland, Greece, and Sweden in 1901, and by Russia and Belgium in 1904, and the workmen's compensation act in England in 1906, —see article by Kenelm E. Digby in 17 Yale L. Jour. pp. 485–498.

Great Britain enacted her employers' liability act in 1880 (43 & 44 Vict. c. 42), her compensation acts in 1897 and 1900 (60 and 61 Vict. c. 373; 63 & 64 Vict. c. 22; 6 Edw. VII. c. 58, in effect July 1, 1907), which was followed by the insurance law

§ VIIc. Savings bank insurance and annuity law of Massachusetts.—In 1907 a statute was enacted in Massachusetts entitled "An

(Lloyd George) National Insurance act 1911 (1 & 2 Geo. V.) c. 55, 49 Brit. Stat. p. 337 (operative July 15, 1912), am'd 1913 (3 & 4 Geo. V.) c. 37; 1914 (4 & 5 Geo. V.) c. 57; 1914 (5 Geo. V.) c. 15 (as respects present war); 1915 (5 Geo. V.) c. 29. See 28 Earl of Halsbury's Laws of England 905; 14 Ency. Britannica (11th ed.) p. 358; 7 New Internatl. Ency. p. 52; New Internatl. Year Book (1911) pp. 800–803.

"Insurance against accidents is compulsory for certain workpeople, in Germany, Austria, Hungary, France, Italy, Denmark, Holland, Belgium, Norway, and other countries. The classes of workpeople involved vary much from one country to another. In France, for example, seamen are affected; in Belgium, miners; in Hungary, agricultural laborers; in Germany, workers in many trades and industries, such as mining, building, agriculture, shipping, etc. The obligation to insure is generally restricted to persons receiving less than a certain defined income. . . . In Austria and Holland no limit is fixed. . . . The system is most highly developed in Germany and Austria-Hungary. In Germany all accidents in the course of work are covered, except those intentionally brought about by the worker, and (since 1900) those due to gross misconduct. In Austria only the first type of accident appears to be excluded from the benefits of insurance. In the earlier period of disablement the injured workers are compensated out of the sickness insurance funds, to which workers contribute two thirds and the employers one third. This period of compensation out of the sickness insurance funds lasts in Germany for thirteen weeks, after which the liability is transferred to the accident insurance funds. The employers pay the whole cost of the latter funds." Webb's New Dict. of Statistics (1911) "Insurance," pp. 343 et seq.

State insurance. "In view of the great activity shown in foreign countries during recent years in favor of government insurance it is a noteworthy fact that very little legislation was attempted along this line in America during the years 1907 and 1908." Year Book of Legislation (1908) vol. 10, pp. 332–3, article by S. Huebner.

It is said by a recent writer that "every civilized nation in Europe, and many other nations in other parts of the world except the United States, have discarded the old system of employers' liability based upon fault, and substituted a system under which every industry bears the burden of relieving the distress caused by injuries to workers in any given industry, practically without litigation." Boyd's Workmen's Compensation, Direct Ins. State Ins. (ed. 1913) p. 16, sec. 8. This writer also considers the origin and development of industrial insurance from the early German guilds (Id. pp. 47–51, secs. 30, 31); discusses the economical basis of these laws, with statistics (Id. pp. 53–82, secs. 33–53); states that the workmen's insurance acts of Ohio, Washington, and even of Massachusetts, are specific adaptations of the German industrial insurance law of 1884, and that the compensation acts of California, Illinois, Kansas, Nevada, New Hampshire, New Jersey, New York (Law unconstitutional, see Ives v. South Buffalo Ry. Co. 201 N. Y. 271, 284, Ann. Cas. 1912B 156, 34 L.R.A.(N.S.) 162, 94 N. E. 431, 40 Ins. L. J. 637) Rhode Island, and Wisconsin, are adaptations of the British workmen's compensation acts. (Id. pp. 412, 413, sec. 167.)

Employers' Liability — Proposed

Act to Permit Savings Banks to Establish Life Insurance Departments;" the words "savings and insurance bank" meaning a sav-

Constitutional Amendment (to art. I. of the State Const.) relating thereto passed by New York Legislature of 1912, to be known as sec. 19. Laws 1912, vol. 2, p. 1382. *Recommendation of committee* (dated March 17-'13) *that such proposed amendment be disapproved.* (Judge Dillon, chairman of committee.) See 48 N. Y. Law Jour. No. 140, of date March 20th, 1913. Amendment to Constitution of New York, art. 1, by adding at the end a new section (sec. 19) to read: "sec. 19. Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance, or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries, without regard to fault as a cause thereof, except where the injury is occasioned by the wilful intention of the injured employees to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination, and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor, shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all monies paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer." 2 Laws of New York, 1912, Appendix, p. 1382. But amendment was adopted Nov. 4, 1913, and became sec. 19, art. I. of Constitution.

Workmen's Compensation Law, Consol. L. N. Y. C. 67, Laws 1914, c. 41, is constitutional. Jensen v. Southern Pacific Co. 215 N. Y. 514, L.R.A.1916A, 403, 109 N. E. 600, aff'g 152 N. Y. Supp. 1120, 167 App. Div. 945.

Insurance against unemployment. "The insurance of workingmen against unemployment has been most largely tried in Switzerland. An insurance scheme was first started in Berne in 1892 by the League of Manual Laborers. Municipal aid, however, was soon asked for, and in 1893 the scheme passed under control of a municipal bureau. Insurance in this bureau is voluntary, and is open to all ablebodied Swiss citizens not over sixty years of age, living in Berne." The monthly premium payable by those insured is about 7d. If insured for eight months, and all premiums are paid, and if in employment for at least six months in the year, insurers may claim, during the winter months, a daily allowance of about 1s. 2d. if single, and 1s. 7d. if married. The allowance continues for a maximum period of ten weeks. Incapacity to work gives no claim to the benefit. Germany has also one or two examples of insurance schemes against unemployment. That of Cologne is most important. A bureau was opened at Leipzig in 1903. In several towns and provinces in Belgium, systems of insurance against unemployment have been in force for several years. The best-known scheme is that at Ghent. The Ghent system was copied in Antwerp in 1902. In France a some-

ings bank which has established an insurance department; and the words "insurance department" meaning the department of a sav-

what similar scheme to that at Ghent, paying unemployed benefits, was adopted, although prior to that date many local authorities had been making subsidies to funds. Webb's New Dict. Statistics (ed. 1911) pp. 613–614.

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ings and insurance bank in which the business of issuing life insurance and the granting of annuities is conducted.[19]

§ VIII. Origin of accident insurance.—We have already noted under preceding sections cattle insurance,[20] and that form of casualty insurance known as insuring the liberty of persons,[1] but insurance which relates to the loss of life or limb, or other personal injury by accident, is of modern origin. Accident insurance, in its original form, seems to have comprehended railway accidents only, for which purpose a company was established in London in 1849, known as the Railway Passengers' Assurance Company, but in 1856 it extended its plans to embrace accidents of all kinds, and the first American company was said by a writer in 1873 to have been then only ten years old.[2] The first accident insurance company in

land (by *Mr. Packer, Secy.* of Commiss.) : also Bureau of Labor. Workmen's insurance and compensation systems in Europe. Washington. Government Printing Office, 1911 (Annual Report of Commissioner of Labor. Bibliography at end of each section) ; also Library of Congress—Division of bibliography. Select list of works relating to employers' liability. Complied under direction of *Appleton Prentiss Clark Griffin.* Washington. Government Printing Office, 1906.

[19] Rev. Stat. of Mass. (Suppl. 1902–1908) pp. 1088 et seq. acts and Resolves of Mass. 1907, pp. 775, et seq. 561.

See article as to merits and demerits of plan, 42 Amer. Law Rev. pp. 901–4, by Alfred L. Aiken.

Bank Commissioners' Report of Massachusetts for 1912, summarizing savings bank insurance in 1909, shows that the two savings banks writing such insurances issued 1299 policies (People's Savings Bank) and 1,710 policies (The Whitman Savings Bank). The kind of policies issued are also set forth. See summary 27 Banking L. J. 1076, 1077, by W. H. Kniffen, Jr.

"*Massachusetts is the first of the states to recognize* by legislation that an adequate system of old age annuities for wage-earners is a pressing social need. Germany resorted to compulsory old age insurance more than a quarter of a century ago, dividing the burden between employer, employee, and the state. England has just turned to old age pensions charged wholly upon general taxation, a sort of general outdoor relief. Massachusetts is seeking to avoid both alternatives. The aim of the recent savings bank insurance and annuity law is to secure to her wage-earners voluntary instead of compulsory old age insurance." Louis D. Brandeis (now Justice of United States Supreme Court) in 42 Amer. Law Rev. (1908) p. 904.

[20] § Va. herein.

[1] § VII. herein.

[2] Bunyon's Life Assurance (2d ed.) 100; 13 Ency. Britannica, 161, 14 Id. (11th ed.) p. 659; 1 Am. & Eng. Ency. of Law, 87; Richards on Ins. (ed. 1892) sec. 9; Id. (3d ed.) sec. 14; Walford's Ins. Guide (2d ed.) 10, 11; 1864, 27 & 28 Vict. c. 125; 7 American Law Review, 585; Porter's Law of Ins. (ed. 1884) c. 24, 431. See Travelers' Insurance Machine Co. v. Travelers' Ins. Co. 142 Ky. 523, 528, 134 S. W. 877, 879, per Lassing, J.

"*The insurance of railway travelers* against injury upon trains was the first form of accident insurance which proved widely acceptable." 14 Ency. Britannica (11th ed.) "Insurance," p. 659. As to insurance against accidents and death from

the United States was the Travelers of Hartford, Connecticut in 1863.[3]

Accident insurance was first offered in Massachusetts in 1864 by a foreign corporation. In 1865 an accident insurance company was specially chartered there, but seems never to have written any policies. The business, however, was carried on by a number of foreign companies, eleven being represented in it in 1867, although all but two had retired in 1869. The form of accident policy at first introduced was substantially that known as the general accident policy insuring against accidents to the person of insured.[4]

§ VIIIa. History of casualty insurance.—Inasmuch as a distinction has been made, in decisions based on certain statutes, between accident and casualty insurance, the former being held to relate to accidents resulting in bodily injury or death, and the latter to property losses resulting from accident or casualty, such as insurances in reference to boilers, plate glass, injury to property by street cars, etc., and perhaps injury to domestic animals,[5] we may state here that the first steam boiler insurance company existed in Hartford, Connecticut, and was chartered in 1866.[6] The first plate glass insurance company in the United States was organized in New Jersey in 1868, and the first New York company was started in 1874.[7] In Massachusetts, casualty insurance against explosion of steam boilers and the breakage of plate glass appeared some years prior to 1879,[8] although it is stated that plate glass was first

traveling, see N. Y. Laws 1879, c. 485, p. 530. See also § X. herein.

"Since the passing of the employers' liability act, 1880 (43 & 44 Vict. c. 42) and the workmen's compensation act 1897 (60 & 61 Vict. c. 37, now replaced by the workmen's compensation act 1906 [6 Edw. VII. c. 58]) the practice of insuring against liability for accidents to third persons has been very largely extended." 17 Earl of Halsbury's Laws of England, p. 571.

[3] Harper's Book of Facts (1906) "Insurance;" 8 Americana (1905) "Insurance." On January 1, 1904, twenty-five stock companies were writing accident and health insurance in the United States. Id. As to number of accident policies, and amount, in force at end of 1907, see Webb's New Dict. Statistics (ed. 1911).

[4] Employers' Liability Assurance Corp. v. Merrill, 155 Mass. 404, 406, 29 N. E. 529, per Barker, J.

History of legislation in Missouri upon subject of accident insurance. See brief of counsel for appellant in Logan v. Fidelity & Casualty Co. 146 Mo. 114, 115, 47 S. W. 948 (brief not given in S. W. Rep.).

[5] See §§ VIII., VIIIa. herein. As to origin of cattle insurance societies, see § Va. herein.

[6] Harper's Book of Facts (1906) "Insurance;" 8 Americana (1905) "Insurance."

[7] 8 Americana (1905) "Insurance." As to sprinkler leakage insurance, and fly-wheel insurance, see Id.

[8] Employers' Liability Assurance Co. v. Merrill, 155 Mass. 404, 406, 29 N. E. 529, per Barker, J.

insured in 1879.[9] As to legislation in New York, it appears that the formation of companies to insure against breakage of plate glass was provided for by the Laws of 1877,[10] now covered by provisions of law relating to life and casualty companies.[11]

In New York in 1883,[11a] the formation of life and casualty companies on the co-operative or assessment plan was authorized.[12]

§ VIIIb. History of employers' liability insurance.—The Employers' Liability Assurance Corporation of London, founded for that purpose, in 1880 very shortly after the enactment of the employers' liability act of that year,[13] which was the earliest statute of that character modifying the common law, was the first company to undertake on a large scale the insurance of employers against liability or loss on account of personal injury from accidents sustained by their employees while engaged in their service.[14] In America, liability insurance, such as employers' liability, seems to have been unknown earlier than 1887.[15]

[9] Harper's Book of Facts (1906) "Insurance."

[10] Chapter 439, p. 506.

[11] Report of Board of Stat. Consol. N. Y. Vol. 3 (1907), p. 2950. See Laws 1912, c. 232, sec. 70, subdiv. 6; Laws N. Y. 1916, pp. 292–4, secs. 204–204a. See § V. herein. As to legislation, statistics, etc.,—casualty insurance, see New Internat. Year Book (1912), pp. 333 et seq.; Id. (1911) pp. 360 et seq.; Id. (1910) pp. 376 et seq.; Id. (1909) pp. 374–5; Id. (1908) pp. 361 et seq.; Id. (1907) pp. 400 et seq.; as to number of policies in force at end of 1907, see Webb's New Dict. Statistics (ed. 1911).

[11a] Laws N. Y. 1883, c. 175, p. 172.

[12] Report of Board Stat. Consol. N. Y. Vol. 3 (1907) p. 2949.

[13] 34 & 44 Viet. c. 42.

[14] 14 Ency. Britannica (11th ed.) p. 659; 5 Universal Cyc. "Guarantee Companies," p. 327, article by Clarence H. Kelsey (designated in said article as *Employers' Liability Guarantee*); 7 New Internatl. Ency. "Employers' Liability," p. 52.

[15] 8 Americana (1905) "Insurance."

On question whether employers' indemnity contract constitutes insurance, see note in 47 L.R.A.(N.S.) 294.

As to laws of Iowa authorizing casualty insurance for the benefit of employers of labor, the repeal thereof, and the law including insurance against personal injuries generally, as well as indemnity against the liability of employers on account of the acts or omissions of their employees, see statutes noted, in connection with "casualty" insurance and the different kinds of insurance authorized by the Iowa statutes, in Bankers Mutual Casualty Co. v. First Nat. Bk. 131 Iowa, 456, 459, 460, 108 N. W. 1046.

Right of mutual insurance companies organized prior to April 6, 1911, to transact employers' liability business, see Mass. acts 1912, c. 311, amd'g acts 1911, c. 251, sec. 1.

An English publication (56 Solicitors' Journ. & W'kly Reporter, p. 249) under date Feb. 3, 1912, says: "Recent attacks by American judges upon employers' liability policies as infringing the law of maintenance, and, so far as employees are concerned, encouraging listlessness, indifference, and neglect, have not, we believe, received much attention in this country. We are, indeed, disposed to think that some of the abuses which have been referred to in the

§ IX. Origin of guaranty, fidelity guaranty, etc., insurances.[15a]—These and kindred insurances have become an important and useful branch of the system of insurance.[16] The earliest mention of fidelity guaranty insurance appears to have been an advertisement in 1720 in the London Daily Post, giving notice of the opening of books for subscriptions to stock for the information of a company to insure masters and mistresses for whatever loss they might sustain by theft from servants, ticketed and registered in the society.[17] But although certain security was required by statute to be given by persons appointed to offices of public trust under the Crown, or by those concerned in the collection, etc., of public monies,[18] and even though in 1840 the "Guarantee Society," the earliest organized company, was first started,[19] still up to 1842 persons appointed to

United States have no existence in the United Kingdom."

An employees' guaranty company for the purpose of fighting employers is said to have been formed in 1889 in New York, although without success, and in 1892, a "legal protection guarantee company," having the same purpose, was started in London. 5 Universal Cyc. "Guarantee Companies," p. 327, article by Clarence H. Kelsey.

[15a] "Guarantee" is the word used in English statutes, text books, etc., although in the United States "guaranty" is used.

[16] 9 Am. & Eng. Ency. of Law, 65; 13 Ency. Britannica, 161; 14 Id. (11th ed.) p. 659; Richards on Ins. (ed. 1892) sec. 10; Id. (3rd ed.) secs. 466 et seq. pp. 652 et seq.

[17] Frost's Law of Guaranty Ins. (ed. 1909) pp. 1, 2, giving copy of advertisement. Francis states that the "Guarantee Company" adopted a scheme for "insuring to all masters and mistresses the losses they may sustain by their servants." Francis' Annals of Life Assur. p. 83.

[18] Under the following acts: Act 50 Geo. III. c. 85 (June 15th, 1810): "An act to regulate the taking of Securities in all Offices in respect to which Security ought to be given and for avoiding the Grant of all such Offices in the Event of such Security not being within a Time to be limited after the Grant of such Offices," requiring a "Bond or Bonds, or other Security or Securities in such Sum and with such sufficient Surety or Sureties as shall be approved of by the Lords Commissioners" etc. The 52 Geo. III. c. 66 (June 9th, 1812) extended same to Scotland. The act 6 & 7 Wm. IV. c. 28 (1836) was entitled "An Act to enable Persons to make Deposits of Stock or Exchequer Bills in lieu of giving Security by Bond to the Postmaster General and Commissioners of Land Revenue, Customs, Excise, Stamps and Taxes." The act 1 & 2 Vict. c. 61 (July 31st, 1838) was an act entitled the same as, and amending 6 & 7 Wm. IV. c. 28 (July 4, 1836).

[19] Francis' Annals of Life Assur. p. 285.

It is also worthy of note that a writer, in 1840, (Dublin Review of 1840, vol. 9, p. 61, in an article entitled: "Prospectuses of New Life Insurance Co.'s (Various)" and the "Necessity of Legislation for Life Assurance.") states that "we have some reason to suppose that an attempt will be made to establish a society for insuring the *honesty of clerks, secretaries*, collectors, and all those persons who usually are obliged to find a friend to become security (that is insurance) for them. This at first sight may seem a strange and hazardous undertaking; but a little con-

or employed in offices of trust were usually obliged to rely upon private individuals, friends, or relatives for sureties, when required for their integrity, fidelity, faithful discharge of their duties, and good conduct.[20] But in that year an act was passed wherein it was declared that "it is expedient, as well for the greater Ease of Persons required to give Security as aforesaid, as for the better securing the public Interest, the further Provisions should be made in this respect," etc., and a statute was enacted granting to the "Guarantee Society" the power to issue and to certain public officers the power to accept the security of said society for persons appointed to certain offices of trust under the Crown. Further provisions were made as to the form of the policy, subject to the approval of said public officers, in whose name the policy should be; also that a certificate of loss should be granted, specifying the nature of its contents, its conclusive effect as proof in an action and the recovery thereupon; and a final provision relieving such public officers from personal liability.[1] Fidelity guaranty insurance may,

sideration will make it obvious that all objections which appear incidental to the scheme might have been made to a life assurance company, if such a thing were now to start for the first time," and the writer adds in a note that "since this was written, the office has begun to act." That fidelity guarantee, as the first development of this class of insurance originated in London in 1840, see 5 Universal Cyc. "Guarantee Companies," p. 326, art. by Clarence H. Kelsey.

[20] See Pamphlet on Private and Public Guarantee for persons Appointed to Offices of Trust, by James Knight, London, 1847.

[1] In 1842 an act entitled "An Act for Regulating Legal Proceedings by or against 'The Guarantee Society,' and for Granting Certain Powers thereto," was passed in England. (local & personal acts, 5 Vict. Sess. 2, c. lxiv. June 18, 1842.) This enactment mentions the fact of the association of several persons into a company under the name of "The Guarantee Society," the objects thereof "being, in consideration of an annual Premium, to become Surety for the Integrity of Clerks, Collectors, Receivers, and other Persons of Reputation approved by the said Society, in whom pecuniary Trust is or shall be imposed." The statute, in addition to the provisions therein regulating legal proceedings, empowered the lords of the treasury, or the principal officers of any other public office, to accept the security of said "Society" for persons appointed to certain offices or employments of public trust under the Crown, "or wherein he shall be concerned in the Collection, Receipt, Disbursement, or expenditure of any public Monies." "The Guarantee or Security of the said Guarantee Society, to be given and executed in and by their Policy or Policies, in the usual Form of such Policy or Policies, or in such other Form and subject to such Conditions" as the said lords of the treasury or said principal officers of any public office "shall require, approve, and direct" Said security to be in lieu of the security required by acts 50 Geo. III. c. 85; 52 Geo. III. c. 66; 6 & 7 Wm. IV. c. 28; 1 & 2 Vict. c. 61). It was further provided that those policies should be in the name of the secretary or any other officer named by said lords of the treasury

therefore, in so far as it offers security for the integrity, fidelity, or honesty of persons holding offices of public trust and concerned with the receipt, disbursement, or control of public monies, be traced directly to this act as its source, and to this act, also for the first statement showing that even at this early date the contract, at least as to its form or terms, was subject to the supervision of public officers of the state. The "British Guarantee Association" was established in Edinburgh in February 1845, and in London was incorporated under an act passed in 1846.[2] Later on "The European Society's act 1859" was passed, reciting that the People's Provident Assurance Society was established in 1854, with power to transact every description of business ordinarily transacted or capable of being transacted by an assurance or guaranty company or society.[3]

or principal officers. A certificate of loss sustained was to be granted to enable the assured to recover the same with costs. Said certificate under the respective hands or hand of the said lords of the treasury or principal officers or officer of the office or department under which the policy was taken and accepted was "to declare that the Revenue has been damnified, and to state the Amount of the Loss occasioned by any Act done, or any Payment or Duty omitted, in contravention of the Duty or Purpose for the Performance of which such Policy shall have been taken and accepted; and that the Production of such Certificate, and Proof of the Handwriting of the Person or Persons subscribing the same (whom it shall not be necessary to prove to have been at the Date of such Subscription, or to be, an Officer or Officers of the Office or Department in which such Policy shall be taken and accepted as aforesaid), shall be final and conclusive Evidence, in every such Action, Suit, or Proceeding, of the Truth of the Contents of the said Certificate, and that the said Policy has become forfeited thereby to the Amount of the Loss stated in the said Certificate; and thereupon the assured shall be entitled to recover such Amount, together with the Costs of such Action, suit, or other Proceeding." The said lords of the treasury and other principal officers were, by said Act, relieved from all personal liability for any act done by them or any of them under the Act. Other powers were also granted to said "Guarantee Society."

[2] 9 & 10 Vict. c. 375 (Aug. 13th, 1846), entitled "An Act to Incorporate the British Guarantee Society," by which the proprietors and shareholders of the Company were incorporated by designation of the "British Guarantee Association." See Pamphlet on Private and Public Guarantee for Persons Appointed to Offices of Trust, by James Knight, of London, 1847.

[3] "The European Assurance Society's act 1859" (22 Vict. c. xxv. 1859, vol. 42, Stat. at Large p. 401) recites that the People's Provident Assurance Society was established and regulated by a deed of settlement dated Sept. 2, 1854, and the objects for which it was established comprised in addition to life assurance, endowment, annuity, fire insurance and other business, the "guaranteeing and becoming Security or Surety to such Extent or within such Limits as the Directors for the Time being of the Society deem expedient, for the Integrity, Honesty, and Fidelity, and the Absence of Negligence, Defaults, and Irregularities in the Conduct of Persons holding or about to enter into Offices or Situa-

The "guarantee by companies act" was passed in 1867.[4] This act was repealed with certain exceptions, and other provisions in lieu thereof made by the government officers (security) act 1875.[5] Prior to 1873 attempts to carry on fidelity guaranty insurance in the United States were a failure,[6] although a Canadian corpora-

tions of pecuniary Trust or Confidence, and the guaranteeing against Loss of Persons bound as Sureties, or otherwise responsible for others holding such Offices or Situations, and generally the transacting of every Description of Business ordinarily transacted or capable of being transacted by an Assurance or Guarantee Company or Society, or appertaining or incidental thereto, and the uniting and combining together of those Several Objects or Purposes, and to that Intent the making or granting of Assurances, of any Kind or Description, respectively dependent or conditional upon the Integrity, Honesty, or Fidelity, or the Absence of Negligence, Defaults or Irregularities in the Conduct of Persons in or about to enter into Offices or Situations of pecuniary Trust or Confidence, and for whose Honesty, Fidelity or Integrity or the Absence of Negligence, Defaults, or Irregularities in whose Conduct the Society might be, or be about to become directly or indirectly responsible; that the Society obtained a Certificate of complete Registration under the Act for Registration, Incorporation, and Regulation of Joint Stock Companies, and became and are incorporated thereunder accordingly," etc. It was provided also that the guarantee of the society might be taken instead of other security required from persons in public offices and employments (Id. sec. 10); also, instead of security required from persons administering the poor laws (Id. secs. 13, 14); also from officers of savings banks (Id. § 17); public officers not to be personally liable for anything done under act (Id. sec. 15). An act to effect a settlement of the affairs of the European Assurance Society and of other companies, 35 & 36 Viet. c. cxlv. 1872, is noted in The Law Reports, 1872, Statutes, vol. VII.

[4] Haydn's Dict. of Dates (25th ed.) p. 649. Under the 30 & 31 Viet. c. 108 (1867) (The Law Reports 1867, Statutes, Vol. 2.) entitled "An Act to Provide for the Guarantee of Persons holding Situations of Trust under Government by Companies, Societies, or Associations," cited as "the guarantee by Companies Act 1867." *"The Term 'Company' shall mean*, and include any Company, Corporation, Society, or Association incorporated by Act of Parliament or by Royal Charter, or under any Act relating to Joint Stock Companies." It provided that security for certain officers (*"Office or Employment in the Public Service"*) might be accepted from companies complying with certain conditions.

[5] 38 & 39 Viet. c. 64. The Law Rep. Stat. 1875, vol. X. Every certificate granted by the Treasury to a company under said act canceled. Security given by any company before passing the act was to continue to be received as security subject to the power of the officer of the department to require other security. Power was vested in the Treasury (commissioners thereof) to vary security in respect to persons holding office or employment in the public service.

[6] As late as 1873 it was declared that it would seem that the fidelity or guarantee insurance business ought to be introduced into the United States, but that it "has been tried already in America, and has proved an utter failure. . . . Every trial that has been made to conduct 'guarantee' insurance . . . in the United

tion, the Guarantee Company of North America, had introduced this insurance here in 1872, it having existed in Canada from 1868. In 1875, however, a company chartered in New York was the first to actually undertake this business.[7] In 1880 "an act to authorize the Knickerbocker Casualty Insurance Company of New York to change the name thereof to 'the Fidelity and Casualty Company of New York,'" was passed.[8]

§ IXa. History of title guaranty insurance.—The Law Property Assurance and Trust Society is mentioned in a work published in 1853, the purpose of said society being the insurance of defective titles, and guaranteeing repayment of loans and mortgages. It was said to be similar in character to rent insurance.[9] In the United States in 1871 there was published [10] "a plan for the insurance of titles and mortgages" by means of a corporation to be called the Title Warranty Company.[11] In 1876 title guaranty insurance was undertaken in Philadelphia by the Real Estate Title and Trust Company, said to be the pioneer in the United States, and the formation of that company was followed in Washington, then in succession in Baltimore, Boston, and New York, and then throughout the principal cities in this country. In 1883 the Title Guarantee and Trust Company was organized, its purpose being to copy the records of real estate in the counties of New York and Kings and to examine and guarantee titles. In 1885 the Lawyers' Title Insurance Company of New York was organized under the general act of 1885, noted below, to examine and insure titles, and has carried on business since 1887.[12] In 1885 an act [13] for the organiza-

States has resulted in the downfall of the companies undertaking to create this class of insurance. The truth is the losses by defalcations in 'guarantee' business would break down any company making the attempt to do fidelity business." 6 Insurance Times (N. Y. Dec. 1873) 859.

[7] See 5 Universal Cyc. "Guarantee Companies," p. 326, art. by Clarence H. Kelsey.

[8] Passed March 31, 1880, to take effect immediately. 1 Laws N. Y. 1880, p. 199, c. 87. In New York the first guarantee insurance act authorizing the guaranteeing fidelity of persons holding places of public or private trust was passed in 1879. Laws N. Y. 1879, c. 485, p. 530, amd'g Laws 1853, c. 463. See § X, note 13 herein, for N. Y. statutes.

[9] Francis' Annals of Life Ins. p. 291. "Copyholds, lifeholds, and leaseholds are made equal to freeholds for all purposes of sale or mortgage." Id.

[10] By Theodore Aub.

[11] "Several features of some of the branches of the proposed company's business are borrowed from the bylaws of the 'Prussian Insurance Stock Company.'" Id.

[12] 5 Universal Cyc. "Guarantee Companies," p. 326, art. by Clarence H. Kelsey. See also History of Title Insurance in New York and Brooklyn, Title Guarantee & Invest. Co., Lotus Press, 1896. The Title Guarantee and Trust Company, organized on the same principle as the Real Estate Title Insurance and Trust Company of Philadelphia, the

tion of title guaranty companies was enacted, for the purpose of examining titles to real estate, of procuring and furnishing information in relation thereto, and of guaranteeing or insuring bonds and mortgages, and the owners of real estate and others interested therein against loss by reason of defective titles and other encumbrances of or upon such real estate. This law was revised and appears in the Consolidated Laws.[14]

§ IXb. History of credit guaranty insurance.—The Commercial Credit Mutual Assurance Company is mentioned in 1853 as fairly representing in England the insurance of bad debts.[15] Credit guaranty was first tried, though without success, in 1887, in New York. The United States Credit System Company in New Jersey, however, tried a safer plan of insurance in 1889.[16] The statute of 1886 was the first general enactment in New York to provide for the incorporation of credit guaranty and indemnity companies. They were authorized by that act to incorporate for the purpose of guaranteeing and indemnifying merchants, manufacturers, traders, and those engaged in business and giving credit, from loss or damage by reason of giving and extending credit to their customers and those dealing with them.[17] This law was revised and

pioneer company in the United States, the Baltimore Title Company, and the Boston Title Insurance Company, to examine titles to real estate, and issue an insurance or guarantee policy on the same, and to pay loss up to amount of policy. From pamphlet issued by Company. Date does not appear, but prior to 1899.

[13] Laws N. Y. 1885, c. 538, p. 905.

[14] Consol. Laws, Laws 1909, art. v. secs. 170–184, as am'd Laws 1911, c. 525, p. 1198. See Laws 1912, c. 232, sec. 70, subd. 4; sec. 170 am'd Laws 1913, c. 81, c. 215; sec. 172 am'd Laws 1913, c. 49; secs. 181, 182 am'd Laws 1913, c. 182; sec. 183 rep. Laws 1913, c. 182; sec. 184 am'd and renumbered: sec. 183, Laws 1913, c. 182. See Report of Board of Stat. Consol. N. Y. Vol. 3 (1907), p. 2950. See §§ X. 13 herein.

Rent Guarantee and Investment Guarantee Insurances. Rent guarantee, which is mentioned by a writer in 1853 as being of a character similar to the insurance of defective titles and the guaranteeing repayment of loans and mortgages (Francis' Annals of Life Ins. (1853), p. 288), is said to have originated as an independent line in New York in 1892, although companies in Great Britain, formed for other purposes, had undertaken it prior thereto as part of their business. Investment guarantee authoritatively classed as offering corporate protection to lenders on mortgage and purchasers of bonds against loss by reason of poorly selected investments, is said to have been first applied in London in 1886. 5 Universal Cyc. "Guarantee Companies," p. 327, art. by Clarence H. Kelsey.

On contract insuring against loss of rents as insurance contract, see note in 47 L.R.A.(N.S.) 296.

[15] Francis' Annals of Life Assur. (ed. 1853), p. 283. On securing against loss by giving credit as insurance, see note in 47 L.R.A.(N.S.) 293.

[16] 5 Universal Cyc. "Guarantee Companies," p. 327, art. by Clarence H. Kelsey.

[17] Laws N. Y. 1886, c. 611, p. 871.

appears in the Consolidated Laws.[18] In England a decision was made in 1858, which seems to be the earliest case of insurance of mercantile credits. It appeared that defendants had delivered to a guarantee company a declaration in writing containing a statement of the amount of their business and losses thereon for a certain number of years preceding, and they were desirous of being guaranteed by the company in respect of their future annual sales in their business, in accordance with the deed of settlement of the company and the rules and by-laws thereof, and that the company had agreed to enter into the guarantee thereinafter contained, upon the terms thereinafter mentioned. There were certain conditions, upon the fulfilment of which by defendants the subscribed funds of the company were to become liable to pay a proportionate share of their losses in respect to goods sold by them during a specified term of years up to a designated date, and during any further period upon compliance with certain conditions. There were other provisions as to notice of renewal, etc. No notice having been given, the agreement was held to have continued for the agreed period. Another point decided was that it did not appear that the company was not empowered to amalgamate.[19] It is declared, however, in a case decided in the United States Circuit Court of Appeals, that "insurance against mercantile losses is a new branch of the business of underwriting, and but few cases dealing with policies of that character have as yet found their way into the courts. The necessarily nice adjustments of the respective proportions of loss to be borne by insurer and insured, the somewhat intricate provisions which are required in order to make such business successful, and the lack of experience in formulating the stipulations to be entered into by both the parties to such a contract, have naturally tended to make the forms of policy crude and difficult of interpretation." [20]

§ X. Origin of other insurances.—In England the earliest schemes of insurances covered almost every conceivable subject or contingency,[1] but the progress of modern insurances and the safe-

See Report of Board of Stat. Consol. N. Y. Vol. 3 (1907) p. 2950.

[18] Laws 1909, c. 33, art. 5, secs. 170–184, as am'd Laws 1911, c. 525, p. 1198. See Laws 1912, c. 232, sec. 70, subdv. 4; sec. 170 am'd Laws 1913, c. 81, c. 215; sec. 172 am'd Laws 1913, c. 49; secs. 181, 182, am'd Laws 1913, c. 182; sec. 183, Rep. Laws 1913, c. 182; sec. 184, am'd and renumbered sec. 183, Laws 1913, c. 182. See § X. 13 herein.

[19] Solvency Guarantee Co. v. York, 3 Hurl. & Norm. 588.

[20] Tebbets v. Mercantile Credit Co. (U. S. C. C. A. 1896) 73 Fed. 95, 96, 19 C. C. A. 281, *quoted* in People (ex rel. Kasson) v. Rose (1898) 174 Ill. 310, 315, 44 L.R.A. 124, 51 N. E. 246, per Wilkin, J.

[1] See Walford's Insurance Guide (2d ed.) 1–3, 24 et seq. As to the act of 1774 in England against gaming or wagering, and as to gambling

guards thrown around them for the protection of the public have done much to place insurance on a legitimate basis, and the necessities of business have given rise to the outgrowth of many branches of the system designed to cover special emergencies. In England, in addition to the insurance already considered herein, such as marine, fire, life, accidents to insured and third persons, insurance of animals, plate glass, and other property, industrial, employers' liability, and workmen's compensation insurances, and guarantee insurance against loss by dishonesty or insolvency, there are at the present time insurances against theft or burglary, also against birth of issue, and as we have before stated there is scarcely any risk that will not be underwritten at Lloyds.[2] Throughout the United States there are also numerous statutory provisions intended to cover almost every contingency to which insurance is or may be applicable.[3] It is unnecessary, however, to enumerate them, although some of the enactments may be briefly considered. To illustrate: In Michigan an act was passed in 1887 providing for the organization and regulation of log and timber insurance companies. Such insurances are intended to indemnify against the risk of lake and river navigation in the transporting and towing of such property.[4] And in that state there are also certain enactments as to Michigan millers' fire insurance companies; manufacturers' fire insurance companies; merchants' fire insurance com-

insurances, see §§ VI., VII. herein and notes. As to prohibition of gambling on loss by maritime perils, see marine insurance (gambling policy) act 1909 (9 Edw. VII. c. 12). See 2 Butterworth's 20th Cent. Stat. (1900–1909) "Insurance," 428. As to avoidance of wagering or gaming contracts, see Marine Insurance, act 1906 (6 Edw. VII. c. 41) sec. 4; 2 Butterworth's 20th Cent. Stat. (1900–1909) p. 399. As to gambling insurances, see Jack's Introduction to History of Life Ins. (ed. 1912) pp. 196–205. As to insurance at lotteries, Besant's London in the 18th Cent. (1903) pp. 460–462. As to bubble life companies and list of projects of South Sea era, see Francis' Annals of Life Assurance (ed. 1853) pp. 63, 81. On what constitutes insurance, see note in 47 L.R.A. (N.S.) 290.

[2] 17 Earl of Halsbury's Laws of England, p. 512.

[3] "Few branches of industry were characterized during the years 1907 and 1908 by such a mass of new legislation as the insurance business. During these two years the legislatures of forty-two states passed 400 acts covering a great multitude of subjects. . . . Of these 400 acts, 333 were passed in the year 1907 and 67 in 1908. . . . Of these 400 acts, 317 or nearly 80 per cent of the total number, were passed by the Western and Southern States, and only 83 were enacted by the New England and Middle Atlantic States." Year Book of Legislation, Vol. 10 (N. Y. State Library, Legislation Bulletins 37–39) p. 311. Review of Legislation on Insurance, 1907–1908 by S. Huebner.

[4] Act Mich. April 16, 1887; acts 1887, act 73, p. 80. See Howell's Annot. Stat. Mich. Suppl. 1883–1890, pp. 3436 et seq., secs. 4323, c. 4 et seq.

panies; cyclone and windstorm insurance companies; live-stock co-operative insurance companies; plate glass, accident, live-stock, steam boiler, and fidelity insurance companies; integrity and fidelity insurance companies;[5] hail insurance;[6] insurance of automobiles, motor cars, and other vehicles, by fire and marine insurance companies; insurance against bodily injury and disease; and shoe dealers' mutual fire insurance companies, insurance of shoe stocks.[7] In New York the earlier statutes consisted of charters to individual companies, acts relating to their dissolution, and prohibiting foreign companies from doing business in that state. And the first general insurance law was passed in 1849.[8] At the risk of repetition to a certain extent it may be stated here that in that state the insurance law of 1909[9] contains certain general provisions; provides for life, health, and casualty insurance corporations; fire insurance corporations; marine insurance corporations; title guaranty, securities guaranty, and credit guaranty corporations; life or casualty insurance corporations upon the co-operative or assessment plan; Lloyds and inter-insurers; fraternal beneficiary societies, orders, or associations; corporations for insurance of domestic animals; and town and county co-operative insurance corporations.[10] The Laws of New York, of 1913 contain provisions as to rate-making associations;[11] and the Laws of 1912 provide as to

[5] Howell's Annot. Stat. Mich. Suppl. 1883–1890, pp. 3423 et seq. See also public acts Mich. 1899–1913.

[6] Public acts Mich. 1911, No. 16, pp. 18–21.

[7] Public acts Mich. 1911, No. 15, p. 18, No. 68, p. 93.

As to the different kinds of insurance authorized by laws of Iowa under McClain's Code sec. 1695, and amendments, see Bankers' Mutual Casualty Co. v. First Nat. Bk. (1906) 131 Iowa, 456, 459, 460, 108 N. W. 1046.

[8] Laws 1849, c. 308, p. 441. Report of Board of Stat. Consol. N. Y. Vol. 3 (1907), pp. 2949, 2950.

For list of New York statutes relating to insurance corporations and associations (alphabetically arranged by name of corporation or association, and date of enactment), see 2 Gen'l Index Laws N. Y. (1777–1901), pp. 754–781.

[9] Laws 1909, c. 33, c. 28 of Consol. Laws.

[10] 2 Birdseye's, Cum. & Gilb. Consol. Laws N. Y. Annot. pp. 2510–2705; 7 Id. (Suppl. 1910) pp. 546–599; 8 Id. (Suppl. 1911) pp. 423–495; 9 Id. (Suppl. 1912) pp. 268–304. See also Laws 1910, c. 634, Laws 1911, c. 150, Laws 1911, c. 525, p. 1198.

In New York, county and town co-operative companies were authorized in Laws 1879, c. 287, and Laws 1880, c. 362, which were revised and consolidated by Laws 1886, c. 573, which amended form art. 9, of the present general law of 1909 as amended. Report of Board of Stat. Consol. Vol. 3 (1907) p. 2949.

[11] Laws N. Y. 1913, c. 26, amd'g sec. 141 (in effect Feb'y 19, 1913) amd'g

co-operative fire insurance corporations transacting business upon the advance premium plan.[12] A statute enacted in 1912 further provides for the formation of corporations for the purpose of making any of the following kinds of insurance: (1) Upon lives or health, and to grant, purchase, or dispose of annuities. (2) Against injury, disablement, or death resulting from traveling or general accident, and against disablement resulting from sickness, and every insurance appertaining thereto. (3) Against loss or damage resulting from accident to or injury suffered by an employee or other person, and for which the person insured is liable, and against loss or damage to property caused by horses or by any vehicle drawn by animal power, and for which loss or damage the person insured is liable. (4) Guaranteeing the fidelity of persons holding places of public or private trust. Guaranteeing the performance of contracts other than insurance policies; guaranteeing the performance of insurance contracts where surety bonds are accepted by states or municipalities in lieu of actual deposits; and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law required. Guaranteeing and indemnifying merchants, traders, and those engaged in business and giving credit, from loss and damage by reason of giving and extending credit to their customers and those dealing with them. (5) Against loss by burglary, or theft or both. (6) Upon glass against breakage. (7) Upon steam boilers and pipes, fly-wheels, engines and machinery connected therewith or operated thereby, against explosion and accident, and against loss or damage to life or property resulting thereupon, and against loss of use and occupancy caused thereby. (8) Upon the lives of horses, cattle, and other live stock. (9) Against loss or damage to automobiles (except loss or damage by fire, or while being transported in any conveyance by land or water), including loss by legal liability for damage to property resulting from the maintenance and use of automobiles. (10) Against loss or damage by water to any goods or premises, arising from the breakage or leakage of sprinklers, pumps, or other apparatus erected for extinguishing fires, and of

Laws 1912, c. 175, p. 317, sec. 141 (in effect April 5, 1912) amd'g Laws 1909, c. 33 (c. 28 of Consol. Laws) sec. 141, as am'd by Laws 1911, c. 460. See 9 Birdseye's Cum. & Gilb. Consol. Laws N. Y. Annot. (Suppl. 1912) pp. 280–282.

[12] Laws N. Y. 1912, c. 90, p. 159 (in effect April 3, 1912) amd'g Laws 1909, c. 33, sec. 267, as added by Laws 1910, c. 328, and am'd by Laws 1911, c. 323. See 9 Birdseye's, Cum. & Gilb. Consol. Laws N. Y. Annot. (Suppl. 1912) pp. 289-291.

water pipes, and against accidental injury to such sprinklers, pumps or other apparatus.[13]

[13] Chapter 232, Laws N. Y. 1912, p. 444 (in effect April 9, 1912) amd'g Laws 1909, c. 33, sec. 70; sec. 70 am'd by Laws 1909, c. 302, Laws 1910, c. 637, and Laws 1911, c. 324, also by Laws 1912, c. 231, p. 444, the amd'ts effected by that act being disregarded here. See also: Laws 1914, pp. 504 et seq. art. 2, sec. 70; Vol. 9 (Suppl. 1912) Birdseye's Cum. & Gilb. Consol. Laws, Annot. p. 277; Id. Vol. 8 (Suppl. 1911) p. 434; Id. Vol. 7 (Suppl. 1910) p. 568; Id. Vol. 2, p. 2554. See § 13 herein.

As to sources of the various New York statutes relating to insurance, see 2 Birdseye's, Cum. & Gilb. Consol. Laws N. Y. (Insurance Law 1909, c. 33) Annot. pp. 2510 et seq.; Id. Vol. 9 (Suppl. 1912), pp. 268 et seq.; Id. Vol. 8 (Suppl. 1911) p. 423 et seq.; Id. Vol. 7 (Suppl. 1910) pp. 2555; Id. Cumulative Suppl. 1910-1913 Vol. 1, pp. 1297 et seq.; Cummings' & Gilbert's Gen'l Laws & Statutes covering the Insurance Law of 1892, c. 690. See also: Report of Board of Statutory Consol. Vol. 3, N. Y. (1907) Schedule of Laws reported, Id. pp. 2929–2948, covering laws repealed thereby, also previous repeals. See further, notes to Schedule of Repeals, Id. pp. 2953–2963.

TITLE II.

GENERAL TERMS AND DEFINITIONS.

CHAPTER I.

TERMS AND DEFINITIONS.

§ 1. "Insured" and "assured" synonymous.
§ 2. Definition of insurance.
§§ 3, 4. (transferred to §§ 338d, 339c herein).
§ 5. Definition of marine insurance.
§ 6. Definition of fire insurance.
§ 7. Definition of life insurance.
§ 7a. Definition of assessment insurance.
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§ 7c. Definition of burial insurance.
§ 7d. Definition of workmen's industrial insurance: state insurance: compulsory insurance: workmen's compensation.
§ 8. Definition of accident insurance.
§ 9. Definition of casualty insurance.
§ 9a. Definition of employers' liability or indemnity insurance.
§ 10. Definition of endowment insurance.
§ 11. Definition of tontine insurance.
§ 12. Definition of guaranty insurance.
§ 13. Definition of real estate and title insurance.
§ 13a. Definition of rent insurance: rent guaranty insurance.
§ 13b. Definition of strike insurance.

§ 1. "Insured" and "assured" synonymous.—Some writers have attempted to distinguish between the terms "insured" and "assured."[1] But an examination of the early English cases and statutes does not discover any distinction between them as applied to the subject of insurances.[2] Lord Bacon[3] says this "kind of con-

[1] Babbage on Assurance of Lives; 13 Encyclopedia Britannica, 169.

[2] See preamble, 43 Eliz. c. 12 (1601) which reads: Whereas, heretofore, "assurers," etc., "have sought to draw the parties assured to seek their moneys of every several assurer." See also Stat. 6 Geo. I. c. 18 (1719); Stat. 19 Geo. II. c. 37 (1746); Stat. 14 Geo. III. c. 48

tract is commonly called 'policy of assurance' or 'insurance.'" Mr. Hopkins [4] asserts that their meaning is identical, and bases his statement on the derivation of the words. Mr. Arnould [5] says: "The party indemnified, called the *assured* in the act,[6] is sometimes also called the *insured*." [7] Other writers use the term indiscriminately. Mr. Justice Field, in Connecticut Mutual Life Insurance Co. v. Luchs,[8] declares that "there are undoubtedly instances where this distinction between the terms 'assured' and 'insured' is observed, though we do not find any judicial consideration of it." In this case a policy was issued on L's application, by which the company agreed to insure the life of D., and to pay the money to the "assured" after due notice and proof of D's death, and it was decided that the term "assured" must be held as applicable to L., as being the party for whose benefit the insurance was intended, the court saying: "The application of either term to the party for whose benefit the insurance is effected or to the party whose life is insured has generally depended upon its collocation and context in the policy." [9]

(1774); The assurance companies act 1909 (7 Edw. VII. c. 49) noted under § 4 herein.

"*Assurances*" *related formerly to the conveyance of property* in England, as is evidenced by Sheppard's work entitled "The Touchstone of Common Assurances . . . or conveyances of the Kingdom." So, in 1627, Charles I. introduced a project "for . . . making and registering . . . assurances."

[3] Bacon's Abridgement (ed 1778) 598, 599.

[4] Hopkins Marine Ins. (ed. 1867) 46.

[5] Arnould on Mar. Ins. (8th ed. Hart & Simey) sec. 1, p. 3.

[6] Marine Ins. act 1906 (6 Edw. VII. c. 41) entitled "An Act to Codify the Law Relating to Marine Insurance."

[7] In the earlier edition of Arnould (6th ed. Maclachlan's) it is said: "The party interested in the property insured is called the insured or assured," p. 16.

[8] 108 U. S. 498, 504, 27 L. ed. 800, 2 Sup. Ct. 949.

[9] See also Cyrenius v. Mutual Life Ins. Co. 73 Hun (N. Y.), 365, 26 N. Y. Supp. 248, 55 N. Y. St. Rep. 897 (aff'd 145 N. Y. 576, 50 N. E. 225). In this case the court said: "It is to be observed that in the policy the amount is payable 'to the said assured, his executors, administrators, or assigns.' The question is, Does the term 'assured' refer to George A. Cyrenius, who is recited to have paid the consideration, or to Alvin Cyrenius, whose life was the subject of the insurance? In determining this question the application may properly be referred to. That was executed by both Alvin and George A., and on its face stated that it was the basis and part of the contract. It is referred to in the policy as furnishing in part the consideration. The policy is stated to be issued upon the faith of the statements and declarations made in the application. Both are part of one transaction, and are to be read together in determining its character and effect. Reading the policy and application together, it appears that George A. Cyrenius was the applicant for the insurance, and was the person for whose benefit it was to be effected. The policy recites that the money consideration is received from him, and in the complaint it is alleged that he paid it.

This case was expressly followed in Brockway v. Connecticut Mutual Life Insurance Company,[10] which latter case was based upon substantially the same material facts and precisely the same policy, the court holding that the same construction should be given the term "assured" as was given in Connecticut Mutual Life Insurance Company v. Luchs.[11] So in other cases this term has been held to mean the person for whose benefit the insurance was made, rather than the one upon whose life it depends.[12] On the other

Such being the case, according to the doctrine laid down in Smith v. Aetna Life Ins. Co. 5 Lans. (N. Y.) 545, the assured should be deemed to be George A. Cyrenius. A similar view is taken in Connecticut Mutual Life Ins. Co. v. Luchs, 108 U. S. 498," 27 L. ed. 800, 2 Sup. Ct. 949. It also appeared in this case that the father furnished the money for the first premium and the greater part of the other premiums, and that the policy was delivered by the son to the father, but there was no evidence of an intent to transfer the title, and no assignment was alleged in the complaint.

[10] (U. S. C. C.) 29 Fed. 766.

[11] 108 U. S. 498, 504, 27 L. ed. 800, 2 Sup. Ct. 949. In the Brockway Case it was held that "assured" referred to the one on whose application the policy was issued, who was the beneficiary and paid the premium, and that the personal representative of the person on whose life the policy was issued could not maintain an action on the contract.

See the following cases: Warnock v. Davis, 104 U. S. 775, 26 L. ed. 924 (question here was one of right of person who has insured his own life to assign it to parties having no insurable interest. Mr. Justice Field, who delivered the opinion [he also delivered the opinion in the Connecticut Mutual Life Ins. Co. Case above noted] uses the word "assured" throughout in reference to the party on whose life the policy was issued, but there is no discussion as to "assured" or "insured"); Traders Ins. Co. v. Pacaud, 150 Ill. 245, 41 Am. St. Rep. 355, 37 N. E. 460 (policy was on grain, "assured's property, or held by assured in trust or on commission or sold but not delivered." It was held that where the party contracts for the insurance pays the premium, and the company makes the loss payable to such party, the agreement to pay is a contract with the person who pays the consideration, and he has a right of action in his own name, although the insurance is in the name of another, no discussion as to "assured" or "insured"); Washington Life Ins. Co. v. Haney, 10 Kan. 525 (declarations of party where life is insured for the benefit of another, made long after application and policy cannot be received in evidence against assured to impeach application. Party insured was not a party to the record. No discussion as to distinction between assured and insured *cited* and *quoted* from in Valley Mutual Life Assoc. v. Teewalt, 79 Va. 421, but the question there was only as to the admissibility of certain evidence and there was no discussion as to insured or assured). In Irving v. Manning 4 H. L. Cas. 303, 307, in the opinion of the judges the words "assured" and "policy of assurance" are used.

[12] Hogle v. Guardian Life Ins. Co. 4 Abb. Pr. N. S. (N. Y.) 346, 348, 6 Rob. (29 N. Y. Sup. Ct.) 567; Ætna L. Ins. Co. v. France, 94 U. S. 562, 24 L. ed. 287. In this case the policy provided that the sum insured should be paid "to the said assured, her executors," etc., and the policy

hand, in Campbell v. New England Mutual Life Insurance Com-

was effected by a brother for a sister's benefit. Reynolds on Life Ins. sec. 22. See also Ferdon v. Canfield, 104 N. Y. 143, 145, 10 N. E. 146 (Rapallo, J. said: "Although the life of" C. "was the life insured by the policy, he was not the party assured thereby. His life was the subject of insurance but the contract does not, on its face, purport to have been made either with him or for his benefit, nor does he appear to have had any interest therein which he could assign." Policy was on the Tontine plan and question was of the rights of assignee of the person whose life was insured. The policy was taken out by and the premiums were paid by the beneficiaries to whom the amount of insurance was payable); Rowe v. Brooklyn Life Ins. Co. 38 N. Y. Supp. 621, 16 Misc. 323 (upon the application of the wife, a policy was issued and delivered to her upon her husband's life, she paid the premiums, and was to receive the amount of the insurance in the event of her husband's death, or in case she died first, then said insurance was to be paid to her heirs, etc. She as beneficiary was held to be the "assured" within the statute of 1876 of that state requiring, in order to effect a forfeiture of the policy for nonpayment of premiums a "notice to the assured" and also that she was the "person whose life is assured" under the statute 1877. Wright, J., said (Id. p. 623): "Under the statutes, and the authorities construing the legislative intent, it must be held, where the contract is made with the beneficiary, to whom the policy is delivered, and to whom it is payable during her life, and after her death to her executors and administrators, and where the person on whose life the policy risk is taken has no interest—present, future or contingent—therein, and where the beneficiary is designated in the policy as the person who must pay the premiums, and is therefore obligated to pay all outstanding indebtedness in case the policy should lapse, and whose default forfeits the policy, that . . . in order to effect a forfeiture of the policy it was necessary to be shown in the language of section 3 of chapter 341 of the Laws of 1876 'that the notice to the assured has been duly addressed and mailed by the company issuing such policy to the assured,' and that in this case the person 'assured,' and to whom the policy was issued, was the plaintiff, and that she, in this case also answers the description of the 'person whose life is assured' in the act of 1877"); New York Life Ins. Co. v. Ireland, — Tex. —, (1891) 14 L.R.A. 278, 281, 17 S. W. 617 (a person is not entitled to the benefit of a tontine policy payable to his wife and children as the "assured." He has neither any rights as trustee to said benefits, nor any legal title to the policy even though he has always held possession and control thereof, has paid the premiums and the beneficiaries have never known of the insurance).

"Beneficiary" and "assured," said to be synonymous terms Union Fraternal League v. Walton, 109 Ga. 1, 11, 77 Am. St. Rep. 350, 46 L.R.A. 424, 34 S. E. 317, dissenting opinion of Lumpkin, P. J., contract was by benefit society with member, and said by court to differ from ordinary life insurance.

The word "assured" is sometimes applied to the beneficiary; but it is generally synonymous with the word "insured," and the meaning of the term "assured" is to be derived from the connection, as well as upon the fact of who procured the policy, and with whom the contract was made, thus a third party may be the "assured." Chandler v. Traub, 159 Ala. 519, 49 So. 241, the court, per

pany,[13] the policy was issued upon the life of A. to him, as "the assured," and the promise was to pay the sum insured to the assured, his executors, etc., for the benefit of his brother's wife, and the court declared that the plaintiff did not, by virtue of the clause declaring the policy to be for her benefit, become the assured; that she was merely the person designated by agreement of the parties to receive the proceeds of the policy on the death of the assured. There was, however, no discussion as to the meaning of these terms.[14] In a Massachusetts case[15] the words "insured" or "assured" in a mutual fire insurance policy were held to apply to the person who owned the property, applied for the insurance, paid the premium, and signed the deposit note, and not another to whom the money was payable in case of loss, although he might have a lease of the premises. Under the standard policy the word "insured" includes "legal representatives."[16]

Simpson, J., says, however: "We think that, in our statute, the word applies to the person whose life is insured." Id. 522.

[13] 98 Mass. 381, 389.

[14] See also Hurlburt v. Pacific Ins. Co. 2 Sum. (U. S. C. C.) 471, 479, Fed. Cas. No. 6919.

[15] Sanford v. Mechanics' Mutual Fire Ins. Co. 12 Cush. (66 Mass.) 541.

[16] Under a standard policy provision that the word "insured," wherever it occurs, shall be held to include the "legal representatives of the insured," the term "legal representatives" refers to those who succeed to insured's legal rights, by reason of his death or the transfer of the policy, and should not be construed to include anyone who is authorized to act for insured. Metzger v. Manchester Fire Assur. Co. 102 Mich. 334, 63 N. W. 650. See Wyman v. Wyman (decided in 1863) 26 N. Y. 253, where it was decided that if one has effected insurance upon a house against loss by fire, the interest in the policy devolves upon his heirs at law, and the damages accrue to them in case of loss. *Distinguished* in Herkimer v. Rice, 27 N. Y. 163, 166, see also Id. 180, as to effect of judgment in the Wyman case. *Distinguished* in Sherwood v. Agricultural Ins. Co. 73 N. Y. 447, 451. *Cited* in Matthews v. American Central Ins. Co. 154 N. Y. 449, 452, 39 L.R.A. 433, 48 N. E. 751, upon point as to legal representatives of assured, including heirs at law, etc., *cited* in Matthews v. American Central Ins. Co. 41 N. Y. Supp. 304, 308, 9 App. Div. 339, 344; Lawrence v. Niagara Fire Ins. Co. 37 N. Y. Supp. 811, 812, 2 App. Div. 267, 269, affirmed (mem.) 154 N. Y. 752, 49 N. E. 1099, which holds that where a fire policy upon real property runs to insured's legal representatives, his executor or administrator may properly bring an action for loss after his death. This last case is *cited* in Matthews v. American Central Ins. Co. 41 N. Y. Supp. 304, 308, 9 App. Div. 339, 344, as simply holding that action may be brought by personal representatives. The Wyman case is also *cited* in Kanes Estate, In re, 77 N. Y. Supp. 874, 878, 38 Misc. 276.

Legal representatives as beneficiaries, see §§ 786, 793 herein.

The Georgia Code uses as part of the definition of insurance upon life the words: "The life may be that of assured, or of another in whose continuance the assured has an interest." Ga. Civ. Code, sec. 2114 (Code 1911, sec. 2496). Union

In determining whether the word "insured" or "assured" applies to a mortgagor or mortgagee, the circumstances will be considered and the words construed and applied in the sense in which they were understood by the immediate parties to the contract whereby the insurance was effected.[17]

But the words "insured" and "assured" may both apply to a grantee with a lien back to the grantor.[18]

Fraternal League v. Walton, 109 Ga. 1, 3, 77 Am. St. Rep. 350, 46 L.R.A. 424, 34 S. E. 317. Under Herron's Sayle's Tex. Civ. Stat. (Suppl. 1908–1910, p. 233) Tit. 58, chap. 11, sec. 1, Tex. Rev. Stat. 1895, Art. 3096a, "The 'insured' or 'policy' holder is the person on whose life the policy of insurance is effected."

[17] Liverpool & London & Globe Ins. Co. v. Davis, 56 Neb. 684, 77 N. W. 66 (where, as between the parties to the contract when the insurance was effected, the protection of the policy was applied and paid for solely on behalf of the mortgagee, the *"insured,"* in a clause voiding the policy for concealment or misrepresentation, will be construed to mean the mortgagee, and not the mortgagor. In this case it was also held that where a policy was made out describing the mortgagor as owner, with a mortgage slip, making loss or damage payable "for the account of the *assured*" to the mortgagee, such clause does not make the loss payable to the mortgagor, but to the mortgagee to be applied to the mortgage indebtedness); Watertown Fire Ins. Co. v. Grover & Baker Sewing Mach. Co. 41 Mich. 131, 32 Am. Rep. 146, 1 N. W. 961 (mortgagee was held one of the parties "assured," under provision of policy that "in case of loss the assured shall give immediate notice"); Lewis v. London & Lancashire Fire Ins. Co. 137 N. Y. Supp. 887, 78 Misc. 176 (*"insured"* under sec. 122 of N. Y. Ins. Law, providing for cancelation of policy upon request of *"insured,"* etc., includes a mortgagee for whose benefit a mortgage clause has been inserted in the policy, *citing* Eddy v. London Assur. Co. 143 N. Y. 311, 25 L.R.A. 686, 38 N. E. 307; Hastings v. Westchester Fire Ins. Co. 73 N. Y. 141, 147, 154; Lewis v. Guardian Ins. Co. 181 N. Y. 397, 106 Am. St. Rep. 557, 74 N. E. 224); De Witt v. Agricultural Ins. Co. 89 Hun (96 N. Y. Sup. Ct.) 229, 36 N. Y. Supp. 520 (where an owner of property obtains insurance thereon, and then sells said property with a mortgage back, and the policy is indorsed to said vendee as the owner, with loss payable to the mortgagee as interest may appear, and said vendee and mortgagor contracts to sell to another party, who enters into possession, and obtains a policy in another company, and thereafter the original policy is indorsed to him as owner, but without his knowledge at the time it was made, said last owner of the property is not, at the time of the issuance of the second policy, the *insured* under the policy issued to the first owner, although he was the *insured*, if at all, as of the time said original policy was indorsed to him); Armstrong v. Agricultural Ins. Co. 56 Hun (63 N. Y. Super. Ct.) 399 (*"assured"* is mortgagee where the policy to owner makes loss payable to former as interest may appear, and as such *"assured"* must deliver preliminary proof of loss); Hastings v. Westchester Fire Ins. Co. 12 Hun (19 N. Y. Super. Ct.) 416 (*"assured"* held to apply only to the owner and mortgagor, and not to the mortgagee's interest).

[18] The grantee with lien back to grantor to whom original policy is assigned, with insurer's consent, be-

Again, the circumstances and construction of the policy may show that the owner of the cargo is meant by the "assured," [19] or that forwarders of the cargo are the "assured," [20] or that a towing company, and not the cargo owner, is the assured.[1]

Where the loss was payable to the "assured" under an agreement to reinsure, it was decided that by "assured" was meant the company reinsured, and not the assured under the original policy.[2] And if parties agree to "reinsure" loss if any, "payable to the assured upon the same terms and conditions, and at same time as contained in the original policies," the word "assured" means the reinsured company, and not the assured in the original policies.[3]

The construction, however, does not appear in any of these cases to have turned upon any distinction between the terms themselves, but rather upon the relation which they sustained to the other words of the policy, and were construed as they were for the purpose of effectuating the intent of the parties to the contract, and determined that the loss was payable to the party whose interest was intended to be covered where the description might apply to more

comes the *"insured"* under the new contract thereby created with the insurer, within a clause against other insurance, etc. Such grantee is also the *"assured"* under a rider with a provision making the loss proven due *"assured"* payable to the grantor (original policy holder) "as interest may appear." Dumphy v. Commercial Union Assur. Co. Ltd. — Tex. Civ. App. — (1911), rehearing denied (1912) 142 S. W. 116.

[19] Under a clause, "the insurers are to be subrogated to all the rights of the *assured* under their bills of lading or transportation receipts," the words following *"assured"* show that the owner of the cargo is meant by the *"assured,"* where also the premium was added to the freight and paid by the owners of the cargo, and it is evident from the facts and the construction of the policy and the certificate that said policy was intended to protect them, and the insurer was entitled to subrogation to said assured's rights. Merchants & Miners Transp. Co. v. Robinson-Baxter-Dissoway Towing & Transp. Co. 113 C. C. A. 427, 191 Fed. 769.

[20] Loss was payable to "the *assured* or order, and return of this certificate." The forwarders of a cargo insured it as part of the price of freight agreed upon. A certificate payable to order was issued to them, and they indorsed and delivered this to the owners. The name of the forwarders alone was entered in the policy book without any additional words as "for whom it may concern," nor did the certificate contain these or any equivalent words, nor were they described as agents. It was held that said forwarders, the persons named, were the *"assured."* The Sidney (U. S. D. C.) 23 Fed. 88.

[1] H. A. Baxter, The (U. S. D. C.) 182 Fed. 930. Policy was taken out by towing company on barge cargo, but loss was payable to cargo owner; case of subrogation to *assured's* rights, but recovery not authorized against towing company for insurer's benefit for fault for collision.

[2] Carrington v. Commercial Fire & Marine Ins. Co. 1 Bosw. (N. Y.) 152.

[3] Carrington v. Commercial Fire & Marine Ins. Co. 1 Bosw. (N. Y.) 152.

than one. We cannot discover that any distinction of practical value has ever been made by the text-writers or the courts in the use of these words, except in those cases where their meaning or application has depended upon the construction of some particular policy, and we shall therefore use the terms throughout this work as synonymous.[4]

§ 2. Definition of insurance.—Insurance, strictly defined, is a contract whereby one for a consideration agrees to indemnify another for liability, damage, or loss by certain perils to which the subject may be exposed, but the contracts of life insurance and of accident insurance covering death are not strictly contracts of indemnity.[5] Emerigon[6] defines insurance as "a contract by which one promises indemnity for things transported by sea, deducting a price agreed upon between the assured, who makes or causes to be made the transport, and the insurer, who takes upon himself the risk and burdens himself with the event," and he adds: "This definition is taken from the Guidon la Mer, and is the doctrine of all our authors." He also says that it "is a contract by which one takes upon himself the peril which the property of others encounters upon the sea.[7] This definition, of course, relates to marine insurance, as do the early definitions. Many other definitions of insurance have been given.[8] It is said in Funke v. Minnesota

[4] See Bouvier's Law Dict.: Bacon's Benefit Societies and Life Ins. (ed. 1888) sec. 19, p. 22; Id. (ed. 1894) sec. 19, p. 27; 13 Am. & Eng. Ency. of Law, 630.

[5] See sees. 24 et seq. for this distinction. On what constitutes insurance see note in 47 L.R.A.(N.S.) 290.

[6] Emerigon on Ins. (Meredith's ed. 1850) c. i. p. 2.

[7] Emerigon on Ins. (Meredith's ed. 1850) c. i. p. 4.

[8] "A contract of insurance is an agreement by which one party, for a consideration (which is usually paid in money either in one sum or at different times during the continuance of the risk), promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest. In fire insurance and marine insurance the thing insured is property; in life or accident insurance it is the life or health of a person." This definition is given by Gray, J., in Commonwealth v. Weatherbee, 105 Mass. 149, 160, *cited* or *quoted* with approval in the following cases:

Alabama.—Supreme Commandery Knights of the Golden Rule v. Ainsworth, 71 Ala. 436, 443, 46 Am. Rep. 332, per Brickell, C. J.

Kansas.—State (ex rel.) v. Vigilant Ins. Co. 30 Kan. 585, 587, 2 Pac. 840, per Brewer, J.

Kentucky.—Sims v. Commonwealth, 114 Ky. 827, 828, 71 S. W. 929.

Massachusetts.—Claflin v. United States Credit System Co. 165 Mass. 501, 52 Am. St. Rep. 528, 43 N. E. 293.

Missouri.—State v. Merchants Exch. Mut. Ben. Soc. 72 Mo. 146, 159, per Napton, J.; State (ex rel. Beach) v. Citizens Benefit Assoc. 6 Mo. App. 163, 169.

Nebraska.—State v. Farmers Ben. Assoc. 18 Neb. 276, 281, 25 N. W. 81.

South Dakota.—Masonic Aid Assoc. v. Taylor, 2 S. Dak. 324, 329, 50 N. W. 93.

"An insurance in relation to property is a contract whereby the insurer becomes bound for a definite consideration, to indemnify the insured against loss or damage to certain property named in the policy, by reason of certain perils to which it may be exposed." Dover Glass Works Co. v. American Fire Ins. Co. 1 Marv. (Del.) 32, 45, 65 Am. St. Rep. 264, 29 Atl. 1039, per Wolcott, Chan.

"Insurance is an agreement by which the insurer, for a consideration, agrees to indemnify the assured against loss, damage, or prejudice to certain property described in the agreement, for a specified period, by reason of specified perils." Barnes v. People, 168 Ill. 425, 429, 48 N. E. 91.

Insurance is "an agreement by which one party, for a consideration, promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest." Rensinhouse v. Seeley, 72 Mich. 603, 617, 40 N. W. 765.

"A contract of insurance is intended as an indemnity against an uncertain event, which, if it occurs, will cause loss to the assured." Cross v. National Fire Insurance Company, 132 N. Y. 133, 30 N. E. 390.

Insurance is a contract whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject by specified perils (conclusion of definition is same as that given in Dover Glass Works case, ante). State (ex rel. Sheets) v. Cincinnati, Chicago & St. Louis Ry. Co. 68 Ohio St. 9, 30, 96 Am. St. Rep. 635, 64 L.R.A. 405, 67 N. E. 93, quoting Bouvier's Law Dict. (Rawle's Rev.) 1668.

"A contract of insurance is merely a guaranty against loss of property by fire or marine disaster." Insurance Co. of North America v. Commonwealth, 87 Pa. 173, 183, 30 Am. Rep. 352.

Insurance is a contract of indemnity, in which the parties may stipulate for the manner and time in which that indemnity shall be made, and the law will enforce such contract. Commonwealth Ins. Co. v. Sennett, 37 Pa. St. 205, 78 Am. Dec. 418.

Insurance "is a contract whereby one party agrees to wholly or partially indemnify another for loss or damage which he may suffer from a specified peril." Shakman v. United States Credit System Co. 92 Wis. 366, 374, 53 Am. St. Rep. 920, 32 L.R.A. 383, 66 N. W. 528.

"Insurance is a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, damage, or prejudice by the happening of the perils specified to certain things which may be exposed to them. If this be the general nature of the contract of insurance, it follows that it is applicable to protect men against uncertain events which may in any wise be of disadvantage to them; not only those persons to whom positive loss may arise by such events, occasioning the deprivation of that which they may possess, but those also who in consequence of such events may have intercepted from them the advantage or profit, which but for such events they would acquire according to the ordinary and probable course of things." Lucena v. Craufurd, 5 Bos. & P. 269, 300, 301, per Lawrence, J. This definition down to and including the words "may be exposed to them" is quoted with approval in Cummings v. Cheshire County Mut. Fire Ins. Co. 55 N. H. 457, 458, per Foster, C. J., although the court gives preference to the definition of Blackstone (2 Blackstone's Commentaries, 458; 2 Hamond's ed. 696; Chase's Blackstone, 567) which is this: "A policy of insurance is a contract be-

Farmers' Mutual Fire Insurance Association [9] that "the word 'insurance' in common speech and with propriety is used quite as often in the sense of contract of insurance or act of insuring, as in that expressing the abstract idea of indemnity or security against

tween A and B, that upon A's paying a premium equivalent to the hazard run, B will indemnify or insure him against a particular event." See Paterson v. Powell, 9 Bing. 320, per Tindal, J., and Mr. Sergeant Coleridge's argument.

Mr. Marshall (Marshall on Ins. [ed. 1810] 1) defines the contract as one "whereby one party, in consideration of a stipulated sum, undertakes to indemnify the other against certain perils or risks to which he is exposed, or against the happening of some event." *Mr. May's* (May on Ins. [3d ed.] sec. 1) definition of insurance is: "A contract whereby one for a consideration undertakes to compensate another if he shall suffer loss," and he says it is substantially the definition given long ago by Roccus. This last definition is also given by Mr. Field: (Field on Damages [2d ed.] sec. 561.) *Mr. Phillips* (Phillips on Ins. [3d ed.] sec. 1) says: "Insurance is a contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against damage or loss on a certain subject by certain perils." See Bacon's Abridg. (4th ed.) 598, 599; Rapalje & Lawrence's L. Dict. 667; Smith's Common Law, 299.

For other definitions of insurance see the following cases:

United States.—Physicians Defense Co. v. Cooper, 47 L.R.A.(N.S.) 290, 199 Fed. 576, 578, 579, 118 C. C. A. 50, case affirms 188 Fed. 332 (under Cal. Civ. Code, sec. 2527).

California.—Whitney Estate Co. v. Northern Assur. Co. 155 Cal. 521, 101 Pac. 911; Union Ins. Co. v. American Fire Ins. Co. 107 Cal. 327, 330, 28 L.R.A. 692 (both *quoting* Cal. Civ. Code, sec. 2527).

Illinois.—People (ex rel. Kasson) v. Rose, 174 Ill. 310, 312, 316, 44 L.R.A. 124, 51 N. E. 246; Vredenburgh v. Physicians Defense Co. 126 Ill. App. 509, 512.

Indiana.—State v. Willett, 171 Ind. 296, 23 L.R.A.(N.S.) 197, 86 N. E. 68.

Kentucky.—New York Life Ins. Co. v. Klopton, 7 Bush. (70 Ky.) 179, 185, 3 Am. Rep. 290.

Maine.—Buffalo Fertilizer Co. v. Aroostook Mutual Fire Ins. Co. 109 Me. 483, 84 Atl. 1078 (*quoting* Me. Rev. Stat. 1903, p. 471, c. 49, sec. 1).

Minnesota.—Physicians Defense Co. v. O'Brien, 100 Minn. 490, 495, 111 N. W. 396 (*quoting* Minn. Rev. Laws 1905, sec. 1596).

Missouri.—Isaac H. Blanchard Co. v. Hamblin, 162 Mo. App. 242, 144 S. W. 880.

New Jersey.—Pirics v. First Russian Slavonic Greek Catholic Benev. Soc. 83 N. J. Eq. 29, 89 Atl. 1036.

Pennsylvania.—Commonwealth v. Provident Bicycle Assoc. 178 Pa. 636, 638, 639, 36 L.R.A. 589, 36 Atl. 197; Commonwealth v. Equitable Ben. Assoc. 137 Pa. 412, 418, 18 Atl. 1112.

South Dakota.—Lawver v. Globe Mut. Ins. Co. 25 S. Dak. 549, 560, 127 N. W. 615.

Tennessee.—American Surety Co. v. Folk, 124 Tenn. 139, 141, 135 S. W. 778, 40 Ins. L. J. 1074 (*quoting* Tenn. acts 1895, c. 160, sec. 2; acts 1899, c. 31, regulating the business of all insurance other than life and casualty. The case gives also a general definition of insurance).

Texas.—American Legion of Honor v. Larmour, 81 Tex. 71, 16 S. W. 633.

[9] 29 Minn. 347, 354, 43 Am. Rep. 216, 13 N. W. 164, per Dickinson, J.

loss." This construction was in a case where the condition was against making any insurance in any other company. Insurance was early defined by statute in England.[10] and it is now defined under the statutes in several of the United States.[11]

§§ 3, 4. (Transferred to §§ 338d, 339c herein).

§ 5. Definition of marine insurance.—Marine insurance is a contract whereby one for a consideration agrees to indemnify another for loss or damage on a certain interest, subject to marine risks by certain perils of the sea or specified casualties during a voyage or a fixed period. This branch of insurance includes risks of river navigation and of railway and other land carriage connected with sea transit.[12] Another definition is this: "Marine insurance is a con-

[10] The statute 43 Elizabeth, chapter 12, declares that a policy of assurance is when a merchant gives a consideration in money to others to assure his goods, ship, or other things by him adventured, upon such terms as may be agreed between the merchant and assurers.

[11] Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event: Cal. Civ. Code, sec. 2527.

"A contract of insurance—life excepted—is an agreement by which one party for a consideration promises to pay money or its equivalent or do some act of value to the assured upon the destruction or injury of something in which the other party has an interest." Me. Rev. Stat. 1903, p. 471, c. 49, sec. 1.

Insurance is "any agreement whereby one party for a consideration undertakes to indemnify another to a specified amount against loss or damage from specified causes, or to do some act of value to the assured in case of such loss or damage." Minn. Rev. L. 1905, sec. 1596.

"An insurance contract is one by which the underwriter is liable for the fortuitous damages which may occur to the insured personal or real property, in consideration of a certain price, which may be unrestrictedly fixed by the parties." Rev. Codes (Civ.) 1902, Porto Rico, sec. 1693.

See also the following statutory definitions:

Alabama.—2 Ala. Code (Civ.) 1907, sec. 4544 (2596).

Dakota.—Codes (Levisee) p. 1027, sec. 1474.

Massachusetts.—Suppl. 1902–1908 to Rev. Laws, p. 1159, sec. 3 (Rev. L. 118, sec. 3; Laws 1907, c. 576, p. 840).

Montana.—Rev. Codes (Civ.) 1907, sec. 5545 (sec. 3370).

North Dakota.—Rev. Code, 1899, sec. 4441.

Oklahoma.—Snyder's Comp. Laws 1909, sec. 3722, p. 883.

South Dakota.—Rev. Codes (Civ.) 1903, sec. 1703, p. 805.

Tennessee. — *Shannon's Annot.* Code 1896, sec. 3275 (Laws 1895, c. 160, sec. 2) Laws 1899, c. 31.

[12] See Hopkins on Ins. (ed. 1867) 53. Commonwealth v. Weatherbee, 105 Mass. 149, 160. See also definition of insurance by Emerigon, given under § 2 herein.

Application of principles of marine insurance to all insurances, see note at end of § I. herein.

"*Insurances may be divided into general and special.* A general insurance is where the perils insured against are such as the law would imply from the nature of a contract of a marine insurance considered in

tract of indemnity against all losses accruing to the subject-matter of the policy from certain perils during the adventure." [13] Marine

itself, and supposing none to be expressed in the policy. A special insurance is where, in addition to the implied perils, further perils are expressed in the policy; and they may be specified or the insurance may be against *all* perils." Vandenheuvel v. United Ins. Co. 2 Johns. Cas. (N. Y.) 127, 150, a policy on freight.

[13] Lloyd v. Fleming, L. R. 7 Q. B. D. 299, 302, per Blackburn, J.

"Insurance has been described as 'a fixed sum as the price of risk.'" Barnstable, The (U. S. D. C.) 84 Fed. 895, 897, 898, a case where there was a stipulation in a charter party that "the owner shall pay for the insurance on the vessel," and the construction of the charter party was involved, and it was determined that as between said owner and the charterers the risk of a collision lien was cast upon the former.

"A policy of marine insurance is a contract by which, for a consideration stipulated to be paid by one interested in a ship, freight, or cargo, subject to marine risks, another undertakes to indemnify him against some or all of those risks during a certain period or voyage; in other words, that, so far as the perils insured against are concerned, the subject insured shall remain, throughout the term of the policy, of the value which it had at the beginning of the adventure." Matheson v. Equitable Marine Ins. Co. 118 Mass. 209, 211, 19 Am. Rep. 441, per Gray, C. J. See Commonwealth v. Weatherbee, 105 Mass. 149, 160.

A contract of insurance is merely a guaranty against loss of property by marine disaster. Insurance Co. of North America v. Commonwealth, 87 Pa. 173, 30 Am. Rep. 352.

Mr. Arnould (Arnould on Marine Ins. [6th ed. Maclachlan] p. 161, Id. [8th ed. Hart & Simey]) defines this contract as that "whereby one party, for a stipulated sum, undertakes to indemnify the other against loss arising from certain perils or sea risks to which his ship, merchandise, or other interest may be exposed during a certain voyage or a certain period of time." *Mr. Duer's* definition (1 Duer on Ins. [ed. 1845] 1) is very brief, being this: "Marine insurance is a contract of indemnity against the perils of the sea." While *Chancellor Kent* (3 Kent's Commentaries [13th ed.] 25) defines marine insurance as "a contract whereby one party, for a stipulated premium, undertakes to indemnify the other against certain perils or sea risks to which his ship, freight, and cargo, or some of them, may be exposed during a certain voyage or for a fixed period of time." This is the same definition given by *Mr. Field* in his work on Damages, (2d ed.) sec. 562. Another definition, given by *Mr. Marshall* (Marshall on Ins. [ed. 1810] 2) is as follows: "Marine insurance is that which is applied to maritime commerce, and is made for the protection of persons having an interest in ships or goods on board from the loss or damage which may happen to them from the perils of the sea during a certain voyage or a fixed period of time." *Mr. Phillips* (Phillips on Ins. 1) says: "Marine insurance is a contract whereby, for a consideration stipulated to be paid by one interested in a ship, freight, or cargo subject to marine risks, another undertakes to indemnify him against some or all those risks during a certain period or voyage." For other definitions, see 2 Parsons on Contracts (7th ed.) 350; Rapalje & Lawrence's Law Dict. 668; Bacon's Abridgement (4th ed.) 598, 599, 13 Encyc. Britannica, 184.

insurance is also defined under the English statute of 1906.[14] And under the statutes of several of the United States.[15]

[14] "(1) A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses; that is to say, losses incident to marine adventure. (2) A contract of marine insurance may, by its express terms or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage. (3) Where a ship in the course of building, or the launch of a ship, or any adventure analogous to a marine adventure, is covered by a policy in the form of a marine policy, the provisions of this act, in so far as applicable shall apply thereto." Marine Ins. act 1906 (6 Edw. VII. c. 41); Butterworth's Twentieth Cent. Stats. (1900–1909) pp. 394 et seq.; 15 Chitty's Stats. Eng. (1902–1907) pp. 881 et seq.

[4] Maritime perils is also defined Marine insurance act 1906, 6 Edw. VII. c. 41; 2 Butterworth's 20th Cent. Stat. pp. 397, 398; 17 Earl of Halsbury's Laws of Eng. "Insurance," pp. 335, 336. The stamp acts (30 Vict. c. 23, sec. 4; 47 & 48 Vict. c. 62, sec. 8, defined sea insurance). See further as to stamp acts, 17 Earl of Halsbury's Laws of Eng. "Insurance."

[15] Marine insurance is an insurance against risks connected with navigation, to which a ship, cargo, freightage, profits, or other insurable interest in movable property may be exposed during a certain voyage or a fixed period of time. Cal. Civ. Code, sec. 2655; Cal. Laws 1913 c. 269, sec. 3, p. 484, amd'g c. 594 of Polit. Code.

"A contract of marine insurance is one by which a person or corporation, for a stipulated premium insures another against losses occurring by the casualties of the sea." Ga. Code 1911, p. 658, sec. 2515 (sec. 2120).

See also Levisee's Dak. Code sec. 1563; Mont. Rev. Codes (Civ.) 1907, sec. 5638 (sec. 3540); N. Dak. Rev. Codes (Civ.) 1899, sec. 4537; S. Dak. Rev. Codes (Civ.) 1903, sec. 1883.

The insurance laws of New York provide for the incorporation of marine insurance companies "for the purpose of making insurance upon vessels, freights, goods, wares, merchandise, specie, bullion, jewels, profits, commissions, bank-notes, bills of exchange, and other evidences of debt, bottomry and respondentia interests, and every insurance appertaining to or connected with marine risks and risks of transportation and navigation including the risks of lake, river, canal, and inland transportation and navigation (above wording is same as that of the first general insurance in corporation act in New York, Laws 1849, c. 308, p. 441. It is also the same as the California Stat. 1913, c. 269, sec. 3, p. 484, amd'g c. 594, of Polit. Code.) insurance upon automobiles, whether stationary or being operated under their own power; which shall include all or any of the hazards of fire, explosion, transportation, collision, loss by legal liability for damage to property resulting from the maintenance and use of automobiles, and loss by burglary or theft or both, but shall not include insurance against loss by reason of bodily injury to the person." N. Y. Laws 1911, p. 190, c. 126, sec. 150 (entitled "An Act to Amend the Insurance Law, in Relation to the Character of the Automobile Indemnity which may be Assumed by Fire and Marine Insurance companies.") See also Laws N. Y. 1912, p. 444, c. 232, sec. 70, subdivs. 9, 10. *Examine* 1 Wolff's Const. & Rev. Laws La. 1904, p. 845.

§ 6. Definition of fire insurance.—Fire insurance is a contract whereby one for a consideration agrees to indemnify another for loss or damage on property by fire.[16]

[16] Fire Insurance is a contract by which the insurer undertakes in consideration of the premium to indemnify the insured against all losses which he may sustain in his house, goods, or merchandise by fire within the time limited in the policy: 11 Petersdorff's Abridgement, 9, note "Insurance." "Fire insurance is a contract to indemnify, in whole or part, one having an insurable interest in property from loss or damage caused by fire to the property insured:" Sharp's Lectures on Fire Ins. 1. "Insurance against fire is a contract to indemnify the insured for loss or damage to his property occasioned by that element during a specified period:" Flanders on Fire Ins. 1, 17. See also Wood on Fire Ins. (2d ed.) p. 4; 2 Marshall on Ins. (ed. 1810) *784; 2 Parsons on Contracts (7th ed.) 418; 7 Am. & Eng. Ency. of Law, 1002. "A contract of fire insurance is a contract by which the insurer agrees, for valuable consideration (usually called a premium), to indemnify the assured, up to a certain amount and subject to certain terms and conditions, against loss or injury by fire which may happen to the property insured during a specified period." 17 Earl of Halsbury's Laws of Eng. "Insurance," p. 516. "Fire insurance is a contract whereby, in consideration of the payment of an agreed premium, the insurer undertakes to make good to the assured any loss or damage which may happen to specified property during a stipulated period. Fire policies—in this respect differing from marine policies—are usually for a specific sum, which bears no necessary relation to the value of the property insured. The amount payable in case of a loss, therefore, is not determined by the value of the property insured and injured, but simply by the amount of the damage. The sum payable can in no case exceed the amount named in the policy; but as the contract is a contract of indemnity, if the loss is less, the amount for which the insurer is liable will also be less." Or for a proportionate share under average clauses. 5 Renton's Ency. of Laws of Eng. p. 348.

For other definitions see the following cases:

United States.—Lycoming Fire Ins. Co. v. Haven, 95 U. S. 242, 24 L. ed. 473; Durham v. Fire & Marine Ins. Co. (U. S. C. C.) 22 Fed. 468, 470, 471.

Maine.—Donnell v. Donnell, 86 Me. 518, 520, 30 Atl. 67.

Massachusetts.—Commonwealth v. Weatherbee, 105 Mass. 149, 160; Wilson v. Hill, 3 Mete. (44 Mass.) 66, 68.

Mississippi.—Lee Mutual Fire Ins. Co. v. State, 60 Miss. 395, 399.

Pennsylvania.—Insurance Co. of North America v. Commonwealth, 87 Pa. 173, 30 Am. Rep. 352 (said to be merely a guaranty against loss of property by fire or marine disaster).

Wisconsin.—See Johannes v. Phoenix Ins. Co. 66 Wis. 50, 56, 57 Am. Rep. 249, 27 N. W. 414 (where the court says: "By such contract the insurer agrees to compensate the insured for loss by fire of certain property for a given time").

The insurance laws of New York provide for the incorporation of fire insurance companies, "for the purpose of making insurances on dwellinghouses, stores, and all kinds of buildings and household furniture and other property against loss or damage by fire, lightning, wind, storm, tornadoes (same as in Laws of 1849, c. 308, p. 441) and earthquakes, and against loss or damage by water to any goods or premises arising from the breakage or leakage of sprinklers, pumps, or other

Fire insurance includes "insurance against loss or damage by fire, lightning, windstorm, tornadoes or earthquakes." [17]

§ 7. Definition of life insurance.—Life insurance is a contract dependent upon human life, whereby one for a consideration agrees to pay another a certain sum of money upon the happening of a given contingency, or upon the termination of a specified period.[18]

apparatus erected for extinguishing fires, and of water pipes, and against accidental injury to such sprinklers, pumps, or other apparatus, and, upon vessels, boats, cargoes, goods, merchandise, freights, and other property against loss or damage by all or any of the risks of lake, river, canal, and inland navigation aand transportation (Laws of 1849 also provided against the risks of inland navigation and transportation) as well as by any or all of the risks specified in section one hundred and fifty of this chapter" (see last note to § 5 herein) "including insurance upon automobiles, whether stationary or operated under their own power, which shall include all or any of the hazards of fire, explosion, transportation, collision, loss by legal liability for damage to property resulting from the maintenance and use of automobiles, and loss by burglary or theft of both, but shall not include insurance against loss by reason of bodily injury to the person." N. Y. Laws 1910, p. 397, c. 168, sec. 110 (entitled "An Act to Amend the Insurance Laws in relation to fire and Marine Insurance Corporations") amending sec. 22, c. 33, Laws 1909 (entitled "An Act in Relation to Insurance Corporations Constituting Chapter Twenty-eight of the Consolidated Laws") as amended by chap. 301, of Laws of 1909, N. Y. Laws 1911, p. 189, c. 126, sec. 110 (entitled "An Act to Amend the Insurance Law, in Relation to the Character of the Automobile Indemnity which may be Assumed by Fire and Marine Insurance Companies"). N. Y. Laws 1912, pp. 444 et seq. c. 232. See Laws 1913, c. 296. See also Ga. Code (Civ.) 1911, sec. 2470 (2089).

[17] Cal. Stat. 1913, c. 269, sec. 2, p. 483, amd'g c. 594 of Polit. Code.

[18] "Life insurance imports a mutual agreement, whereby the insurer, in consideration of the payment by the assured of a named sum annually, or at certain times, stipulates to pay a larger sum at the death of the assured. The company takes into consideration, among other things, the age and health of the parents and relatives of the applicant for insurance, together with his own age, course of life, habits, and present physical condition; and the premium exacted from the assured is determined by the probable duration of his life, calculated upon the basis of past experience in the business of insurance. The results of that experience are disclosed by standard life and annuity tables, showing at any age the probable duration of life." Ritter v. Mutual Life Ins. Co. 169 U. S. 139, 151, 18 Sup. Ct. 300, 42 L. ed. 693, 27 Ins. L. J. 804, 813.

A contract of life insurance or of insurance upon a life in the ordinary form, "is a contract to pay a certain sum of money on the death of the insured." State (ex rel. Clapp) v. Federal Investment Co. 48 Minn. 110, 111, 50 N. W. 1028.

"Life insurance is a contract to pay a certain specific sum on the happening of a particular event, which may or may not occasion a pecuniary loss." Trenton Mutual Life & Fire Ins. Co. v. Johnson, 24 N. J. L. 576, 585.

Life insurance is a contract to pay money upon the death of the assured, in consideration of certain payments being duly made at fixed periods dur-

ing his life. Reed v. Provident Savings Life Assurance Soc. 190 N. Y. 111, 82 N. E. 734, 736, *quoted* in Wayland v. Western Life Indemnity Co. 166 Mo. App. 221, 148 S. W. 626, 630.

Life and accident insurance is a contract whereby one party, for a stipulated consideration, agrees to indemnify another against injury by accident, or death from any cause not excepted in the contract. State (ex rel. Sheets) v. Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. 68 Ohio St. 9, 30, 96 Am. St. Rep. 635, 64 L.R.A. 405, 67 N. E. 93.

A contract of life insurance contemplates a payment by the insurer on the death of insured, as the primary intent, although a secondary question may arise as to when the payment is due. Smith v. Metropolitan Life Ins. Co. 222 Pa. 226, 20 L.R.A.(N.S.) 928, 128 Am. St. Rep. 799, 71 Atl. 11.

"Life insurance is the promise to pay a certain sum on the death of the assured." Ellison v. Straw, 119 Wis. 502, 508, 97 N. W. 168.

In an English case it is said life insurance "is simply a contract that on the consideration of a certain annual payment the company will pay at a future time a fixed sum, calculated by them with reference to the value of the premiums which are to be paid in order to purchase the postponed payment. Whatever event may happen meanwhile is a matter of indifference to the company. They do not found their calculations on that, but simply upon the probabilities of human life, and they get paid the full value of that calculation." Law v. London Indisputable Life Policy Co. 1 Kay & J. 229, per Wood, V. C.

In Fryer v. Morland, L. R. 3 Ch. 675, 685, Jessel, M. R., in construing the succession duty act (16 & 17 Vict. c. 51), and the meaning of "policy of insurance on the life," etc., says those words mean "a contract, no doubt, for money. It is a purchase of a reversionary sum in consideration of a present payment of money, or, as is generally the case, on the payment of an annuity during the life of the person insuring;" and also says it is not a disposition of property at all, as "a mere covenant to pay money is not a disposition of property in the ordinary sense. The insurance company does not die, and therefore a covenant to pay money on the death of some other person is a mere contract to pay money."

"The term 'life insurance' is not alone applicable to an insurance of the full term of one's life. On the contrary, it may be for a term of years, or until the assured shall arrive at a certain age." Briggs v. McCullough, 36 Cal. 542, 550, 551. In this case *policy was to become payable on death of person insured, provided he died within ten years.*

"Life insurance may be defined as a contract by which the insurer agrees upon the death of the person whose life is insured (commonly called the life insured) to pay a given sum, in consideration of the payment by or on behalf of the assured during the continuance of the life of certain sums called premiums." 17 Earl of Halsbury's Laws of Eng. "Insurance," p. 543. In *Bunyon* on Life Ins. (ed. 1868) 1, *cited* in State ex rel. v. Mechanics' Exchange Mut. Ben. Soc. 72 Mo. 146, 159, the contract is "defined to be that in which one party agrees to pay a given sum upon the happening of a particular event contingent upon the duration of human life, in consideration of the immediate payment of a smaller sum or certain equivalent periodical payments by another." *Mr. Marshall* (2 Marshall on Ins. [ed. 1810] 766, says: "The insurance of a life is a contract whereby the insurer, in consideration of a certain premium, either in a gross sum or periodical payments, undertakes to pay the person for whose benefit the insurance is made a stipulated sum or an annuity equivalent upon the death of

Life insurance has also been defined by statutes in some of the states.[19]

the person whose life is insured, whenever this shall happen, if the insurance be for the whole life, or, in case this shall happen within a certain period, if the insurance be for a limited time." "A contract by which the insurer, in consideration of a certain premium, either in a gross sum or by annual payments, undertakes to pay the person for whose benefit the insurance is made a certain sum of money or annuity on the death of the person whose life is insured:" 1 Smith's Mercantile Law, (Macdonell & Humphrey's ed. 1890) 491.

See Bliss on Life Ins. (ed. 1872) sec. 3; Cooke on Life Ins. (ed. 1891) sec. 1; Petersdorff's Abridgement, title "Insurance," 16.

For other definitions see the following cases:

California.—Briggs v. McCullough, 36 Cal. 542, 551.

Connecticut.—Fuller v. Metropolitan Life Ins. Co. 70 Conn. 647, 663, 675, 41 Atl. 4.

Georgia.—Rylander v. Allen, 125 Ga. 206, 6 L.R.A.(N.S.) 128, 53 S. E. 1032, 35 Ins. L. J. 724; Union Fraternal League v. Walton, 109 Ga. 1. 3, 77 Am. St. Rep. 350, 46 L.R.A. 424, 34 S. E. 317 (both cases *quoting* Ga. Civ. Code, sec. 2114 [Code 1911, sec. 2496]); Cason v. Owens, 100 Ga. 142, 143, 28 S. E. 75.

Massachusetts.—Mutual Life Ins. Co. v. Allen, 138 Mass. 24, 27, 52 Am. Rep. 246; Commonwealth v. Weatherbee, 105 Mass. 149, 160.

Missouri.—State (ex rel. Atty. Genl.) v. Merchants Exchange Mut. Benev. Soc. 72 Mo. 146, 159.

New Jersey.—Merchants and Miners Transp. Co. v. Borland, 53 N. J. Eq. 282, 285, 31 Atl. 272.

New York.—Columbia Bank v. Equitable Life Assur. Soc. 80 N. Y. Suppl. 428, 431, 79 App. Div. 601; St. John v. American Mutual Life Ins. Co. 13 N. Y. 31, 38, 64 Am. Dec. 529.

Ohio.—Keckley v. Coshocton Glass Co. 86 Ohio St. 213, 225, 226, 99 N. E. 299.

Virginia.—Cosmopolitan Life Ins. Assoc. v. Koegel, 104 Va. 619, 52 S. E. 166 (within sec. 3251 of Code).

England.—Dalby v. India & London Life Assur. Co. (1854) 15 C. B. 365, 387, 13 Eng. Rul. Cas. 383, per Parke, B.

As to indemnity see §§ 24 et seq. herein.

[19] "An insurance upon life is a contract by which the insurer, for a stipulated sum, engages to pay a certain amount of money if another dies within the time limited by the policy. The life may be that of the assured, or of another in whose continuance the assured has an interest." Ga. Code (Civ.) 1911, p. 654, sec. 2496 (sec. 2114). Life insurance includes "insurance upon the lives of persons and every insurance appertaining thereto, and the granting, purchasing and disposing of annuities." Cal. Stat. 1913, c. 269, sec. 1, p. 483, amd'g c. 594 of Polit. Code.

Life annuities. An aleatory contract of annuity binds the debtor to pay a pension or annual rent to one or more specified persons during their lives, for a principal in personal or real property, the ownership of which is at once transferred to said debtor "charged with the income." Rev. Codes (Civ.) Porto Rico 1902, sec. 1704. "An annuity may be constituted on the life of the person who gives the capital, on that of a third person, or on that of several persons. It may also be constituted in favor of the persons for whose life it is granted, or in favor of another or other different persons." Rev. Codes (Civ.) Porto Rico, 1902, sec. 1705.

That deferred annuity policy valid and not contrary to public policy though payments to commence in future during beneficiary's lifetime, see

§ 7a. Definition of assessment insurance.—Assessment insurance is that where the benefit to be paid is dependent upon the collection of such assessments as may be necessary for paying the amount insured, it constitutes assessment insurance when the payments are not unalterably fixed by the contract. In old-line policies the amount of the premiums is fixed unalterably, and the insurer's liability is definitely fixed.[19a] A mutual benefit association provides insurance "upon the assessment plan," even though it agrees to pay a definite sum and has fixed rates of assessment which it has authority to receive in advance, where it has no "legal reserve," but only an "emergency fund," and it has the reserved right, under its contracts, to increase or lower the rates of assessment.[20] In insurance and business circles the words "assessment company," as distinguished from "old-line mutual" company, means that in such first-named company the money to pay a death loss is collected by an assessment made upon those members who sur-

Mutual Life Ins. Co. v. Smith, 184 Fed. 1, 106 C. C. A. 593, 33 L.R.A. (N.S.) 439.

[19a] Knott v. Security Mutual Life Ins. Co. 161 Mo. App. 579, 592, 144 S. W. 178, *quoting* from Haydel v. Mutual Reserve Fund Life Assoc. (U. S. C. C.) 98 Fed. 200, 203, case aff'd 104 Fed. 718, 44 C. C. A. 169.

Assessment or co-operative plan, life insurance defined; statutes construed. Mutual insurance on the assessment plan is defined under Laws Cal. 1891, p. 126, c. 116, sec. 1. The statute is construed in Engwicht v. Pacific States Life Assur. Co. 153 Cal. 183, 96 Pac. 87, a case determining the rights of members or "contract holders," and that a certain debenture was not such a contract. Assessment or co-operative insurance, see Wolff's Const. Rev. Laws La. 1904, p. 845. "Every contract whereby a benefit is to accrue to a person or persons named therein, upon the death or physical disability of a person also named therein, the payment of which said benefit is in any manner or degree dependent upon the collection of an assessment upon persons holding similar contracts, shall be deemed a contract of insurance upon the assessment plan." Mo. Rev. Stat. 1909, sec. 6959 (Rev. Stat. 1899, sec. 7901; Rev. Stat. 1889, sec. 5860, was enacted in 1887), *quoted* and *applied* in Moran v. Franklin Life Ins. Co. 160 Mo. App. 407, 140 S. W. 955, holding nonforfeiture law of that state not applicable to life policy in that case, as it was an assessment policy (see note to above cited Stat. 1909, sec. 6950). See Haydel v. Franklin Life Ins. Co. 136 Fed. 285, 69 C. C. A. 423, construing Mo. Rev. Stat. 1899, sec. 7901, deciding when policy is one under assessment plan, and not an ordinary life policy, and not within the nonforfeiture law. *Examine* also Haydel v. Mutual Reserve Fund Life Assoc. 104 Fed. 718, 44 C. C. A. 169, aff'g 98 Fed. 200, determining when contract is not an endowment policy, but one on the assessment plan. Co-operative or assessment plan, life insurance defined. Minn. Rev. Laws, Suppl. 1909, Annot. p. 443, sec. [1702] 1. (Act 1907, c. 318, sec. 1).

[20] State (ex rel. Covenant Mutual Benefit Assoc.) v. Root, 83 Wis. 667, 19 L.R.A. 271, 54 N. W. 33, case of petition for mandamus to compel insurance commissioner to issue license; writ issued.

vive the member, the insurance upon whose life is paid.[1] The insurance law of New York clearly distinguishes between casualty companies on the co-operative assessment plan, and fraternal or beneficiary societies or associations; one may be conducted for profit, and the other for charity only. In the one the right to contract to make payments at a certain fixed period of old age exists, while in the other it does not.[2] A relief department of a railroad is not carrying on the business of life or casualty insurance on the co-operative or assessment plan, where the "relief fund" for the payment of definite amounts to employees in the event of accident or sickness, or to their relatives in case of death, is formed by voluntary contributions from employees, appropriations by the company when necessary to make up deficits, income or profits from investment of the fund, and gifts or legacies, and where membership is voluntary and confined to employees.[3]

A secret and fraternal society which relies for the means of paying the stipulated benefits on assessments levied by no fixed rule upon the different branches of the order, under a system which, after it ceases to be a "going concern," is incapable of application, and which does not rely upon the accumulation of premiums paid, does not stand in the same relation to its certificate holders as that occupied by a life insurance company to its policy holders.[4]

§ 7b. Definition of industrial insurance.—Industrial insurance is, except where otherwise defined by statute, an insurance upon life, for a small or limited amount in consideration of a premium payable in small instalments and collectable weekly, or at some other short periodical interval. It includes both adult and child

[1] Mutual Benefit Life Ins. Co. v. Marye, 85 Va. 643, 645, 8 S. E. 481, per Lacy J., case of application for mandamus to compel auditor to license, assessment life insurance company without depositing bonds; denied.

[2] People (ex rel. Mount) v. Chapter General of America, Knights of St. John & Malta (1910) 198 N. Y. 15, 90 N. E. 1134.

[3] Colaizzi v. Pennsylvania Rd. Co. 208 N. Y. 275, 101 N. E. 859, aff'g 128 N. Y. Suppl. 312, 143 App. Div. 638 (Consol. Laws N. Y. 1909, c. 28, sec. 201). See 129 N. Y. Supp. 1116, 145 App. Div. 909.

Railroad relief association contract is not within insurance laws, but may be enforced as between the parties. Wolfstern v. Pennsylvania Railroad Voluntary Relief Dept. 76 N. J. Eq. 78, 74 Atl. 533, on associations providing relief for railroad employees as insurance, see note in 47 L.R.A. (N.S.) 299.

[4] Fawcett v. Supreme Sitting of the Order of the Iron Hall, 64 Conn. 170, 24 L.R.A. 815, 29 Atl. 614. *Compare* dissenting opinion of Hammersley, J., who declares that such business is clearly distinguishable from legitimate insurance, and also from that quasi insurance business which really partakes more of the nature of investment or savings bank business, called endowment insurance, and also from that of fraternal and mutual aid societies. Id. pp. 204–206.

insurance, and amounts in fact to burial insurance. Industrial or prudential insurance is more fully defined under the statutes of Georgia,[5] Louisiana,[6] Missouri,[7] and Virginia.[8]

[5] Industrial life insurance is that insurance for which the stipulated premiums, advance assessments, or dues, are regularly payable and collectable weekly or biweekly, and the policies or benefit certificates for which are for sums of not more than $500 on a single life, and which policies or benefit certificates may provide a weekly benefit for disability, caused by sickness or accident, not greater than $20 per week." Code Ga. 1911 (Civ.) sec. 2502 (acts 1905, p. 96, sec. 2506). "All corporations, associations, relief organizations, societies, or fraternal orders, with or without capital stock, and having or not having a ritualistic form of government, whether operating under the present insurance laws as insurance companies, or operating under the laws governing fraternal beneficiary orders, and issuing policies or benefit certificates, and conducting their business in the manner and within the meaning and definition set forth in the preceding paragraph, shall be held and deemed to be doing an industrial life insurance business, and shall be subject to this section and all the other laws of this state not repugnant to this section, regulating the business of life, health, and accident-insurance in this state." Code Ga. 1911, p. 655 (Civ.) secs. 2502, 2503.

[6] "Industrial life insurance is hereby defined to be that insurance for which the stipulated premiums, advances, assessments, or dues are regularly payable and collectable every four weeks, tri-weekly, bi-weekly, semi-weekly or at any other stated terms less than a month apart, and the policies or benefit certificates for which are for sums of $500 or less on a single life on which policies or benefit certificates provide a weekly cash benefit for disability, caused by sickness or accident, of $20 per week or less, or which provide for the attendance of a physician or supply of drugs, or furnishing a funeral." La. act 1906, p. 101, No. 65, sec. 1. Sec. 2, of same act specifies what companies shall be held and deemed to be doing industrial life insurance business. Act 1908, p. 366, art. 246, further regulates organization of industrial life insurance companies. The act of 1906 considered in State (ex rel. Unity Industrial Life Ins. & Sick Ben. Assn.) v. Michel, 121 La. 350, 46 So. 352, 37 Ins. L. J. 587.

[7] "*Industrial" and "Prudential" companies defined—powers.* "Industrial or prudential life insurance companies under the meaning of this article are such life insurance companies that issue policies not exceeding $500 in amount, the premiums on which are computed at a weekly rate and are collected and paid weekly under the terms of the policies of the company issuing the same. But the companies organized under the provisions of this article may also issue life policies, not exceeding $1,000 in amount, the premiums on which shall be computed at a monthly rate, and by the terms of the policy shall be paid monthly to such company." Mo. Rev. Stat. 1909, sec. 6993 (Rev. Stat. 1899, sec. 7943) art. 5, title "Industrial and Prudential Insurance." Article was enacted by Law 1897, p. 138.

[8] Industrial sick benefit associations embrace associations that collect weekly dues and assessments, and issue policies providing weekly indemnity on account of sickness or accident, in addition to benefit in case of death and associations not required to maintain legal reserve for death benefits: certain fraternal beneficiary associations excepted: corporations, joint-stock companies, or associations are included. Va. acts 1910, p. 438,

In England in the collecting societies and industrial assurance companies act of 1896,[9] entitled "An Act to Consolidate the Enactments Relating to Friendly Societies and Industrial Assurance Companies which Receive Contributions and Premiums by Means of Collectors," the term "industrial assurance company" refers to any person or body of persons, corporate or unincorporate, granting insurance on any one life for a less sum than twenty pounds. And the assurance companies act of 1909 [10] provides for insuring money to be paid for the funeral expenses of a parent, grandparent, payment dependent upon the length of time between the issuance the life is insured for a specified sum, still, whether the entire amount, or a proportionate part thereof, or any sum whatever shall be paid, may be governed by a limitation or restriction making such payment dependent upon the length of time between the issuance of the policy and the death of the insured. This is illustrated by the limitation that one half the benefit is to be paid if death occurs within six months from date of the policy, and the full amount if death occurs thereafter; that one half is to be paid if death occurs after six months and within one year; that one fourth is to be paid if death occurs after three months and within six months, and that no benefit is to be paid if death occurs within three months. There are said to be two reasons for such restrictions, namely to keep out fraudulent risks, and at the same time to keep the expense of investigations duly proportional to the amount of insurance, and to keep the amount of premiums paid always within a reasonable proportion to the premiums collected, in view of the fact that only a small instalment, as in case of a weekly premium, is paid in advance, differing therein from the premium due in advance under an ordinary life policy.

A policy or contract is industrial, and not accident, insurance where it contains the limitation first above stated, and also the provision that in the event of death from accident within six months from date of the policy "the full amount of insurance named in the first schedule will be paid." It is not the giving of direct affirmative benefits of a special kind on account of the accident. It constitutes simply an exception of this class of cases from the ordinary rights of an insured person, which limitation was established to prevent fraud of a kind bearing no relation to deaths by accident.[11]

c. 291, entitled "an Act to Define and Classify Industrial Sick Benefit Companies and Associations."

As to statutory limitation of amount payable on lives of children; aggregate of two or more policies may exceed sum. Flynn v. Prudential Ins. Co. of America, 130 N. Y. Supp. 546, 145 App. Div. 704; Laws N. Y. 1892, c. 690, sec. 55.

[9] 59 & 60 Vict. c. 26.

[10] 9 Edw. VII. c. 49, sec. 36; 2 Butterworth's 20th Cent. Stat. p. 446; 15 Earl of Halsbury's Laws of England, pp. 119 et seq.

[11] Metropolitan Life Ins. Co. v.

A policy with premiums payable monthly, expiring one year after its issuance unless renewed, and which provides for the payment of a weekly indemnity in case of accident or injury from violent or external means in the industry and special class of employment in which the insured was engaged at the time, is an industrial or accident insurance policy, and, even though it covers loss of life from "external violent and purely accidental means," it is not a life or endowment policy, within the meaning of a legislative act excluding industrial policies from certain conditions as to the application being made a part of the policy.[12]

§ 7c. Definition of burial insurance.—Burial insurance is a contract based upon a legal consideration, whereby the obligor undertakes to furnish the obligee, or one of the latter's near relatives, at death, a burial reasonably worth a fixed sum. It is a valid contract, and constitutes life insurance.[13] Such a contract has, however, been held void as against public policy and in restraint of trade, where the purpose of the association was to provide at their death a funeral and proper burial for the members, and the association was organized on the mutual plan, the members contributing a stipulated sum weekly, and the funeral, certain funeral furnishings and outfit were to be furnished by and through a designated undertaker, or official undertaker.[14]

§ 7d. Definition of workmen's industrial insurance; state insurance; compulsory insurance; workmen's compensation.—The terms "workmen's industrial insurance, state insurance, compulsory insurance, and workmen's compensation," mean those statutory provisions which cover the relation of master and servant and industrial accidents suffered by employees. The several systems embrace accidents, nonfatal or fatal to employees, sickness, unemployment, old age, and invalidity. Except where such enactments provide for insurance which is noncompulsory, either express or implied, they relate rather to economic or sociologic conditions than to the contract of insurance or to the principles governing that contract, or, at the most, they create new remedies or are but

Hardison, 208 Mass. 386, 94 N. E. 477, 40 Ins. L. J. 901. *Decided* under Mass. Stat. 1907, c. 576, sec. 34, under which contracts of insurance for each of the classes of insurance specified in sec. 32, must be in separate policies.

[12] Pride v. Continental Casualty Co. 69 Wash. 428, 125 Pac. 787, under Rem. & Bal. Code, secs. 6155, 6159.

[13] State v. Willett, 171 Ind. 296, 23 L.R.A.(N.S.) 197 and note, 86 N. E. 68. See State (ex rel. Attorney Gen'l) v. Wichita Mutual Burial Assoc. 73 Kan. 179, 84 Pac. 757.

[14] Robbins v. Hennesey, 86 Ohio St. 181, 99 N. E. 319, void under 99 Ohio Laws, p. 131.

an evolution of the employer's liability principle. These enactments, in there general nature are designated as either compulsory or elective or voluntary insurance or purely compensation laws, with an element that might be construed as coercive or in the nature of a penalty.[15] It is said in connection with governmental insur-

[15] It is said in a case holding the Wisconsin act constitutional, that "none can say what the practical operation of the law will be. It is enough for our present purpose that no one can say with certainty that it will operate to coerce either employer or employee." Borgnis v. Falk County, 147 Wis. 327, 37 L.R.A. (N.S.) 489, 133 N. W. 209, per Winslow, Ch. J. The decision in this case was under the workmen's compensation act, Laws 1911, c. 50; Laws 1911, c. 485, and so far as is necessary to state here, it divided all priate employers of labor into two classes: (1) Those who elected to come under the law; and (2) those who did not so elect. It took away the defenses of assumption of risk, and negligence of a coemployee from the second class (except that where there were less than four co-employees the latter defense was not disturbed), but left both defenses intact to the first class. It prescribed the manner in which an employer might elect to come under its terms, and how an employee might make his election, and when silence on the part of an employee would be considered an election; but it did not in terms compel either employer or employee to submit to its provisions. It was urged as an objection that the law, while in its words presenting to employer and employee a free choice to accept or not accept its terms, was in fact coercive, so that neither employer nor employee could be said to act voluntarily in accepting it. As to the employer the argument was that the abolition of the two defenses was a club forcing him to accept; and as to the employee it was argued that if his employer accepted the law the employee would feel compelled to accept also, through fear of discharge if he did not accept.

"Workmen's compensation is at present being presented to the American people in three forms, viz.: First: In a form merely optional, i. e., contemplating that the employers and employees should bring themselves under its provisions (which, except in the Ohio bill, provides for direct liability of the employer, instead of insurance) by their own action; or quasi-optional, i. e., requiring them, if not desiring to be bound by its provisions, to take affirmative action indicating their election. . . . Second: A law substituting for the present employers' liability law, a system of workmen's compensation, the employer to be liable for the payment of the compensations, and the same to be applicable to all employments. . . . Third: A system of compulsory insurance in which the state lends its sovereign power to afford at least the compulsion, and in which it either may or may not also assume the management and conduct of the business." Art. by Miles M. Dawson, in Bullock's Selected Articles on Compulsory Ins. (1912) pp. 88, 90, 93. On workmen's compensation acts generally see note in L.R.A.1916A, 23. The constitutionality of workmen's compensation and industrial insurance statutes is discussed in notes in 37 L.R.A. (N.S.) 466; L.R.A.1916A, 409. "There are two classes of workmen's compensation laws: One imposes the liability upon the individual employer, while the other is based upon the principle of mutual insurance. Laws of the first class may be either optional or compulsory," etc. New Internat. Year Book (1911) p. 239. "In the states of the civilized world

ance covering accident, sickness, old age, and invalidity: "That it is only by the loose use of language that the term 'insurance' can be applied to the system. It is in realty an elaborate system of poor relief, and its success or failure has little significance for the question of practicability of the public management of insurance on scientific principles.[16] It is also said that "compul-

there are two systems of employers' liability for accidental injuries. The first, which formerly prevailed in all, but which now survives in the United States, and, in a transition stage in Switzerland, is that of tort, or more particularly the master and servant branch of the law of negligence. The second is that of 'compensation' which embraces both 'simple compensation' and also its more complex form of 'compulsory insurance.'" Article by Tecumseh Sherman, in Bullock's Selected Articles on Compulsory Ins. (1912) p. 72. Many of these statutes, however, contain certain provisions relating to insurance, such as providing for the creation of an insurance or state insurance fund, or for direct insurance, or for mutual insurance associations or companies, or they involve the doctrine of subrogation with respect to insurance companies, or require casualty insurance corporations insuring employers to report industrial accidents to certain state boards or officials, or make insurance contracts subject to the statute, or even by the character of their provisions preclude such contracts, etc. An act was passed in Massachusetts in 1910 (c. 559) acts & res. 1910, p. 538, authorizing employees, officers, and agents of any corporation, firm, or individual, and the corporation, firm, or individual by which they were employed, to form an association for the purpose of providing annuities, pensions, or endowments for employees retiring from their employment on account of age, the participating employees to contribute to the funds a certain percentage of their wages or salaries, to be deducted by the employer, and the employer also contributing to said fund. Act is entitled "An Act to Authorize Employers and Employees to Establish Co-operative Retirement, Annuity, or Pension Systems." See acts & res. 1911, p. 546, c. 532, (am'd acts & res. 1912, c. 363); Id. c. 628, secs. 29a–33, R. L. 106, 119 (see acts & res. 1911, c. 751, secs. 23, 24; Id. 1912, c. 82). *Examine* acts & res. 1912, c. 571; Id. c. 311; Id. c. 666; Id. c. 721. In determining the constitutionality of the workmen's compensation act of Massachusetts it is said by the justices who rendered that opinion on July 24, 1911, that "it is to be observed that no liability insurance company is obliged to insure, and that if it chooses to do so there is nothing unconstitutional in requiring that it and the policy holder shall be governed by the provisions of the act so far as applicable." Opinion of the Justices, 209 Mass. 607, 96 N. E. 308. Act declared constitutional on questions submitted.

As to insurance against claims arising under workmen's compensation act of England 1906 (in force July 1, 1907) see Wilkinson v. Car & General Ins. Corp. 108 L. T. 512.

[16] 10 New Internat. Ency. (1908) p. 688. "The recent agitation in the United States has been confined practically to the compensation of workmen for injuries received in industrial accidents and the liability of employers for the same." As to foreign countries, the subject is "interwoven with other forms of social insurance—such as insurance against unemployment and old age," etc. Preface to Meyers Select List of References, etc., noted in bibliography in note p. 51, § VIIb herein.

sory insurance, where and in so far as it is at the expense of employers, is in effect simply a liability to pay compensation for accidental injuries to employees, with a legal obligation added to insure its payment," and "the principles of the compensation law are developments of the negligence law." [17] Again, it is declared as to workingmen's compensation, that it "is a term used to designate that form of compensation for industrial accidents which has come to replace employers' liability. . . . Most of the American legislation still takes the form of employers' liability laws." [18] Mr. Bradbury states, in the preface, that the introduction to his work shows the evolution of the employers' liability principle into the workmen's compensation and the state insurance doctrines.[19] Mr. Boyd considers the distinctions between the common law, employers' liability laws, and workmen's compensation laws as remedies for compensating workmen injured in the due course of their employment; he also states that the relation imposed by the workmen's insurance acts is purely economic in character as distinguished from the creation of a new right in the employee sounding in tort, and that the obligation falls within the domain of contract, one thrust upon the employer, as part of the contract of employment, to become a party to an insurance policy created by law, to be entered into as an additional consideration for services rendered by the employee. The same writer also notes the fundamental differences between the principles of workmen's industrial insurance and those of employers' liability laws or compensation acts in certain states.[20] It is said of the workmen's compensation act of England of 1906 that: "That act has rendered it practically necessary for all who desire to avoid the risk of bankruptcy, and who cannot afford to be their own insurers, to insure. Tens of thousands of small shopkeepers with one assistant, lodging-house keepers, and others with one 'general', small farmers, tenants of small buildings, and the like with one man, are driven to insure." [1]

[17] Article by P. Tecumseh Sherman in Bullock's Selected Articles on Compulsory Ins. (1912) pp. 72, 73. See also Boyd's Workmen's Compensation Direct Payment & State Ins. (ed. 1913) p. 205, sec. 100.

[18] New Internat. Year Book (1912) "Workmen's Compensation," p. 815.

[19] Bradbury's Workmen's Compensation & State Ins. Law (ed. 1912). Preface, p. VI.

[20] Boyd's Workmen's Compensation, Direct Payment & State Ins. (ed. 1913) pp. 1 et seq. sec. 1 et seq.; pp. 13, 14, sec. 6; p. 155, sec. 67.

[1] Bradley & Essex & Suffolk Accident Indemnity Soc., In re, 81 L. J. K. B. 523, 530, [1912] 1 K. B. 415, 105 L. T. 919, 28 T. L. R. 175, [1912] W. Rep. 6, per Farwell, L. J., case of construction of policy taken out by a carrier and small farmer against liability for accidents under workmen's compensation act of 1906. Proviso here was for keeping wages book.

§ 8. Definition of accident insurance.—Accident insurance is a contract whereby one for a consideration agrees either (1) to indemnify another against personal injury resulting from accident, or (2) to pay another a certain sum of money in case of death caused by accident. It is said that accident insurance is intended to indemnify for injury resulting from accident or to compensate by payment of a fixed sum where death results to the insured in consequence of accident, and that the contract closely resembles that of life insurance.[2] It is also declared by the court, in Healey

[2] 7 American Law Review, 585, 587. See Commonwealth v. Weatherbee, 105 Mass. 149, 160; see also definition of life and accident insurance in State (ex rel. Sheets) v. Pittsburg, Cincinnati, Chicago & St. Louis Rd. Co. 68 Ohio St. 9, 30, 96 Am. St. Rep. 635, 64 L.R.A. 405, 67 N. E. 93, is given under, § 7 herein. What accident insurance covers, see 17 Earl of Halsbury's Laws of Eng. "Insurance," pp. 566, 571; *compare* § 9 herein. See also Miller v. Maryland Casualty Co. 193 Fed. 343, 113 C. C. A. 267.

As to last point in text, see Logan v. Fidelity & Casualty Co. 146 Mo. 114, 47 S. W. 948; Maryland Casualty Co. v. Gehrmann, 96 Md. 634, 650, 54 Atl. 678; *compare* Tietin v. Fidelity & Casualty Co. (U. S. C. C.) 87 Fed. 543; Standard Life & Acci. Ins. Co. v. Carroll, 86 Fed. 567, 30 C. C. A. 253, 41 L.R.A. 19; National Life & Accident Ins. Co. v. Lokey, 166 Ala. 174, 52 So. 45.

"An ordinary life policy includes the occurrence of death by accident as one of the conditions which call for a payment by the company, as well as death from any other cause, and ordinary accident policies include injuries by accident causing death, and to that extent they provide insurance for life." Metropolitan Life Ins. Co. v. Hardison, 208 Mass. 386, 389, 94 N. E. 477, 40 Ins. L. J. 901, per Knowlton, Ch. J., holding that certain provisions in a life and industrial policy did not, even though providing against accidental death, constitute accident insurance under the Statute 1907, c. 576, sec. 32, cl. 5, specifying kinds of accident insurance that companies may transact.

What constitutes an accident or industrial policy, and not a life or endowment policy, see Pride v. Continental Casualty Co. 69 Wash. 428, 125 Pac. 787, under Rem. & Bal. Code, secs. 6155, 6159.

Under a decision in New Jersey in 1908 it is determined that a contract for life insurance cannot under the statute of that state be included in the same policy with insurance against bodily injury or death by accident. Ætna Life Ins. Co. v. Watkins, 77 N. J. L. 223, 71 Atl. 325, 38 Ins. L. J. 125. Under Pub. Laws 1902, p. 407, as am'd 1907 Pub. Laws, 128, specifying among the classes of insurance for which companies might be formed in that state: "(3) Upon the lives or health of persons and every insurance appertaining thereto, and to grant, purchase, or dispose of annuities. (4) Against bodily injury or death by accident (and upon the health of persons)." Citing Ætna Life Ins. Co. v. Hardison, 199 Mass. 181, 85 N. E. 407.

Company authorized to issue policies against accidents to individuals may likewise issue policy against accidents to live-stock. Pennsylvania Casualty Co. In re, 36 Pa. Co. Ct. 635, under Pa. act May 1, 1876 (Pub. L. 53) as am'd by act July 9, 1897 (Pub. L. 239) classifying insurance.

v. Mutual Accident Association,[3] that "a policy of accidental insurance is issued and accepted for the purpose of furnishing indemnity against accidents and death caused by accidental means." [4] Under the Massachusetts act of 1887 [5] accident insurance policies include "horse or vehicle policies," "general liability policies," "outside liability policies," and "elevator policies," all being intended to cover accidental injuries to persons arising from different causes, or under which the indemnity is paid for loss to the assured by an accident for the effects of which he is legally responsible and which results in bodily injury or death, as specified within the policy classification, and the issuance of said policies is not carrying on more than "one class or kind of insurance." [6]

A statute permitting the insurance of the health of persons and against accidental injuries, etc., resulting from traveling and general accidents by land or water does not authorize the issuance of a policy covering liability imposed by law by reason of bodily injuries, including death, accidentally sustained by reason of the maintenance, use, etc., of automobiles.[7]

§ 9. Definition of casualty insurance.—Casualty insurance has been defined as an insurance against loss through accidents or casualties resulting in bodily injury or death.[8] In a case decided in Massachusetts a distinction is made by the court between "accident"

[3] 133 Ill. 556, 560, 9 L.R.A.(N.S.) 371, 23 Am. St. Rep. 637, 25 N. E. 52.

[4] See Employers' Liability Assur. Corp. Lim. v. Merrill, 155 Mass. 404, 29 N. E. 529; Bunyon on Ins. p. 100; Black's Law Dict. 632; Rapalje & Lawrence's Law Dict. 668.

[5] Chapter 214, sec. 29, cl. 5, same also as to Pub. Stat. c. 119, sec. 201; Stat. 1887, c. 214, sec. 80; Stat. 1889, c. 356; Stat. 1891, c. 195.

[6] Employers' Liability Assur. Corp. Lim. v. Merrill, 155 Mass. 404, 29 N. E. 529. As to Rev. Laws Mass. Suppl. 1902–1908 (acts 1908) p. 1176, see note under next section (§ 9 herein). See People (ex rel. Ocean Accident & Guarantee Corp.) v. Van Cleave, 187 Ill. 125, 58 N. E. 422 (as to kinds of business casualty companies may transact, under act 1899); People (ex rel. Stevens) v. Fidelity & Casualty Co. 153 Ill. 25, 26 L.R.A. 295, 38 N. E. 752 (as to meaning of "any kind of business," under Stat. 1879, which foreign companies might carry on). Under Herron's Suppl. 1908–1910 to Sayle's Tex. Stat. p. 233, accident insurance relates to the injury, disablement, or death of persons resulting from traveling or general accidents by land or water.

[7] American Fidelity Co. v. Bleakley, 157 Iowa, 442, 138 N. W. 508.

"Travelers' insurance" is recognized as a line applicable to that class as a distinct line of insurance. Most accident companies make a specialty of it. It is a generic term, and no one has an exclusive right to its use when such use by another is not made to operate to the former's detriment. Travelers Insurance Machine Co. v. Travelers Ins. Co. 142 Ky. 523, 528, 529, 134 S. W. 877, a cause of action to enjoin use of name.

[8] State (ex rel. Clapp) v. Federal Invest. Co. 48 Minn. 110, 111, 50 N. W. 1028.

and "casualty" insurance, it being said that the "distinguishing feature of what is known in our legislation as 'accident insurance' is that it indemnifies against the effects of accidents resulting in bodily injury or death. Its field is not to insure against loss or damage to property, although occasioned by accident. So far as that class of insurance has been developed it has been with reference to boilers, plate-glass, and injuries to property by street-cars, etc., and perhaps injury to domestic animals, and is known as 'casualty insurance.'" [9] In an Iowa case,[10] the court, per Weaver, J., in considering the statutes of that state and the words "other casualty," "casualty," and "casualty insurance," says: "It cannot be said that their definition has been very accurately settled by the courts. Strictly and literally 'casualty' is perhaps to be limited to injuries which arise solely from accident without any element of conscious human design or intentional human agency; or, as it is sometimes expressed, inevitable accident, something not to be foreseen or guarded against.[11] But in ordinary usage 'casualty,' like 'accident,'

[9] Employers' Liability Assur. Corp. Lim. v. Merrill, 155 Mass. 404, 29 N. E. 529. Under Rev. Laws Mass. Suppl. 1902–1908 (acts 1908) p. 1176, accident insurance companies are authorized to insure against breakage of plate glass. As to Mass. Statute 1907, c. 576, sec. 32, cl. 5, specifying kinds of accident insurance that companies may transact. See Metropolitan Life Ins. Co. v. Hardison, 208 Mass. 386, 389, 94 N. E. 477, 40 Ins. L. J. 901, *considered* under note to last preceding section herein. Accident and casualty insurance includes plate glass insurance. Metropolitan Casualty Ins. Co. v. Basford, 31 S. Dak. 149, 139 N. W. 795. See also Laws S. Dak. 1911, c. 176, amd'g Laws 1905, c. 73. Under Herron's Suppl. (to Sayle's Tex. Civ. Stat.) 1908–1910, p. 233, accident insurance is conditioned upon the injury, disablement, or death of persons resulting from traveling, or general accidents by land or water.

Suits on accident policies insuring against accidents to human beings are not within South Dakota Code Civ. Proc. sec. 99, subd. 5, providing that all actions brought on a policy of insurance to recover for loss or damage to property insured shall be tried in a certain county, etc. Mullen v. Northern Accident Ins. Co. 26 S. Dak. 402, 128 N. W. 483, 40 Ins. L. J. 122.

Casualty insurance on assessment plan applies to accidental death or physical disability from accident or sickness. Me. Rev. Stat. 1903, p. 497, c. 49, sec. 122. "Casualty insurance" defined, under definition of assessment plan of insurance: Suppl. 1888, Pub. Stat. Mass. c. 183, pp. 291, 292. Casualty insurance, upon cooperative or assessment plan, included in accident insurance covering accident, sickness or other physical disability. Minn. Rev. Laws, Suppl. 1909, annot. p. 443, sec. [1702—] 1 (act 1907, c. 318, sec. 1). By N. Y. Laws 1883, c. 175, the formation of life and casualty companies in cooperative or assessment plan was authorized. Report of Board of Statutory Consol. (covering insurance) vol. 3, p. 2949. See present N. Y. Stat. *considered* under § X. herein, notes 8–13, pp. 63–65.

[10] Bankers Mutual Casualty Co. v. First Nat. Bk. 131 Iowa, 456, 461, 108 N. W. 1046.

[11] *Citing* Standard Dict.

is quite commonly applied to losses and injuries which happen suddenly, unexpectedly, not in the usual course of events, and without any design on the part of the person suffering from the injury. Nor does the fact that the conscious or intended act of some other person produces it take from such injury its character of an accident or casualty." [12] The court concludes that the insurance against casualty under the laws of that state has no reference whatever to other than property losses, as distinguished from losses by personal injury, or those through accidents resulting in bodily injury or death, and insurance against loss by burglary was held included within the words "other casualty" under the Code.[13]

§ 9a. Definition of employers' liability or indemnity insurance.—An employers' liability or indemnity insurance is a contract which, for a consideration or premium and for a specified term, insures an employer against liability to an employee for damages, or which agrees to indemnify the employer for the loss or damages actually sustained by him, by reason of his liability to the employee.[14] This insurance is considered a distinct branch of accident insurance.[15] The usual provision seems to be one whereby the insurer

[12] *Citing* Richards v. Travelers Ins. Co. 89 Cal. 170, 23 Am. St. Rep. 455, 26 Pac. 762; Accident Ins. Co. v. Crandal, 120 U. S. 527, 30 L. ed. 740, 7 Sup. Ct. 685; Schneider v. Provident Life Ins. Co. 24 Wis. 28, 1 Am. Rep. 157.

[13] McClain's Iowa Code, sec. 1695, providing what kinds of insurance contracts might be made by companies organized under the laws of that State. The language of the court in concluding is as follows: "In State (ex rel. Clapp) v. Federal Investment Co. 48 Minn. 110, 50 N. W. 1028, 'casualty insurance' is said to have 'a well-defined meaning as insurance against loss through accidents resulting in bodily injury or death.' But it is perfectly apparent that the insurance against casualty provided for by our state . . . has no reference whatever to injuries or losses of this class, for it is expressly treating of property losses, as distinguished from losses by personal injury. It comes rather within the definition of the phrase which is given by the supreme court of Massachusetts in Employers' Liability Assur. Corp. v. Merrill, 155 Mass. 404, 29 N. E. 529, where, in differentiating between accident companies and casualty companies, it classes under the latter head companies insuring against the explosion of steam boilers and breaking of plate glass. A casualty by which a loss of property is occasioned is not necessarily restricted to a conflagration by which the property is consumed, and we can see no reason why, in the absence of other restrictive provisions in the statute, it may not as well include lightning, tornado, flood, hail, or other force or violence by which such property is injured, destroyed, or lost without the agency or design of the owner."

[14] This insurance is classed as guaranty insurance. See 5 Universal Cyc. "guarantee companies," p. 327, article by Clarence H. Kelsey. *Considered* in note 19, p. 56, § IX. herein.

[15] Employers' liability "is insurance taken out by an employer to protect him against loss on account of injury to his employees while engaged in his service. It is recognized as a distinct class of the accident in-

agrees to indemnify the employer, or assured, against loss from common law or statutory liability for damages on account of bodily injuries, fatal or nonfatal, accidentally suffered by any employee or employees of the assured. Another condition or provision is that whereby the insurer agrees to reimburse or indemnify the assured only for losses actually sustained and paid by him in satisfaction of a judgment after a trial of the issue, and it requires the action to be brought by assured himself.[16] The nature or character

surance business, and yet it is common knowledge that most accident insurance companies carry a line of employers' liability." Travelers Insurance Machine Co. v. Travelers Ins. Co. 142 Ky. 523, 531, 134 S. W. 877, 881, per Lassing, J. Employers' liability is accident insurance. Employers' Liability Assur. Corp. v. Merrill, 155 Mass. 404, 406, 29 N. E. 529. "Employers' Liability" is a descriptive term generally used to designate a certain well-known branch of the insurance business. Employers' Liability Assur. Corp. Ltd. v. Employers' Liability Ins. Co. 16 N. Y. Supp. 397, 61 Hun (68 N. Y. Supr. Ct.) 552, 10 N. Y. Supp. 845, 24 Abb. N. C. 368, case of action to enjoin use of name. Employers' liability insurance is but a branch of accident and casualty insurance, and a foreign company, in the absence of restrictive words in its charter, may engage in the former business under an authority to do the matter. Metropolitan Casualty Ins. Co. v. Basford (1913) 31 S. Dak. 149, 139 N. W. 795, under S. Dak. Laws 1911, c. 176, amd'g Laws 1905, c. 72. See People v. Ætna Life Ins. Co. — Ill. —, 35 Chicago Leg. N. 423, 27 Nat. Corp. Rep. 6.

Insurance against liability for accidents to third person;—employer's liability. "Under a policy of this description the insurance company undertakes to indemnify the assured against his liability to pay damages and costs, in case any person may sustain injury by accident, and claim compensation against the assured." 17 Earl of Halsbury's Laws of Eng. "Insurance," p. 571.

As to insurance of claims arising under workmen's compensation act of 1906 in England, see Wilkinson v. Car & General Ins. Corp. 108 L. T. 512. On insurance against injuring property or person of third person as indemnity or liability insurance see note in 48 L.R.A.(N.S.) 184. On injuries covered by employer's indemnity policy, see notes in 30 L.R.A. (N.S.) 1192; L.R.A.1915C, 155.

[16] *Arkansas.*—American Employers' Liability Ins. Co. v. Fordyce, 62 Ark. 562, 54 Am. St. Rep. 305, 36 S. W. 1051 (agreement to pay "all damages with which the insured might be legally charged, or required to pay, or for which it might become liable;" construed).

California.—Taxicab Motor Co. v. Pacific Coast Casualty Co. 73 Wash. 631, 132 Pac. 393 (what constitutes payment of judgment).

Maine.—Fry v. Bath Gas & Electric Co. 97 Me. 241, 94 Am. St. Rep. 500, 59 L.R.A. 444, 54 Atl. 39, 32 Ins. L. J. 656 (construing both provisions).

Minnesota.—Kennedy v. Fidelity & Casualty Co. 100 Minn. 1, 9 L.R.A. (N.S.) 478, annot. 110 N. W. 97 (last above clause construed); Anoka Lumber Co. v. Fidelity & Casualty Co. 63 Minn. 286, 30 L.R.A. 689, 65 N. W. 353.

Missouri.—Conqueror Zinc & Lead Co. v. Ætna Life Ins. Co. 152 Mo. App. 332, 133 S. W. 156, 40 Ins. L. J. 721 (clauses construed).

New Hampshire. — Sanders v.

of this class of insurance may be further illustrated by certain clauses in the different contracts which cover liability for such injuries as are sustained: While the employee is on duty; or while prosecuting his work; or while on duty in the occupation specified;

Frankfort Marine, Accident & Plate Glass Co. 72 N. H. 485, 101 Am. St. Rep. 688, 57 Atl. 655 (last clause construed).

New Jersey.—Travelers Ins. Co. v. Moses, 63 N. J. Eq. 260, 92 Am. St. Rep. 663, 49 Atl. 720 (clauses construed); Ross v. American Employers' Liability Ins. Co. 56 N. J. Eq. 41, 38 Atl. 22 (undertaking was "that said company will pay to the insured all damages with which the insured may be legally charged under the common law, or any statute [not exceeding the amounts hereinafter limited], for, or by reason of, any accidental injuries, fatal or otherwise, happening to any employee or employees of the insured").

Oregon.—Fenton v. Fidelity & Casualty Co. 36 Ore. 283, 48 L.R.A. 770, 56 Pac. 1096 (clauses construed; when indemnity is created).

Tennessee.—Cayard v. Robertson & Hobbs, 123 Tenn. 382, 30 L.R.A. (N.S.) 1224, 131 S. W. 864, 40 Ins. L. J. 144 (clauses construed; also that employee could not sue indemnity company though employer insolvent); Finley v. United States Casualty Co. 113 Tenn. 592, 83 S. W. 2, 34 Ins. L. J. 179 (clauses construed).

Washington.—Seattle & San Francisco R. & Nav. Co. v. Maryland Casualty Co. 50 Wash. 44, 18 L.R.A. (N.S.) 121, 96 Pac. 509 (last clause construed).

Wisconsin.—Stenborn v. Brown-Corliss Engine Co. 137 Wis. 564, 20 L.R.A.(N.S.) 956, 119 N. W. 308 (last clause construed); Hoven v. Employers' Liability Assur. Corp. 93 Wis. 201, 32 L.R.A. 388, 67 N. W. 46 (agreement to pay "all sums for which it shall become liable to its employees," construed).

Another form is "against loss by reason of liability imposed by law upon the assured for damages on account of bodily injuries" suffered by any employee through accident, etc. Also that no action shall lie against insurer for loss "unless it shall be brought by the assured for loss actually sustained and paid in money by him after actual trial of the issue," with an absolute right in the company to determine whether an appeal should be taken. Saratoga Trap Rock Co. v. Standard Accident Assoc. 128 N. Y. Supp. 822, 143 App. Div. 852. See also London Guarantee & Accident Ins. Co. v. Morris, 156 Ill. App. 533 (first above clause does not cover injuries suffered by child *employed in violation of law.*) See as to exception of loss or expense arising on account of, or resulting from injuries or death to or caused by any person *employed in violation of law*, Buffalo Steel Co. v. Ætna Life Ins. Co. 141 N. Y. Supp. 1027, 156 App. Div. 453 (aff'g 136 N. Y. Supp. 977), aff'd (mem.) 215 N. Y. 638. Insurance against loss to by reason of injury to third persons while employee violating city speed ordinance, *not against public policy.* Taxicab Motor Co. v. Pacific Coast Casualty Co. 73 Wash. 631, 132 Pac. 393. As to excepted loss or expense for injuries or death caused by *failure of assured to observe any statute affecting safety of persons*, see Butler Bros. v. American Fidelity Co. 120 Minn. 157, 44 L.R.A.(N.S.) 609, 139 N. Y. 355).

Massachusetts.—Hood & Sons v. Maryland Casualty Co. 206 Mass. 223, 30 L.R.A.(N.S.) 1192, and note, 138 Am. St. Rep. 379, 92 N. E. 329 (first clause construed).

Minnesota.—Butler Bros. v. American Fidelity Co. 120 Minn. 157, 44 L.R.A.(N.S.) 609, and note 139 N.

or while actually engaged in the performance of duty in the trade or occupation for which employed; or only for loss or liability for injuries sustained during the immediate doing of certain construction work;[17] or while engaged in certain specified work within certain territorial limits;[18] or for injuries in a designated place;[19] or while on duty at the places, or at any of the places specified; or covering all operations connected with the business including certain designated classes of employees;[20] or against liability on all inside or shop work, and general liability on outside work, including liability to persons other than employees;[1] or for injuries accidentally suffered by any person not employed by assured, while at or about certain described work of assured during the prosecution of the latter's work at the place or places specified;[2] or for injuries accidentally suffered by any person or persons not employed by assured, in and during the period of construction of certain specified work;[3] or to cover, in addition to employees, the liability of assured to the public only for personal injuries, only caused by as-

W. 355 (loss to be paid in money, etc.); Patterson v. Adan (Philadelphia Casualty Co.) 119 Minn. 308, 48 L.R.A.(N.S.) 184, and note, 138 N. W. 281 (*automobile policy;* injury etc. caused by: loss payable in money, etc.: applies only when insurer denies liability and refuses to defend).

North Carolina.—Cannon Manufacturing Co. v. Employers Indemnity Co. 161 N. C. 19, 76 S. E. 536 (to reimburse for loss sustained and paid in money under a final judgment: what constitutes final judgment).

Ohio.—Garrett v. Travelers Ins. Co. 20 Ohio Dec. 181, 55 Ohio L. Bull. 181. (Last above clause construed as one of indemnity against loss, etc.: injured employee cannot sue).

Rhode Island.—Herbo-Phosa Co. v. Philadelphia Casualty Co. 34 R. I. 567, 84 Atl. 1093 (what constitutes payment though not "in money").

See Taxicab Motor Co. v. Pacific Coast Casualty Co. 73 Wash. 631, 132 Pac. 393, *what constitutes payment of judgment;* case of insurance against loss on account of bodily injuries or death accidentally suffered by any person from *operation of taxicabs.*

[17] Construed in Camden & Atlantic Teleph. Co. v. United States Casualty Co. 227 Pa. 242, 75 Atl. 1077. Contract here covered only persons not employed by assured in and during certain construction work.

[18] Construed in connection with the right to recover additional premiums, in Pacific Coast Casualty Co. v. Home Teleph. & Teleg. Co. 11 Cal. App. 712, 106 Pac. 262.

[19] Construed in Ætna Life Ins. Co. v. DuParquet, Huot & Moneuse Co. 65 Misc. 551, 120 N. Y. Supp. 759.

[20] Construed in Humes Const. Co. v. Philadelphia Casualty Co. 32 R. I. 246, 79 Atl. 1. See also Hoven v. West Superior Iron & Steel Co. 93 Wis. 201, 32 L.R.A. 388, 67 N. W. 46.

[1] Construed in Cornell v. Travelers Ins. Co. 175 N. Y. 239, 67 N. E. 578, 32 Ins. L. J. 769. See also Butler Bros. v. American Fidelity Co. 120 Minn. 157, 44 L.R.A.(N.S.) 609, 139 N. W. 355.

[2] Construed in Henderson Lighting & Power Co. v. Maryland Casualty Co. 153 N. C. 275, 30 L.R.A. (N.S.) 1105, and note, 69 S. E. 234.

[3] Construed in Camden & Atlantic Teleph. Co. v. United States Casualty Co. 227 Pa. 242, 75 Atl. 1077.

sured or his workmen;[4] or the policy may be one indemnifying plaintiff against loss from liability imposed by law upon assured for damages on account of bodily injuries, including death resulting therefrom, accidentally suffered by any person or persons whomsoever, while within or upon the described premises or the premises or wings adjacent thereto.[5] The contract may also agree to indemnify assured in a certain sum against liability for damages on account of fatal or nonfatal injuries accidentally suffered by employees, and also against liability to workmen employed by other contractors and the public, arising out of personal injuries caused by them or their workmen, but not caused by a subcontractor or subcontractor's workmen.[6] An indemnity policy may also be *issued to a carrier* to protect it against loss on account of injuries sustained by its employees.[7] A liability policy may also agree to indemnify against loss on account of accidental injuries suffered by *persons using elevators.*[8] A casualty policy against *explosion of steam boilers* may cover employers, employees and other persons; as, where it is taken out to indemnify the employer against injury or loss of life, "whether to the assured, to employee, or to any other person or persons," "payable to the assured for the benefit of the injured person or persons, or to their legal representatives in case of death, and not contingent upon the legal liability of the assured."[9] But a law authorizing insurance of employers against loss

[4] Construed in Creem v. Fidelity & Casualty Co. 126 N. Y. Supp. 555, 141 App. Div. 493, 40 Ins. L. J. 600; s. c. 118 N. Y. Supp. 1102, 134 App. Div. 949; s. c. 116 N. Y. Supp. 1042, 132 App. Div. 241. See Lewinthau v. Travelers' Ins. Co. 61 Misc. 621, 113 N. Y. Supp. 1031.

[5] Harbor & Suburban Bldg. & Savings Assoc. v. Employers' Liability Assur. Corp. 140 N. Y. Supp. 117, 79 Misc. 150. See also Graustein & Co. v. Employers' Liability Assur. Corp. Ltd. 214 Mass. 421, 101 N. E. 1073.

[6] Tolmie v. Fidelity & Casualty Co. 88 N. Y. Supp. 717, 95 App. Div. 352. Insured was a contractor for erection of a city building.

[7] New Orleans & C. R. Co. v. Maryland Casualty Co. 114 La. 154, 6 L.R.A.(N.S.) 562 and note, 38 So. 89.

[8] Nesson v. United States Casualty Co. 201 Mass. 71, 87 N. E. 191. See also Scarritt Estate Co. v. Casualty Co. of America, 166 Mo. App. 567, 149 S. W. 1049.

Elevator policy to indemnify owner of legal title to building from liability for damages resulting from accident or injury in elevator, when only record or legal owner and not beneficial owner, within protection of policy, the latter owner not being named therein. McCarl v. Travelers Ins. Co. 151 Iowa, 669, 132 N. W. 12, 40 Ins. L. J. 1820.

[9] Embler v. Hartford Steam Boiler Inspection & Ins. Co. 158 N. Y. 431, 44 L.R.A. 512, 53 N. E. 212, aff'g 40 N. Y. Suppl. 450, 8 App. Div. 186. In this case recovery against an employer for an employee's death precluded recovery by latter's legal representatives. Policy was issued prior to the New York statute of 1892, under which an employer was expressly authorized to take out a policy of accident insurance covering his employees collectively, for the

in consequence of accidents or casualties to employees or other persons or to property or both, resulting from employees' acts occurring in connection with the transaction of business or from the operation of machinery connected therewith, does not authorize the issuance of a policy covering liability imposed by law by reason of bodily injuries, including death accidentally sustained by reason of maintenance, use, etc., of *automobiles.*[10]

In policies limited to employees' injuries, *the premium* is based upon or bears a direct ratio to the gross amount of wages paid by the insured.[11]

§ 10. Definition of endowment insurance.—Endowment insurance is, in general, a contract to pay assured a specified sum of money at the termination of a certain designated period, if he is then living, but to a person named if assured dies before the specified time.[12] There are, however, several forms of endowment pol-

benefit of such as might be injured. The Insurance Law (Laws 1892, c. 600) sec. 55.

[10] American Fidelity Co. v. Bleakley, 157 Iowa, 442, 138 N. W. 508. On insurance against liability for automobile accidents, see notes in 44 L.R.A.(N.S.) 73; 51 L.R.A.(N.S.) 584; L.R.A.1915E, 575.

As to different kinds of insurance other than life, authorized in Iowa, see Iowa Code, Suppl. Annot. 1907, p. 356, sec. 1709; acts 1913, p. 150, c. 143, p. 151, c. 144, Id. pp. 165–171, c. 147 (mutual benefit—under Employers' liability and workmen's compensation act).

[11] So, in Palmer & Hardin v. Fidelity & Casualty Co. 137 Ky. 139, 125 S. E. 270, 39 Ins. L. J. 554; Pacific Coast Casualty Co. v. Home Teleph. & Teleg. Co. 11 Cal. App. 712, 106 Pac. 262; Empire State Surety Co. v. Moran Bros. Co. 71 Wash. 171, 127 Pac. 1104, case of action to recover balance of premium: amount of premium was based upon entire amount of compensation paid to employees: "kind of business" and "kind of work" defined in connection with rate of premium.

[12] State (ex rel. Clapp) v. Federal Investment Co. 48 Minn. 110, 111, 50 N. W. 1028.

See the following cases:

Alabama.—Hopkins v. Northwestern National Life Ins. Co. 41 Wash. 592, 83 Pac. 1019, 35 Ins. L. J. 267, 269 (contract here provided unequivocally for endowment policy and for endowment fund, expressly providing that if holder of certificate kept same in force and survived until a certain date he should surrender certificate to association and receive a certain sum from the endowment fund; question was one of waiver of right to endowment).

California.—Briggs v. McCullough. 36 Cal. 542, 550, 551.

Illinois.—Rockhold v. Canton Masonic Benev. Soc. — Ill. —, 19 N. E. 710, aff'd 129 Ill. 440, 2 L.R.A. 420. 21 N. E. 794 (contract was to pay insured upon arriving at seventy years of age, or after he had been a member in good standing for twenty-five years, or, upon his death, to his wife if living, if not, then to his children or legal representatives; benevolent society held to have no power to issue endowment insurance; see, in this connection, Boyd v. Southern Mutual Aid Asso. 145 Ala. 167, 41 So. 164).

Indiana.—Union Central Life Ins. Co. v. Woods, 11 Ind. App. 335, 37 N. E. 180, 26 Ins. L. J. 151 (*quoting* definitions from And. L. Dict. and Bliss on Ins. [2d ed.] p. 6, sec. 6).

Missouri.—State (ex rel. Supreme

icies, or rather, plans of endowment insurance.[13] So a policy may be issued on what is called the endowment plan combining an insurance of the life and an investment of the moneys paid.[14]

§ 11. Definition of tontine insurance.—Tontine insurance, strictly so called, derives its name from Tonti, an Italian, to whom its invention is accredited. It is based upon survivorship among a number who share an annuity, or rather participate in an apportionment

Lodge of Fraternal Union of America) v. Orear, 144 Mo. 157, 45 S. W. 1081. (In this case the time for payment was arbitrarily fixed with reference to the age of assured. The amount being payable at the end of a fixed period was, therefore, held to be an endowment insurance.)

Endowment policy is one payable at a certain time at all events, or sooner if the party should die sooner; the premiums all to be paid within a certain limited time; amount payable to the person whose life is insured or to his assigns on a day certain, or if he should die before that time, then to be payable to a person or persons designated. Carr v. Hamilton, 129 U. S. 252, 253, 32 L. ed. 669, 9 Sup. Ct. 295.

Endowment insurance has been defined as "that quasi insurance business which really partakes more of the nature of investment or savings bank business." Fawcett v. Supreme Sitting of the Order of the Iron Hall, 64 Conn. 170, 205, 24 L.R.A. 815, 29 Atl. 614, dissenting opinion of Hammersley, J.

When policy not endowment insurance. In Haydel v. Mutual Reserve Fund Life Assoc. 104 Fed. 718, 44 C. C. A. 169, 30 Ins. Law. Jour. 289, 291–293, certain *"five-year Combination option policies"* were claimed to be endowment policies because "the company undertook to pay or make return of a specified sum of money at the termination of certain designated periods during the lifetime of the assured," but they were declared not endowment policies in that they lacked some of the essential features of such contracts, and that they were not so far variant from ordinary policies issued on the co-operative or assessment plan as to warrant a ruling that a company, restricted to business on the assessment plan, exceeded its power in issuing them.

When policy not an endowment or life policy, but an industrial or accident insurance policy, see Pride v. Continental Casualty Co. 69 Wash. 428, 125 Pac. 787, under Rem. & Bal. Code, secs. 6155, 6159.

[13] As to reserve dividend plan of W. P. Stewart, see Fuller v. Metropolitan Life Ins. Co. 37 Fed. 163.

Participating tontine endowment policy upon "reserve dividend plan" —form of, see Fuller v. Metropolitan Life Ins. Co. 70 Conn. 647, 656–659, 41 Atl. 4. Most of these policies were for a term of ten years.

[14] Miller v. Campbell, 140 N. Y. 457, 462, 463, 35 N. E. 651. In this case the policy differed from an ordinary life insurance, a certain period being fixed within which the obligation of the insurer accrued to the wife, children, or personal representatives, and they had no rights to receive payment under it beyond that period. It combined an insurance of the life and an investment of the moneys paid, in that it provided for a state of widowhood or orphanage in case of the death of the person whose life was insured pending a specified period, and it also secured to the person effecting the insurance upon his life for a certain period for the benefit of his family, a presumably profitable return of the original investment of his moneys with the insurer, and might thus be regarded as a provision for an advanced period of his life.

of the profits upon the lapse of certain intervals, and the sum representing the share of one deceased is enjoyed by those who survive to this extent, that the profits to be apportioned among the survivors must, theoretically at least, increase as the deaths increase, until final division made among the survivors, or the last survivor may take the whole according as the terms of the agreement may provide.[15] A tontine contract of insurance is more than a policy of life insurance. In addition it is an agreeennnt on the part of the insurer to hold all the premiums collected on the policies forming

[15] See Pierce v. Equitable Life Assur. Soc. 145 Mass. 56, 1 Am. St. Rep. 433, 12 N. E. 858, per Devens, J.; Uhlman v. New York Life Ins. Co. 109 N. Y. 421, 4 Am. St. Rep. 482, 17 N. E. 363; Jacks' Introduction to History of Life Ins. (ed. 1912) pp. 211 et seq. "A species of life annuity propounded by Lorenzo Tonti, about 1650, as a mode by which governments might obtain loans. The general idea is that property is loaned, owned, or invested for the benefit of a certain number of persons who at first receive its income, the share of a deceased member increasing the sum divisible among the survivors; the last survivor taking the whole income or principal, as the case may be:" Anderson's Dict. of Law 1039, title "Tontine." "A species of association or partnership formed among persons who are in receipt of perpetual or life annuities, with the agreement that the shares or annuities of those who die shall accrue to the survivors:" *Black's* Law Dict. 1178, title "Tontine." "Besides the provision for payment by the insured on the happening of the event on which the liability of the insurer becomes consummated, provision is sometimes made for appropriation for the benefit of the insured of dividends or profits from the business conducted by the insurer. This is commonly done in what is known as a 'tontine policy,' wherein provision is made for the distribution of such profits at the expiration of a specified period:" Cooke on Life Ins. (ed. 1891) 200, 201, sec. 110. "A life annuity or a loan raised on life annuities with benefit of survivorship:" 2 Rapalje & Lawrence's Law Dict. 1280, title "Tontine." See definition in *Bouvier's* Law Dict. "Insurance," *quoted* in Romer v. Equitable Life Assur. Co. 102 Ill. App. 621. See, also, 2 Abbott's Law Dict. 572; Wharton's Law Lexicon, 826, title "Tontine."

The system of Tontines was "invented by Lorenzo Tonti or Tontine, a Neapolitan, in 1653. The plan was this: A certain number of persons clubbed together a specified sum (without reference to age or sex) annually, and at the expiration of each year the interest of this fund was divided among the subscribers who were living; and so on from year to year, until the last survivor received the whole interest. This novel scheme had all the appearance of a profitable investment, until an inquiry was instituted to ascertain what became of the principal sum subscribed, as the interest of the fund only was awarded. This was fatal to the invention. . . . A limited number of years was fixed for the continuation of the tontine, and the amount originally subscribed received by the member who survived. . . . In 1689, the last survivor of a tontine in France was a widow, who at the period of her death, at the age of ninety-six, enjoyed an income of 73,500 livres (£3,062, 10s.) for her original subscription of 300 livres, of the value of only £12, 10s." Burt's Life Assur. Historical & Statistical, etc. p. 45.

that class for the specified period, which is called the tontine period or period of distribution, and after paying death losses, expenses, and other losses out of the fund so accumulated, to divide the remainder among those who are alive at the end of the tontine period, and who have maintained their policies in force.[16] In this, as in other kinds of insurances, several plans have been devised which differ in a greater or less degree from "Tontine" insurance strictly so called.[17]

[16] Equitable Life Assur. Soc. v. Winn, 137 Ky. 641, 648, 28 L.R.A. (N.S.) 558 and note, 126 So. 153.

[17] "*Tontine savings fund policy plan.*" Provisions were in substance as follows: Insurance was during natural life. If the person whose life was insured should die before a certain specified time, said amount was to be paid to his surviving children share and share alike; for nonpayment of premium, policy was to lapse. Prior to the completion of the tontine dividend period as above stated, no benefit could be derived from the policy by either the assured or his beneficiaries except in case of assured's death. Said policy had no surrender value, either in cash or in a paid-up policy. No dividends were payable upon the policy except assured survived the completion of the tontine dividend period, and unless the policy was then in force.. All surplus or profits derived from such policies, on said plan, as should cease to be in force before completion of their respective tontine dividend periods, were to be apportioned equitably among such policies as should complete their tontine dividend periods. Certain options were to accrue to the legal holder or holders of the policy upon assured's death, or upon the termination of the tontine dividend period, such as withdrawal in cash of policy's entire share of the assets; receiving a paid-up policy; continuing the insurance and purchasing an annuity; and withdrawal in cash of accumulated surplus and continuing policy in force on ordinary plan. It would seem that prior to the completion of the tontine dividend period the policy was an ordinary life policy. Columbia Bank v. Equitable Life Assur. Soc. 80 N. Y. Supp. 428, 79 App. Div. 601 (case of action in aid of an attachment) rev'g 61 App. Div. 594, 70 N. Y. Supp. 767. See also as to Tontine Savings Fund plan with term of fifteen years; Equitable Life Assurance Soc. v. Spellman, 22 Ky. L. Rep. 183, 56 S. W. 710, 29 Ins. L. J. 651, question as to right to paid up policy and waiver. Gadd v. Equitable Life Assurance Soc. (U. S. C. C.) 97 Fed. 834.

"*Tontine savings fund plan*" considered with reference to right to surrender value or paid-up insurance, and forfeiture for nonpayment of premiums see Danner v. Equitable Life Assurance Soc. 141 N. Y. Supp. 442, 156 App. Div. 562.

Fifteen-year tontine investment plan. If insured survived said period, the proceeds or value were nevertheless to be paid; no dividend was to be allowed or paid on the policy unless insured survived until completion of the tontine dividend period, and unless the policy was then in force; surplus or profits derived from such policies on said plan as should not be in force at the completion of their respective tontine dividend periods were to be apportioned equitably among such policies of the same date as should complete their tontine dividend periods; premiums were paid semi-annually in advance. If assured survived the tontine period, and the policy was then in force, the face of the policy was to be paid and also a share of all accrued dividends on the policy. New York

An insurance company which by a policy agrees that the surplus or profits derived from policies on the tontine savings fund assurance plan, that shall cease to be in force before the completion of their tontine dividend periods, shall be apportioned equitably among such policies as shall complete their tontine dividend periods, does not hold such surplus or profits as a trust. The amount to be apportioned is not a dividend in the limited sense in which that word is used in its application of dividends to stockholders. The assured is not a member of the corporation, but its creditor who has contracted with it. At the end of the fixed period, having complied with the contract on his own behalf, and made the payments required, he is entitled to have apportioned to him his share of a certain fund to be computed.. This share, or its equivalent in value, is the assured's own property.[18] In Bogardus v. New York Life In-

Life Ins. Co. v. Miller, 22 Ky. L. Rep. 230, 56 S. W. 975, 29 Ins. L. J. 1033.

"Free tontine policy" maturing in ten years. If insured then living and the policy in force he was entitled to certain options, among them being the right to withdraw in cash such policy's entire share of the assets; that is, of the accumulated reserve and in addition thereto the surplus apportioned by the society to such policy. Donoho v. Equitable life Assurance Soc. 22 Tex. Civ. App. 192, 54 S. W. 645, a case whether representations of agent as to surplus were false and fraudulent or a matter of estimate and opinion only. Held the latter.

"Tontine policy and tontine installment policy;" meaning of terms may be shown by oral evidence. Thompson v. Thorne, 83 Mo. App. 241.

Semi-tontine policy with option to purchase annuity, with other options if policyholder alive and policy in force at end of tontine period. See Timlin v. Equitable Life Assurance Soc. 141 Wis. 276, 124 N. W. 253, 40 Ins. L. J. 295 (case of effect of writing attached to policy, and nature of relation of parties to contract).

Fifteen-year semi-tontine policy with certain options at termination of accumulative period. See Langdon v. Northwestern Mutual Life Ins. Co. 199 N. Y. 188, 92 N. E. 440.

Where tontine insurance void as gambling contract. Fuller v. Metropolitan Life Ins. Co. 70 Conn. 647, 41 Atl. 4.

Tontine debenture certificates. Contracts of investment security debentures or certificates, when contrary to public policy and unlawful. State v. Interstate Savings Inv. Co. 64 Ohio St. 283, 52 L.R.A. 530, 60 N. E. 220.

[18] Pierce v. Equitable Life Assur. Soc. 145 Mass. 56, 61, 62, 1 Am. St. Rep. 433, 12 N. E. 858, per Devens, J.

Right to accounting in equity of holder of matured tontine dividend policy, see Peters v. Equitable Life Assur. Soc. 200 Mass. 579, 86 N. E. 885 (under Rev. Laws Mass. c. 159, sec. 3, cl. 5) See also Everson v. Life Assur. Soc. 71 Fed. 570, 18 C. C. A. 251, aff'g 68 Fed. 258, semi-tontine policy (*quoting* from Uhlman v. New York Life Ins. Co. 109 N. Y. 421, 432, 17 N. E. 363, and *cited* in Grieb v. Equitable Life Assur. Soc. [U. S. C. C.] 189 Fed. 498, 502, which is aff'd [U. S. C. C. A.] on opinion below in 194 Fed. 1021); Hunton v. Equitable Life Assur. Soc. (U. S. C. C.) 45 Fed. 661; Equitable Life Assurance Soc. v. Winn, 137 Ky. 641, 28 L.R.A.(N.S.) 558, 126 S. W. 153; Hackett v. Equitable Life As-

surance Company [19] the policy was on the tontine or "ten-year dividend system;" annual premiums were to be paid each year for a ten years' policy, to be voided in case of default, dividends to be allowed assured only in case he survived the ten-year dividend period, the policy being then in force. Aside from the provision for payment of amount at death, it was stipulated, in case of surviving the period specified and the policy remained in force, that there should be a payment in cash or annuity bonds of a proportionate share of dividends, accretions, etc., from a fund to be created by a certain class of policyholders, consisting of those effecting insurance on the same plan in the same year, and that the surplus and profits from certain funds of that class should be equitably apportioned among survivors of that class holding policies, and it was held that the policy did not require a separate investment of the funds of that class to which the policy belonged, and that the consent of assured to placing of dividends in a reserve fund did not extend its obligations in this respect. The court said: "No express obligations are assumed by the defendant, either in the policy or by the application, with reference to the management or investment of the funds in question, and the tontine plan is referred to as a known and understood system of insurance pursued by all life companies of similar character to determine in a certain contingency the extent of the company's liability to a special class of its policyholders. It contemplates the union of the interests of a large number of persons, and the administration of a fund for their mutual benefit, and from its very nature is incapable of being molded and managed to meet the special requirements of particular individuals. Upon the accession of every person to this class, he becomes interested in the contributions of every other member, and neither of them can afterward withdraw his contribution without injury to the rights of all others interested in the fund. . . . We therefore think that the use of these moneys in connection with its other funds, and their investment and management according to the mode which in the judgment of the defendant was best adapted to promote the interests of all of its policyholders, was entirely legiti-

sur. Soc. 63 N. Y. Supp. 1092, 50 App. Div. 266, aff'g 63 N. Y. Supp. 847, 30 Misc. 523.

Tontine policy—Apportionment by society not reviewable by courts in action to recover distributive share without showing fraud or irregularity in procedure. Gadd v. Equitable Life Assurance Soc. (U. S. C. C.) 97 Fed. 834, 30 Ins. L. J. 281.

When accounting unnecessary and contention that remedy in equity untenable. Hackett v. Equitable Life Assur. Soc. 63 N. Y. Supp. 847, 30 Misc. 523, aff'd 63 N. Y. Supp. 1092, 50 App. Div. 260, case of complaint at law by policyholder on *"semi-tontine" plan* to reach reserve and surplus, — demurrer.

[19] 101 N. Y. 328, 4 N. E. 522, per Ruger, C. J.

mate, and in accordance with the true meaning of the contract. The tontine plan undoubtedly contemplated such action on the part of the insurers as would enable them at the expiration of the ten-year dividend period to determine the aggregate of such dividends, accretions, and interest, and to divide the same among the survivors of the class to which they belonged according to their respective rights therein; but it seems to us that it does not involve the necessity of keeping separate from its other funds either the premiums paid by such class or their profits or accumulations, or the duty of separately handling, investing, or accumulating such funds." [20]

§ 12. Definition of guaranty insurance.—Guaranty insurance is a contract whereby one for a consideration agrees to indemnify another against loss arising from the want of integrity, fidelity, or insolvency of employees and persons holding positions of trust, against insolvency of debtors, losses in trade, losses from nonpayment of notes and other evidences of indebtedness, or against other breaches of contract. It includes other forms of insurance which are specifically classified, such as "fidelity guaranty," "credit guaranty," etc.[1] As we have seen, the first English statute covering

[20] As to uncertainty of amount to be received, see Avery v. Equitable Life Assur. Soc. 117 N. Y. 451, 459, 23 N. E. 3, per Gray, J.; Uhlman v. New York Life Ins. Co. 109 N. Y. 421, 430, 431, 4 Am. St. Rep. 482, 17 N. E. 363, per Peckham, J.

[1] See Bunyon on Ins. 107; 9 Am. & Eng. Ency. of Law, 65; 13 Ency. Britannica, 161. See People (ex rel. Kasson) v. Rose, 174 Ill. 310, 312, 44 L.R.A. 124, 51 N. E. 246; American Surety Co. v. Folk, 124 Tenn. 139, 135 S. W. 778, 40 Ins. L. J. 1074; Hogan, In re, 8 N. Dak. 301, 73 Am. St. Rep. 759, 45 L.R.A. 166, 78 N. W. 1051, 28 Ins. L. J. 520.

For illustrative cases showing kind of policy, see the following: Crystal Ice Co. v. United Surety Co. 159 Mich. 102, 123 N. W. 619 (policy indemnified against loss through or by default of employee); Rankin v. United States Fidelity & Guaranty Co. 86 Ohio, 267, 99 N. E. 314 (bond to indemnify bank for a certain period against dishonesty or fraud of its cashier); Atlantic City Aerie No. 64, Fraternal Order of Eagles v. International Fidelity Ins. Co. 83 N. J. L. 583, 85 Atl. 325 (bond to indemnify fraternal order for any loss it might sustain by reason of the dishonesty of its treasurer with certain conditions or requirements).

A policy may insure against dishonesty or fraud of a factor of insured in his management of money intrusted to him to buy merchandise. Clifton Manufacturing Co. v. United States Fidelity & Guaranty Co. 60 S. Car. 128, 38 S. E. 790.

As to cases where policy protects against pecuniary loss resulting from fraud or dishonesty of an employee or private corporation officer amounting to embezzlement or larceny, see American Bonding & Trust Co. v. Burke, 36 Colo. 49, 85 Pac. 692; Canton National Bk. v. American Bonding & Trust Co. 111 Md. 41, 73 Atl. 684; Champion Ice Manufacturing & Cold Storage Co. v. American Bonding & Trust Co. 115 Ky. 863, 103 Am. St. Rep. 356, 75 S. W. 197, 32 Ins. L. J. 810; Farmers State Bk. v. Title Guaranty & Trust Co. 133 Mo. App. 705, 113 S. W. 1147; United American Fire Ins. Co. v. American Bonding Co. 146 Wis. 573, 40

guarantee insurance related to fidelity guarantee, or the insuring the integrity, fidelity, or honesty of persons holding offices of public trust and concerned with the receipt, control, or disbursement of public moneys.[2]

A credit indemnity or a guaranty policy or agreement may provide that general assignments of, or attachments against, insolvent debtors, the absconding of debtors, or executions returned *nulla bona* shall constitute insolvency, and that, the appointment of a receiver, a sell out on the death of a debtor does not establish insolvency.[3]

"Loss sustained by the insolvency of debtors" includes losses upon sales made by insured to debtors who have made a general assignment for the benefit of their creditors. The scheme of indemnity may cover two classes of losses, one an initial loss to be first

L.R.A.(N.S.) 661, 131 N. W. 994, 40 Ins. L. J. 805.

Larceny or embezzlement defined. See John Lee Clarke v. Fidelity & Deposit Co. 73 Wash. 62, 131 Pac. 468. "Embezzlement" in policy construed same as in indictment. Debenhams (Lim.) v. Excess Ins. Co. 28 T. L. R. 505, Hamilton, J.

Bank cashiers guarantee bond not against public policy because it limits insurance liability to losses occurring and discovered within specified time. Ballard County Bank's Assignee v. United States Fidelity & Guaranty Co. 150 Ky. 236, 150 S. W. 1.

[2] See § IX. herein.

In New York, guarantee corporations are divided into: (1) Title guarantee; (2) Securities guarantee; and (3) credit guarantee corporations. See § 13 herein. See also § X. herein.

In Georgia, fidelity insurance companies insure against losses caused by the defalcation, default, neglect, or dishonesty of a trustee, officer of the law, officers of courts, agents, or other employees and such other persons as may be required to give bonds, or other obligations as individuals do who sign as sureties. Ga. Code (Civ.) 1911, p. 665, sec. 2550 (sec. 2141).

In Louisiana an act was passed in 1894, entitled "An Act to Authorize Certain Corporations to Become Surety upon Bonds Required to be Furnished by Law, and Prescribing the Conditions under Which They May Do So." Wolff's Const. & Laws La. 1904, p. 896 (act 41, 1894, p. 45). There is a statutory provision in that state as follows: "*Third*—To guarantee the fidelity of persons in positions of trust, private or public, and to act as *surety on official bonds,* and for the performance of other obligations." . . . "*Ninth*—to carry on the business commonly known as *credit insurance or guarantee*, either agreeing to purchase uncollectable debts, or otherwise to insure against loss or damage from the failure of persons indebted to the assured to meet their liabilities. Wolff's Const. & Rev. Laws La. 1904, p. 845.

Mr. Frost divides guarantee insurance into "fidelity," "commercial" and "judicial" insurances, and defines each. Frost on Guaranty Ins. (2d ed.) secs. 1, 2. Sec. 2 is quoted as to classification, and definitions noted in Cowles v. United States Fidelity & Guaranty Co. 32 Wash. 120, 98 Am. St. Rep. 838, 72 Pac. 1032, (case aff'd 37 Wash. 695, 79 Pac. 1134).

[3] Construed and insolvency defined in Stronse v. American-Credit Indem. Co. 91 Md. 244, 46 Atl. 328, 1063.

borne by assured, and the other a loss in excess of said initial sum, to be borne by the indemnitor, both resulting from the insolvency of debtors who owe the indemnified;—as where policy provides for an indemnity not exceeding a certain sum resulting from the insolvency of debtors over and above a net loss of a specified amount first to be borne by assured.[4]

A guaranty insurance bond may guarantee or secure the faithful performance of a private or public building contract;[5] or guarantee payment of all claims for labor or material on a construction contract;[6] and there may be an insurance of securities, or a contract to insure the payment of a sum of money deposited with a bank if the bank should default in paying the same.[7]

Policies of life insurance and ship policies are contracts for securing against losses to be incurred under circumstances entirely different from the loss contemplated under guaranty policies.[8]

§ 13. Definition of real estate and title insurance.—Title guaranty insurance is a contract whereby one agrees for a consideration

[4] People v. Mercantile Credit & Guarantee Co. 166 N. Y. 416, 419, 60 N. E. 24, rev'g 55 App. Div. 594, meaning of "*insolvency*," see Strouse v. American Credit-Indemnity Co. 91 Md. 244, 46 Atl. 328, 1063, 29 Ins. L. J. 980. See also Steinwender v. Philadelphia Casualty Co. 141 App. Div. 432, 126 N. Y. Supp. 271, 40 Ins. L. J. 128.

Validity of insurance against insolvency or credit insurance. In Minnesota the business of insuring against losses resulting from the insolvency of those to whom goods are sold on credit was authorized by Laws 1881, c. 123 (G. S. 1894, secs. 3331–3337, inclusive) entitled "An Act to Authorize and Regulate within this State the Business of Insurance Other than Life, Fire, and Marine," such enactment being broad enough to authorize any kind of insurance that is not against good morals or public policy. Hayne v. Metropolitan Trust Co. 67 Minn. 245, 59 N. W. 916. See also Genl. Stat. Minn. 1894, secs. 333 et seq. Credit insurance unlawful in Massachusetts. Claflin v. United States credit System Co. 165 Mass. 501, 52 Am. St. Rep. 528, 43 N. E. 293; Rosenbaum v. United States Credit-System Co. 64 N. J. L. 34, 44 Atl. 966.

[5] A. R. Shorthill Co. v. Ætna Indemnity Co. — Iowa, —, 124 N. W. 613; Hornel & Co. v. American Bonding Co. 112 Minn. 288, 33 L.R.A. (N.S.) 513, 128 N. W. 12, 40 Ins. L. J. 137; First National Bank v. School District, 77 Neb. 570, 110 N. W. 349 (school district); Illinois Surety Co. v. Hildebrand, 126 N. Y. Supp. 651 (municipal).

[6] Knennan v. United States Fidelity Guaranty Co. 159 Mich. 122, 123 N. W. 799.

[7] Dane v. Mortgage Ins. Corp. Law Rep. [1894] 1 Q. B. 54. Surety companies have legal right to insure payment of bank deposits. Report of Attorney General of New York (1893) p. 266.

And a bond may guarantee that a person against whom a judgment has been rendered will perform the judgment of the court. United States Fidelity & Guaranty Co. v. Barrett, 140 Ky. 697, 131 S. W. 796, what allegations sufficient to show breach of bond.

[8] Towle v. National Guardian Ins. Co. 7 Jur. (N. S.) 618, 623.

to guarantee or protect another's title to real estate,[9] or which insures against all loss or damage, not in excess of a specified sum, which assured may sustain by reason of existing defects or unmarketableness of title to a described estate, mortgage, or interest, or because of liens and encumbrances changing the same, as of the date of the policy, with certain exceptions; or by reason of defects in the title of a mortgagor in the mortgaged estate, or mortgage interest.[10]

[9] See Hogan, In re, 8 N. Dak. 301, 73 A. S. 759, 45 L.R.A. 166, 78 N. W. 1051, 28 Ins. L. J. 520. Mr. Richards says: "The Title Guarantee" & Trust Co. of New York by its policy obligates the insurer in substance to do three things for the protection of the insured: (1) To defend suits against the title at the expense of the insurer; (2) To pay adverse judgments therein rendered; (3) and, if the insured contracts to sell or if he negotiates a loan, and the title is refused, to test its validity in court at the expense of the insurer, and, if defeated, either to pay damages or else to take the property at the contract price where the insured has contracted to sell it or to make the loan where he has negotiated a loan." Richards on Ins. (3rd ed.) sec. 467, p. 653; Id. (ed. 1892) sec. 10, p. 14.

[10] *United States.*—Equitable Trust Co. v. Ætna Indemnity Co. (U. S. C. C.) 168 Fed. 433 (to insure titles of mortgagees of a builder and owner and of purchasers of buildings to be erected on the builder's land, to protect them from the owner's defaults in building operations, and from liens, the indemnity company being secured by bond executed by the owner to a trust company); Banes v. New Jersey Title Guarantee & Trust Co. 142 Fed. 957, 74 C. C. A. 127 (a policy or contract of guarantee against loss or damage which assured may sustain on account of existing defects of title to a mortgage interest, or because of liens and encumbrances affecting his interest at the date of guarantee and against all loss or damage not exceeding a certain amount); *California.*—Bothin v. California Title Ins. Co. 153 Cal. 718, 96 Pac. 500 (from all loss or damage not in excess of a certain sum which assured shall sustain by reason of defects of title of assured to the described estate or interest, or by reason of liens or encumbrances affecting the same on the date of the policy with certain express exceptions); *Minnesota.*—Place v. St. Paul Title Ins. & Trust Co. 67 Minn. 126, 64 Am. St. Rep. 404, 69 N. W. 706 (to indemnify not in excess of a certain amount against all loss or damage sustained by reason of defects in the title of mortgagors in the mortgaged estate with certain specified exceptions); *New York.*—Trenton Potteries Co. v. Title Guarantee & Trust Co. 176 N. Y. 65, 68 N. E. 132 (against all loss or damage not in excess of a stipulated amount which insured may sustain by reason of any defect in the title of the described premises, or by reason of unmarketability of the title of insured, or by reason of liens and encumbrances charging the same as of the date of the policy); *Pennsylvania.*—Foehrenbach v. German-American Title & Trust Co. 217 Pa. 331, 118 Am. St. Rep. 9, 12 L.R.A.(N.S.) 465, 66 Atl. 561 (to indemnify and insure against all loss or damage not exceeding a specified sum which the insured shall sustain by reason of the defects of the title of insured to the estate mortgage and interest described, or because of liens or incumbrances charging the same at the date of the policy); Wheeler v. Equitable Trust Co. 206 Pa. 428, 55 Atl. 1065 (to indemnify and insure against all loss or damage not exceeding a specified sum arising from de-

The sole object of title insurance is to cover possibilities of loss through defects that may cloud or invalidate titles. It is an assumption for a premium, of risk based on a careful examination of the muniments of title and the exercise of judgment by skilled conveyancers. It means the opinion of the company issuing it, as to the validity of the title, and an agreement to indemnify or make the title good in case loss should result in consequence thereof to assured.[11] The risks of title insurance end where those of other kinds begin. The purpose or intent of title insurance is to protect or save the insured harmless from loss through defects, liens, or encumbrances, etc., that may burden his title when he takes it, and it is not designed as a protection to him against matters that may arise during a stated period after the policy is issued. As a general rule, therefore, it would follow that when insured gets a good title, the covenant of the insurer has been fulfilled and there exists no liability.[12]

Such a policy guarantees only the record title where it excepts the tenure of present occupants and liens and encumbrances, judicial proceedings, etc., not shown by any public record.[13] Under the New York statute, title guaranty corporations may be formed for the purpose (1) of examining title to real property and chattels real, to procure and furnish information in relation thereto, to make and guarantee the correctness of searches for all instruments, liens or charges affecting the same, guarantee or insure the payment of bonds and mortgages, invest in, purchase, and sell, with such guarantee or with guarantee only against loss by reason of defective title or encumbrances, such bonds and mortgages as are lawful invest-

fects or unmarketableness of title, subject insured was a mortgage on ground rents issuing out of certain lots and buildings said mortgage was taken as collateral security also against loss from failure to complete certain buildings according to plans and specifications mentioned); Wheeler v. Real Estate Title Ins. & Trust Co. 160 Pa. 408, 28 Atl. 849 (construction of policy upon a mortgage. The covenant in it was to indemnify the holder against "all loss . . . by reason of defects or unmarketableness of the title to the estate or interest insured . . . or because of liens or encumbrances charging the same at the date of this policy," with one class excepted: unmarketability by reason of possibility of liens, a building being then in process of erection on the mortgaged premises it being so set forth in the policy).

[11] Foehrenbach v. German-American Title & Trust Co. 217 Pa. 331, 336, 337, 118 Am. St. Rep. 916, 12 L.R.A.(N.S.) 465, 66 Atl. 561, per Potter, J., Id. 336, 337.

[12] Trenton Potteries Co. v. Title Guarantee & Trust Co. 176 N. Y. 65, 72, 68 N. E. 132, per Werner, J.; Foehrenbach v. German-American Title & Trust Co. 217 Pa. 331, 336, 337, 118 Am. St. Rep. 916, 12 L.R.A. (N.S.) 465, 66 Atl. 561, per Potter, J.

[13] Bothin v. California Title Ins. & Trust Co. 153 Cal. 718, 96 Pac. 500.

ments for insurance companies under the act, and guarantee and insure the owners of real property and chattels real, and others interested therein, against the loss by reason of defective titles thereto and other encumbrance thereon. Such corporation to be known as a title *"guarantee"* [13a] *corporation.* (1a) To guarantee the validity and legality of bonds or other evidences of indebtedness issued by any state or by any city, county, town, village, school district, municipality, or other civil division of any state, or by any private or public corporation; to act as registrar or transfer agent, but not fiscal, of any such corporation, and to transfer and countersign its certificates of stock, bonds, or other evidences of indebtedness. Such corporation to be known as a *securities guaranty corporation.* (2) To guarantee and indemnify merchants, traders, and those engaged in business and giving credit, from loss and damage by reason of giving and extending credit to their customers and those dealing with them. Such corporation to be known as a *credit guaranty corporation.*[14] As to the nature of this contract it is said in Minnesota Title Insurance and Trust Company v. Drexel,[15] that "the insurer is not a surety.[16] In that case the defendant company for an adequate consideration agreed to 'indemnify, keep harmless, and insure, Drexel, the mortgagee, 'from all loss or damage not exceeding fifty-five thousand dollars,' the amount of the mortgage debt, which he or his assigns might sustain by reason of defects in the title to the mortgaged premises, or by reason of liens or encumbrances thereon existing at the date of the policy. The contract is plain and explicit on this point. In a word, it is a guaranty that the mortgagee should not suffer any loss or damage by reason of defects in the title to the property, or liens or encumbrances thereon existing at the date of the policy, under this guaranty, if the mortgaged property with a clear title and free from encumbrances was worth the amount of the mortgage debt, the mortgagee could confidently rely upon the sufficiency of his security."

§ 13a. Definition of rent insurance; rent guaranty insurance.—Rent insurance is that class of underwriting which offers indemnity or a guarantee to the lessor, against loss of rents resulting from fire rendering the property untenantable; or against loss to a tenant, where his lease does not exempt him therefrom, by reason of an obligation to pay rent while the premises, as the result of fire, re-

[13a] So in original.

[14] Laws N. Y. 1911, c. 525, p. 1198, amd'g Laws 1909, c. 33, sec. 170, as am'd by Laws 1909, c. 202. See 2 Birdseye's Cum. & Gilb. Consol. Laws N. Y. Annot. pp. 2635 et seq.; 7 Id. (Supp. 1910–13) p. 1386.

[15] 70 Fed. 194, 198, 17 C. C. A. 56, per Caldwell, J.

[16] Laws applicable to sureties do not apply to guaranty and surety companies to indemnify against losses by bad debts: Tebbets v. Mercantile Credit Guarantee Co. 73 Fed. 95, 19 C. C. A. 281, 38 U. S. App. 431. This question, however, is considered elsewhere herein.

main untenantable;[17] or to vendors, against loss of rentals in case the vendee fails to make certain improvements on realty and complete certain buildings within a specified time.[18] Insurance against loss of rentals is in the nature of or analogous to insurance on profits,[19] and also to a valued policy.[20]

§ 13b. Definition of strike insurance.—Strike insurance may be defined as a contract whereby, for a consideration, the insurer agrees to indemnify and guarantee firms, corporations or other persons carrying on manufacturing, against damage or loss, directly or indirectly, resulting from any interference with, or suspension or interruption of business or the use and operation, wholly or partly of a manufacturing establishment by reason of employees strike.[1]

[17] See Whitney Estate Co. v. Northern Assurance Co. 155 Cal. 521, 523, 23 L.R.A.(N.S.) 123, and note, 101 Pac. 511. *Examine* also: Amusement Syndicate Co. v. Prussian Nat. Ins. Co. (1911) 85 Kan. 97, 116 Pac. 620, 40 Ins. L. J. 1882 (case of insurance measuring liability by loss of rents while building being rebuilt or repaired, unless insured elected not to rebuild or repair, when time necessary therefor determined amount of loss; also question involved as to effect of valued policy law and insurance on rents being insurance on "real property"); Palatine Ins. Co. v. O'Brien (1908) 109 Md. 100, 16 L.R.A.(N.S.) 1055 and note, 71 Atl. 775, 38 Ins. L. J. 482, s. c. (1907) 107 Md. 341, 16 L.R.A.(N.S.) 1055, 68 Atl. 484, 36 Ins. L. J. 616 (case of insurance against loss of rent by fire; loss to be computed from date of fire and to cease upon premises becoming tenantable, with agreement to rebuild or repair within such a short time as the circumstances permitted, but rents were not re-established owing to delay by civil authority); Heller v. Royal Ins. Co. (1896) 177 Pa. 262, 34 L.R.A. 600, 35 Atl. 726 (insurance by tenant for loss by reason of payment of rent while premises untenantable. Same case, same insurance (1892) 151 Pa. 101, 25 Atl. 83; (1890) 133 Pa. 152, 7 L.R.A. 411, 19 Atl. 349; Carey v. London Provincial Fire Ins. Co. (1884) 33 Hun (40 N. Y. Supr. Ct.) 315 (insurance upon lease-hold interest; action for profits on subleases; loss by fire); Cushman v. North-Western Ins. Co. (1852) 34 Me. 487 (insurance by lessee of interest acquired by lease).

Insurance against loss of rents authorized: Iowa acts 1911, p. 12, c. 18, sec. 4, amd'g sec. 1709, par. 1, of Supp. 1907.

This contract classed as rent guarantee insurance. See 5 Universal Cyc. "Guarantee companies," p. 327, Article by Clarence H. Kelsey. See also Francis' Annals Life Assur. (1853) p. 288.

[18] Young v. American Bonding Co. 228 Pa. 373, 77 Atl. 623; German-American Title & Trust Co. v. Citizens Trust & Surety Co. (1899) 190 Pa. 247, 42 Atl. 682 (a case of insurance against actual loss which might result to one as purchaser of ground rents upon unimproved land, by reason of noncompletion of buildings to be erected. No policy was issued, but settlement certificate was treated by parties as complete agreement).

[19] See note 38 Ins. L. J. 491, and sections on *profits* under chapters herein covering Description of Property and Risks and Losses.

[20] Whitney Estate Co. v. Northern Assurance Co. 155 Cal. 521, 23 L.R.A.(N.S.) 123, 101 Pac. 511, under definition in Cal. Civ. Code, sec. 2596.

[1] Buffalo Forge Co. v. Mutual Security Co. 83 Conn. 393, 76 Atl. 995, 39 Ins. L. J. 1347.

TITLE III.

CONTRACT AND POLICY.

CHAPTER II.

NATURE OF THE CONTRACT.

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§ 16. Risk is an essential element.—There must be a risk, since that is an essential element. It is of the very essence of insurance and forms the principal foundation of the contract. In other words, the insurer takes upon himself the peril which the property or interest of others is liable to encounter. The very life of the contract involves the presumption that the thing is or will be exposed to some danger. But the risk should be of a real loss which neither the insurer nor insured has the power to avert or hasten.[2] If the term "risk" is used in a contract of insurance or reinsurance, the court must in case of doubt determine what the parties intended, having in view the whole contract, and the sense in which the word is used and the precise contract relations sustained by the parties to each other is important. The word, as ordinarily used, describes the liability assumed as specified on the face of the policy.[3] This risk or cause of loss against which it is intended to indemnify the assured[4] may, as a general rule, be any uncertain event which may

[2] See Emerigon on Ins. (Meredith's ed. 1850) c. i. pp. 4, 5; Hopkins' Marine Ins. (ed. 1867) 53, 55; 13 Ency. Britannica, 161; Nye v. Grand Lodge A. O. U. W. 9 Ind. App. 131, 140, 141, 36 N. E. 429; per Latz, J. Hart v. Delaware Ins. Co. 2 Wash. (U. S. C. C.) 346, 350, Fed. Cas. No. 6150; Stern v. Rosenthal, 128 N. Y. Supp. 711, 713, 71 Misc. 422; Jones & Abbott v. Insurance Co. of North America, 90 Tenn. 604, 25 Am. St. Rep. 706, 18 S. W. 260.

As to meaning of "sum at risk" in marine policy, see Standard Marine Ins. Co. v. Nome Beach Lighterage & Transp. Co. 133 Fed. 636, 67 C. C. A. 602, 1 L.R.A.(N.S.) 1095.

[3] Continental Ins. Co. v. Ætna Ins. Co. 138 N. Y. 16, 20, 33 N. E. 724, per O'Brien, J., reversing, as to the construction of the word "risk" under the facts of the case, 17 N. Y. Supp. 106. See also Pitcher v. Hennessey, 48 N. Y. 415, where "risks of navigation" were held broader than "perils of navigation." But see definition of the word "peril" in Marshall on Ins. (ed. 1810) 2, note a, which is: "In insurance the word 'peril' generally signifies the happening of the event or misfortune of which danger was apprehended." "Perils of the Seas," see §§ 2797–2799 herein.

[4] 1 Phillips on Ins. (3d ed.) sec. 905.

in anywise be of disadvantage to the party insured,[5] provided always that said party has an insurable interest which is exposed thereto, or which may suffer damage or loss therefrom, and provided further that the risk is a legal one not in contravention of the provisions or obvious policy of the law, nor an infringement upon the rights of persons not parties to the contract, and that it does not arise from the fraud of the insured.[6] These points will, however, be fully considered under insurable interest, void and illegal insurances, wager policies, description of subject matter and property, risk and loss, etc.

§ 17. Division and distribution of loss are essential.—Another most important principle underlying the contract of insurance is that which minimizes the loss to the individual by a division and distribution of liability among a large number of persons who are subjected to like risks, and it follows as a necessary corollary, that the peril ought to happen only to a comparatively small number. This principle of division and distribution of loss is fully recognized by the text-writers and courts as fundamental. Thus, Maylnes writes: "This most laudable custom of assurances whereby the danger and adventure of goods is divided, repaired, and borne by many persons consenting and agreed upon between them what part everie man will be contented to assure, make goode, and pay if any loss or casualtie should happen to the goods adventured, or to be adventured, at the seas as also by land, to the end that merchants might enlarge and augment their traffieke and commerce, and not adventure all in Bottome to their loss and overthrow, but that the same might be repaired and answered for by many."[7] Substantially the same language was used in 1601, in the preamble to the statute 43 Elizabeth, chapter 12, and also by Lord Bacon in his Abridgment.[8] So Willes, Lord Chief Justice, in Pole v. Fitzgerald,[9] says: Insurances "were at first invented for the benefit of trade, that if a merchant miscarried in one voyage he might not be ruined forever, but by giving premiums to other persons to insure either his ship or his goods, the loss, if it happened, might be divided amongst them, and so the merchant might be enabled to try his fortune in another voyage." Again, the court, in New York Life Insurance Company v. Statham,[10] declares that "the business of insurance is founded on the law of average, that of life insurance eminently so. . . . By

[5] Lucena v. Crauford, 5 Bos. & P. 301, per Lawrence, J.

[6] See 1 Phillips on Ins. (3d ed.) 905 et seq.

[7] Maylnes' Lex Mercatoria (ed. 1622) 146.

[8] Vol. 3 (4th ed.) 598, 599.

[9] Willes, 641, 645.

[10] 93 U. S. 24, 31, 32, 23 L. ed. 789.

spreading their risks over a large number of cases the companies calculate on this average with reasonable certainty and safety." And the court also says: "The insured parties are associates in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all, out of the coexistence of many risks arises the law of average which underlies the whole business. An essential feature of this scheme is the mathematical calculations referred to on which the premiums and amounts assured are based." [11] It is also said that: "The conditions necessary to the business of insurance are: (a) The existence of a known danger to which all property owners are exposed, and against which they cannot effectually protect themselves; (b) the strong probability that loss from this danger will fall upon but few of these who are exposed to it; (c) the certainty that when the loss happens it will fall so heavily on those to whom it comes as to make pecuniary indemnity a matter of great importance; (d) some knowledge of the relative value of the property annually destroyed by fire to serve as a basis for calculating the risk assumed by the insurer, and the amount of premium required to enable the insurer to meet losses and expenses and secure a fair return for the capital employed." [12]

§ 18. **Insurance is an aleatory contract.**—The derivation of this word embodies the idea of chance or uncertainty, and the contract is aleatory in the sense that it is dependent upon some contingent event: That the obligation of the insurer is subordinated to certain perils. As we have already stated,[13] risk is an essential element of insurance, and neither the assurer nor insured can know whether the event will or will not happen, nor can either control the event to avert or hasten it. Therefore, since insurance depends upon some contingent event against the occurrence of which the contract is intended to provide, although it may never occur, it is an aleatory contract. It must be understood, however, that true insurance is always concerned with real value; it is not merely speculative, as in case of wager policies, but is intended to protect actual interests from possible losses. It is based upon certain facts and data required to be made known as far as ascertainable. It does not proceed upon concealed facts, since the chance or probability of the uncertain event happening or of the peril must be estimated beforehand with an approximate degree of certainty.[14]

[11] New York Life Ins Co. v. Statham, 93 U. S. 31, 23 L. ed. 789.

[12] Commonwealth v. Vrooman, 164 Pa. 306, 318, 44 Am. St. Rep. 603, 25 L.R.A. 250, 30 Atl. 217.

[13] § 16 herein.

[14] See Emerigon on Ins. (Meredith's ed. 1850) c. i. sec. 3, pp. 11, 13; 1 May on Ins. (3d ed.) sec. 5; Hopkins' Marine Ins. (ed. 1867) 53, 58, 59, 299.

"Contracts of life insurance fall

§ 19. **Insurance is a voluntary contract.**—Insurance is a voluntary contract, and insurers have the right to impose conditions therein. If the assured objects to them, he is not bound to close the contract, but if he voluntarily enters therein, he will be bound thereby.[15] This of course relates to valid conditions, and those not prohibited by positive law nor against public policy.

§ 19a. **Standard fire policy a voluntary contract.**—Although the form of a standard policy is prescribed by statute, nevertheless its force and efficacy is derived from the consent of the parties, and upon acceptance by them it is to be treated as a voluntary contract, and not as a legislative enactment.[16]

§ 20. **Insurance is an executory contract.**—The contract of insurance is an executory contract in the sense that it is executed by the payment of the sum insured on a loss.[17] And a benefit society's contract entered into with a member is executory.[18] It is said in a New York case that "the contract (life) was not as to all its stipulations and as to both parties executory. It was executed by the plaintiff by the payment of the annual premiums from 1849 to and including 1861, while it was wholly executory on the part of defendant, its undertaking being to pay the amount specified upon the death of the insured."[19] A parol contract of insurance must, it is held, take effect in praesenti, and must not be executory. It is distinguished in this respect from a parol agreement to issue a policy.[20]

§ 21. **The contract is synallagmatic.**—Inasmuch the contract of insurance is a mutual agreement imposing certain reciprocal obligations upon the insurer and insured, it may be said to be synallagmatic whether the subject matter be of a marine character or a

within the class of aleatory contracts." 17 Earl of Halsbury's Laws of England, "Insurance," p. 514.

[15] Keim v. Home Mut. Fire & M. Ins. Co. 42 Mo. 38, 43, 97 Am. Dec. 291.

[16] Dunton v. Westchester Fire Ins. Co. 104 Me. 372, 20 L.R.A.(N.S.) 1058, 71 Atl. 1037, 38 Ins. L. J. 600. Policy in standard form prescribed by Me. Rev. Stat. c. 49, sec. 4, par. 7. The Court, per Whitehouse, J., says: "As stated by the court in Reed v. Washington Ins. Co. 138 Mass. 572, with reference to the standard policy then prescribed by their statute: 'It is their contract. As such it does not deprive the plaintiff of his action and his trial by jury. It is not to be presumed that the legislature intended by prescribing the form of contract, and prohibiting any other, to give it effect in depriving a party of rights, which, as a contract, it would not have.'"

[17] Mutual Life Ins. Co. v. Wager, 27 Barb. (N. Y.) 354, 367. See New York Life Ins. Co. v. Statham, 93 U. S. 24, 23 L. ed. 789.

[18] Union Fraternal League v. Walton, 109 Ga. 1, 77 Am. St. Rep. 350, 44 L.R.A. 424, 34 S. E. 317.

[19] Cohen v. New York Mutual Life Ins. Co. 50 N. Y. 610, 10 Am. Rep. 522, per Allen, J.

[20] Hartford Fire Ins. Co. v. Whitman, 75 Ohio St. 312, 9 Am. & Eng. Ann. Cas. 218, 79 N. E. 459.

On validity of oral contract of insurance, see note in 22 L.R.A. 768.

building or the life or health of a person, or any other insurable interest. "Pothier says that 'the contract of insurance is synallagmatic, for it produces reciprocal obligations. The insurer enters into an obligation to the assured to guarantee and indemnify him against the perils of the sea, and the assured binds himself in turn to the insurer to pay him the premium agreed upon.' "[1]

§ 22. **Insurance is a conditional contract.**—Insurance is a conditional contract in the sense that the contract may never attach even though the terms be agreed upon, as where the payment of the premium is a condition precedent or where some act is required to be performed by the assured in relation to the risk before the contract is completed. It is also conditional in the sense that the insurer is not obligated to pay unless the loss arises from the specified perils or where no risk attaches and no premium is due.[2] If the contract stipulates that in certain contingencies it shall be void and insures "against all direct loss or damage by fire except as hereinafter provided," it is a conditional contract. It is also conditional when it insures against loss to property "while located and contained as described herein and not elsewhere."[3] The court said in this case: "(a) The contract is declared upon as absolute and unconditional; it is alleged that by it the defendant did insure the plaintiff against all direct loss or damage by fire upon or to the property, etc. The contract in proof insures 'against all direct loss or damage by fire except as hereinafter provided,' and there are subsequent stipulations which provide that in certain contingencies the policy shall be void, such as loss caused by riot, etc. By the very terms of the contract it is conditional; it insures the plaintiff only in case the loss does not occur from the excepted causes. A contract to insure without limitation is not a contract to insure only in certain cases. (b) In another respect, the contract in proof is a conditional or qualified one. The declaration is upon a contract to insure the tinshop building and its contents. The company would be liable if the property burned, situated as described, when the policy was issued, and it might be liable in case of loss if the building was located elsewhere and the personal property contained in some other building.[4] The contract in proof insured the property 'while lo-

[1] Emerigon on Ins. (Meredith's ed. 1850) c. i. sec. 2, pp. 5, 6.

[2] Emerigon on Ins. (Meredith's ed. 1850) c. i. sec. 3, p. 11; 1 May on Ins. (3d ed.) sec. 4; McKee v. Metropolitan Life Ins. Co. 25 Hun (N. Y.) 583, 584; Tyrie v. Fletcher, 2 Cowp. 666, 668, 14 Eng. Rul. Cas. 502, per Lord Mansfield; Stevenson v. Snow, 3 Burr. 1237. See Hart v. Delaware Ins. Co. 2 Wash. (U. S. C. C.) 346, 350, Fed. Cas. No. 6150; Jones & Abbott v. Insurance Co. of North America, 90 Tenn. 604, 25 Am. St. Rep. 706, 18 S. W. 260.

[3] Cooledge v. Continental Ins. Co. 67 Vt. 14, 30 Atl. 798.

[4] *Citing* Pelly v. Royal Exchange

cated and contained as described herein and not elsewhere.' This latter clause qualifies the contract, making it conditional." [5]

§ 23. Insurance is a personal contract.—It is well settled that insurance is a personal contract, whatever the subject matter of the insurance may be.[6] It is a contract by which the insurer undertakes to indemnify or pay money to the insured in the manner and subject to the conditions agreed upon. This liability of the insurer to pay money is not altered by the fact that such money may be expended in rebuilding under certain circumstances, as in a fire

Assur. Co. 1 Burr. 341, 14 Eng. Rul. Cas. 30; Lyons v. Providence Ins. Co. 14 R. I. 109.

[5] Cooledge v. Continental Ins. Co. 67 Vt. 27, 28, 30 Atl. 798, per Taft, J.

[6] *United States.*—Hurst v. Springfield Fire & Marine Ins. Co. 196 U. S. 47, 25 Sup. Ct. 179, 49 L. ed. 381; Royal Ins. Co. v. Stinson, 103 U. S. 25, 28, 26 L. ed. 473; Carpenter v. Providence Washington Ins. Co. 16 Pet. (41 U. S.) 495, 503, 504, 10 L. ed. 1044, per Story, J.; Columbia Ins. Co. v. Laurence, 10 Pet. (35 U. S.) 507, 512, 9 L. ed. 512; Northern Trust Co. v. Snyder, 76 Fed. 34, 37, 22 C. C. A. 47.

Alabama.—Shadgett v. Phillips & Crew Co. 131 Ala. 478, 90 Am. St. Rep. 95, 56 L.R.A. 461, 31 So. 20.

Illinois.—Lindley v. Orr, 83 Ill. App. 70.

Indiana.—Nordyke & Marmon Co. v. Gery, 112 Ind. 535, 2 Am. St. Rep. 219, 13 N. E. 683.

Kentucky.—See Cook v. Kentucky Growers Ins. Co. 24 Ky. L. Rep. 1956, 72 S. W. 764.

Maine.—Adams v. Rockingham Mutual Fire Ins. Co. 16 Shep. (29 Me.) 292, 294, per Tenney, J.; Whitehouse v. Cargill, 88 Me. 479, 34 Atl. 276.

Maryland.—Skinner & Sons Shipbuilding & Dry Dock Co. v. Houghton, 92 Md. 68, 86, 84 Am. St. Rep. 485, 48 Atl. 85; Heller v. National Marine Bank, 89 Md. 602, 73 Am. St. Rep. 212, 45 L.R.A. 438, 43 Atl. 800.

Michigan.—Hall v. Niagara Fire Ins. Co. 93 Mich. 184, 190, 32 Am. St. Rep. 497, 18 L.R.A. 135, 53 N. W. 727; Disbrow v. Jones, Har. (Mich.) 48.

Nebraska.—Farmers & Merchants Ins. Co. v. Jensen, 56 Neb. 584, 44 L.R.A. 861, 76 N. W. 577, aff'd 58 Neb. 522, 44 L.R.A. 862, 78 N. W. 1054.

New Hampshire.—Lahiff v. Ashuelot Ins. Co. 60 N. H. 75.

New Jersey.—Kase v. Hartford Ins. Co. 58 N. J. L. 34, 32 Atl. 1057.

New York.—Lett v. Guardian Fire Ins. Co. 125 N. Y. 82, 25 N. E. 1088, per Gray, J.; Wyman v. Wyman, 26 N. Y. 253; Wyman v. Prosser, 36 Barb. (N. Y.) 368; Ætna F. Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 397, 30 Am. Dec. 90.

Ohio.—McDonald v. Black, 20 Ohio, 185, 192, 55 Am. Dec. 448; Hubbard v. Winshel, 6 Ohio N. P. Rep. (41 Weekly Law Bull.) 249; Hubbard v. Austin, 9 Ohio C. P. Dec. 111.

Tennessee.—American Steam Laundry Co. v. Hamburg-Bremen Fire Ins. Co. 121 Tenn. 13, 21 L.R.A. (N.S.) 442, 113 S. W. 394.

Utah.—McLaughlin v. Park City Bank, 22 Utah, 473, 54 L.R.A. 343, 63 Pac. 589.

Wisconsin.—Stanhilber v. Mutual Mill Ins. Co. 76 Wis. 285, 291, 45 N. W. 221.

England.—Rayner v. Preston, L. R. 18 Ch. D. 1, 10, per Brett, L. J.

See note 135 Am. St. Rep. 743.

policy, nor that it may be paid out in defending suits against the title, or in testing its validity or in paying judgments rendered, as in case of title insurance. It is nevertheless a contract either to indemnify the assured or to pay him a certain sum of money in case a certain casualty happens.[7] This obligation does not run with the property whether it be real estate or personalty, neither does it pass with the title unless assigned with the consent of the insurer,[8] or

[7] See Rayner v. Preston, L. R. 18 Ch. D. 1, 9, per Brett, L. J.

Fire insurance is a purely personal contract, by which the insurer agrees to indemnify insured against any loss he may sustain by destruction of his interest in the property insured. Nordyke & Marmon Co. v. Gery, 112 Ind. 535, 2 Am. St. Rep. 219, 13 N. E. 683.

[8] *United States.*—Hunt v. Springfield Fire & Marine Ins. Co. 196 U. S. 47, 50, 25 Sup. Ct. 179, 49 L. ed. 381; West Norfolk Lumber Co., In re, 112 Fed. 759.

Alabama.—Shadgett v. Phillips & Crew Co. 131 Ala. 478, 90 Am. St. Rep. 95, 56 L.R.A. 461, 31 So. 20.

California.—Davis v. Phoenix Ins. Co. 111 Cal. 409, 415, 43 Pac. 1115.

Illinois.—Lindley v. Orr. 83 Ill. App. 70.

Maine.—Whitehouse v. Cargill, 88 Me. 479, 34 Atl. 276; Adams v. Rockingham Ins. Co. 16 Shep. (29 Me.) 292, 294.

Massachusetts.—Wilson v. Hill, 3 Met. (44 Mass.) 66, 69.

Michigan.—Disbrow v. Jones, Har. (Mich.) 48.

New Hampshire.—Lahiff v. Ashuelot Ins. Co. 60 N. H. 75; Cumming v. Cheshire County Mut. Fire Ins. Co. 55 N. H. 457, 459.

New York.—Lett v. Guardian Fire Ins. Co. 125 N. Y. 82, 86, 25 N. E. 1088; Ætna Fire Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 397, 30 Am. Dec. 90.

Ohio.—McDonald v. Black, 20 Ohio St. 185, 192, 55 Am. Dec. 448.

South Carolina.—Annely v. De Saussure, 26 S. Car. 497, 505, 4 Am. St. Rep. 725, 2 S. E. 490.

Vermont.—Plimpton v. Farmers Mut. Fire Ins. Co. 43 Vt. 497, 500, 5 Am. Rep. 297.

England.—Rayner v. Preston, L. R. 18 Ch. D. 1, 9.

"A contract of fire insurance is a personal contract with the assured, and is not a contract passing with the property insured," 17 Earl of Halsbury's Laws of England, "Insurance," p. 517.

A contract of insurance does not run with the land nor pass as an incident to it. Carpenter v. Providence Washington Ins. Co. 16 Pet. (41 U. S.) 495, 10 L. ed. 1044, *cited* in:

United States.—City of Norwich, The (Place) v. Norwich & New York Transp. Co. 118 U. S. 494, 30 L. ed. 144, 6 Sup. Ct. 1150; West Norfolk Lumber Co. In Re, 112 Fed. 763.

California.—Davis v. Phœnix Ins. Co. 111 Cal. 409, 415, 43 Pac. 1115.

Missouri.—Sauner v. Phœnix Ins. Co. 41 Mo. App. 480, 486.

New Hampshire.—Lahiff v. Ashuelot Ins. Co. 60 N. H. 76; Cummings v. Cheshire County Mut. Fire Ins. Co. 55 N. H. 458; Folsom v. Belknap County Mut. Fire Ins. Co. 30 N. H. 240.

Ohio.—McDonald v. Black, 20 Ohio 193, 55 Am. Dec. 448.

Pennsylvania.—Nippe's App. 75 Pa. 479.

Rhode Island.—Hoxsie v. Providence Mut. Fire Ins. Co. 16 R. I. 529.

South Carolina.—Steinmeyer v. Steinmeyer, 64 S. Car. 420, 92 Am. St. Rep. 809, 59 L.R.A. 323, 42 S. E. 184; Graham v. American Fire Ins. Co. 48 S. Car. 218, 59 Am. St. Rep. 707, 26 S. E. 323; Annely v. De Saussure, 26 S. Car. 505, 4 Am. St. Rep. 725, 2 S. E. 490.

unless by extraordinary or special and express stipulation of the parties it is made to run with the subject matter,[9] or unless it be so framed as to be inseparably attached to the property and follow the successive owners during the continuance of the risk, such successive owners being in turn the parties really assured, as where the insurance is on account of the "owners," or for whom it may concern, or where the loss happens to be payable to "bearer," although this latter form rarely exists.[10] So where one insured real property, the insurance payable to himself, his executors, administrators, and assigns, the interest in the policy was held to pass to his executors in preference to his heirs.[11]

But neither a mortgagee nor any other lien creditor has any right to claim the benefit of a policy underwritten for the mortgagor or owner of the property unless there is an express agreement permitting it.[12] So a contract of insurance upon property sold at a fore-

[9] Cummings v. Cheshire County Mutual F. Ins. Co. 55 N. H. 457, 459.

See also the following cases:

United States.—West Norfolk Lumber Co., In re, 112 Fed. 759.

California.—Davis v. Phœnix Ins. Co. 111 Cal. 409, 415, 43 Pac. 1115.

Illinois.—Lindley v. Orr, 83 Ill. App. 70.

Maryland.—Heller v. National Marine Bk. 89 Md. 602, 73 Am. St. Rep. 212, 45 L.R.A. 438, 43 Atl. 800.

Tennessee.—American Steam Laundry Co. v. Hamburg-Bremen Fire Ins. Co. 121 Tenn. 13, 21 L.R.A. (N.S.) 442, 113 S. W. 394.

Utah.—McLaughlin v. Park City Bank, 22 Utah, 473, 54 L.R.A. 343, 63 Pac. 589.

[10] See Rogers v. Traders' Ins. Co. 6 Paige (N. Y.) 583, 588; 2 Duer on Ins. (ed. 1846) pp. 49, 50, sec. 31.

[11] Wyman v. Prosser (N. Y.) 36 Barb. 368.

[12] Heller v. National Marine Bk. 89 Md. 602, 73 Am. St. Rep. 212, 45 L.R.A. 438, 43 Atl. 800. *Examine* § 24a herein.

See also the following cases:

United States.—Northern Trust Co. v. Snyder, 76 Fed. 34, 37, 22 C. C. A. 47.

Maine.—Whitehouse v. Cargill, 88 Me. 479, 34 Atl. 276.

Michigan.—Hall v. Niagara Fire Ins. Co. 93 Mich. 184, 32 Am. St. Rep. 497, 18 L.R.A. 135, 53 N. W. 727.

South Carolina.—Annely v. De Saussure, 26 S. Car. 497, 505, 4 Am. St. Rep. 725, 2 S. E. 490.

Utah.—McLaughlin v. Park City Bk. 22 Utah, 473, 54 L.R.A. 343, 63 Pac. 589.

Vermont.—Plimpton v. Farmers' Mut. Fire Ins. Co. 43 Vt. 497, 500, 5 Am. Rep. 297.

On right of mortgagee to benefit of insurance taken in name of mortgagor, see note in 25 L.R.A. 305.

A contract of insurance is not in any manner incident to the estate, running therewith, but a special agreement with the underwriters against loss or damage which assured may sustain, and not the loss or damage which may fall upon any other person having an interest as grantee, mortgagee, or creditor, or otherwise. Adams v. Rockingham Mutual Fire Ins. Co. 16 Shep. (29 Me.) 292, 294; Plimpton v. Farmers Mut. Fire Ins. Co. 43 Vt. 497, 500, 5 Am. Rep. 297; Ca enter v. Providence Washington Ins. Co. 16 Pet. (41 U. S.) 495, 10 L. ed. 1044. *Cited* in:

Illinois. — Pinckneyville Mutual

closure sale between the purchaser and an insurance company is a personal contract of indemnity between such purchaser and the company alone, which does not inure to the benefit of the party entitled to redeem, and the purchaser, having collected the insurance money after the property has been destroyed by fire, is under no obligation to account for it to such redemptioner.[13] The distinction which underlies this construction is that the thing is not insured but the right appertains to the person since the contract is not in its nature an incident to the property. The term formerly used was "aversio periculi," it being the intention of all insurances to avert any damages or loss the insured might sustain.[14] In the case of Lynch v. Dalzell,[15] Chancellor King says: [16] "These policies are not insurances on the specific things mentioned to be insured, nor do such insurances attach on the realty or in any manner go with the same as incident thereto by any conveyance or assignment, but they are only special agreements with the persons insuring against such loss or damage as they may sustain. The party insured must have a property at the time of the loss, or he can sustain no loss, and consequently can be entitled to no satisfaction." [17] So,

Fire Ins. Co. v. Kimmell, 59 Ill. App. 535; Miller v. German Ins. Co. 54 Ill. App. 58.

Maine.—Donnell v. Donnell, 86 Me. 518, 520, 30 Atl. 67.

New York.—Loos v. Wilkinson, 113 N. Y. 500, 10 Am. St. Rep. 496, 4 L.R.A. 359, 21 N. E. 392; Loos v. Wilkinson, 51 Hun, 83, 5 N. Y. Supp. 410; Wyman v. Prosser, 36 Barb. 371.

North Carolina.—Stamps v. Commercial Fire Ins. Co. 77 N. Car. 210, 24 Am. Rep. 443.

Pennsylvania.—Nippe's Appeal, 31 Phila. Leg. Int. 276.

As to lien creditors, see also West Norfolk Lumber Co., In re, 112 Fed. 759.

[13] Deming Investment Co. v. Dickerman, 63 Kan. 728, 88 Am. St. Rep. 265, 66 Pac. 1029. See Farmers Loan & Trust Co. v. Penn Plate Glass Co. 186 U. S. 434, 453, 46 L. ed. 1245, 22 Sup. Ct. 842.

On right to proceeds of insurance where loss occurs after foreclosure, but during period of redemption, see note in 6 L.R.A.(N.S.) 448.

[14] Columbian Fire Ins. Co. v. Lawrence, 10 Pet. (35 U. S.) 507, 512, 9 L. ed. 512; Wilson v. Hill, 3 Met. (44 Mass.) 66, 69; Lahiff v. Ashuelot Ins. Co. 60 N. H. 75; Cummings v. Cheshire County Mut. Fire Ins. Co. 55 N. H. 457, 459; Saddlers' Co. v. Badcock, 2 Atk. 557; Patterson v. Powell, 9 Bing. 320, 322, per Coleridge, J., who says: "Every policy of insurance must insure some thing or person from some risk to which that thing or person is liable"

[15] 4 Bro. Cas. Parl. 432.

[16] This quotation is as reported in Parke on Insurance (ed. 1800) 453, and ascribed by him to Chancellor King, while in the above report it is apparently ascribed to counsel.

[17] *Cited* in Carpenter v. Providence Washington Ins. Co. 16 Pet. (41 U. S.) 495, 503, 10 L. ed. 1044. See also Columbian Ins. Co. v. Lawrence, 10 Pet. (35 U. S.) 507, 9 L. ed. 512. *Cited* in:

United States.—Farmers Loan & Trust Co. v. Penn Plate Glass Co. 186 U. S. 434, 453, 46 L. ed. 1245, 22 Sup. Ct. 842; City of Norwich, The (Place v. Norwich & New York Transp. Co.) 118 U. S. 468, 494, 30

in a Massachusetts case [18] the court declared that "it has been repeatedly decided here that under the forms of our policies none but the parties to the contract or their legal representatives in case of their death can avail themselves of the contract although others may in fact have an equitable or even legal interest in the property insured. The only exception to this rule which has been admitted exists where a policy has been bona fide and for a valuable consideration assigned with notice to the underwriter and an assent on his part, either express or implied." And again it is said that the contract of insurance "appertains to the person or party to the contract, and not to the thing which is subjected to the risk against which its owner is protected. It is not a contract running with the land in the case of real estate nor running with the personalty, so to speak, in the case of a chattel interest of the insured." [19] There is, however, another class of cases where the question arises whether certain covenants to insure made between certain parties relative to land run with the land. Thus, a covenant to effect insurance and apply the proceeds in case of loss by fire to the reparation of the insured property is held such a covenant as may run with the land.[20] Again, it is determined that *a contract to procure insurance* will bind legal representatives, successors, and assigns, where it specially so provides.[1]

L. ed. 144, 6 Sup. Ct. 1150; West Norfolk Lumber Co., In re, 112 Fed. 763; Farmers Loan & Trust Co. v. Penn Plate Glass Co. 103 Fed. 132, 156, 43 C. C. A. 138, 56 L.R.A. 718.

Illinois.—Miller v. German Ins. Co. 54 Ill. App. 58.

Kentucky.—Spalding v. Miller, 103 Ky. 413, 45 S. W. 462.

Massachusetts.—Harrison v. Pepper, 166 Mass. 289, 55 Am. St. Rep. 404, 33 L.R.A. 241, 44 N. E. 222.

Missouri.—Sanner v. Phœnix Ins. Co. 41 Mo. App. 486.

[18] Carroll v. Boston Marine Ins. Co. 8 Mass. 515, 517.

[19] Cummings v. Cheshire County Mut. Fire Ins. Co. 55 N. H. 457, 458.

[20] Thomas v. Vonkapffs, 6 Gill & J. (Md.) 372; Masoury v. Southworth, 9 Ohio St. 340. Where interest need not be personal, see § 890 herein.

A builder who has entered into possession without a sale under a decree upon his contract of building made with the lessee, and insures the premises to the extent of his interest in the lease, the policy does not inure to the benefit of the lessor or his assigns, nor does it make the builder liable on the covenant of insurance in the lease. Merchants' Ins. Co. v. Mazange, 22 Ala. 168.

A covenant to keep premises insured for a certain sum during the term, in companies approved by the lessor or lease to be forfeited, does not tend to renew prior policy covering lessor's own interest, but lessee may insure respective interests of lessor and self. Sherwood v. Harral, 39 Conn. 333

See, further, as to covenants to insure: Whitaker v. Hawley, 25 Kan. 674, 37 Am. Rep. 277; Eberts v. Fisher, 54 Mich. 294; Rhone v. Gale, 12 Minn. 54. *Examine* Hidden v. Slater Mutual Fire Ins. Co. 2 Cliff. (U. S. C. C.) 266.

[1] Tannebaum v. Greenwald, 73 N. Y. Supp. 873, 67 App. Div. 473.

§ 24. Insurance other than that of life and accident is a contract of indemnity.—It is elementary that the contract of insurance, other than that of life and of accident where the injury results in death, is one of indemnity.[2] By indemnity is meant that the party insured is entitled to be compensated for such loss as is occasioned by the perils insured against, in precise accordance with the principles and terms of the contract of insurance. The right

[2] *United States.*—Imperial Fire Ins. Co. v. Coös County, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. ed. 231 (is contract of indemnity upon terms and conditions specified in policy); Phœnix Mutual Life Ins. Co. v. Bailey, 13 Wall. (80 U. S.) 616, 618, 20 L. ed. 501, per Clifford, J.; British & Foreign Marine Ins. Co. Ltd. v. Maldonado & Co. 183 Fed. 744 (C. C. A.) (policy insuring against general average contribution is contract of full indemnity against loss within insured valuation); Western Assurance Co. v. Redding, 68 Fed. 708, 714; Hedger v. Union Ins. Co. 17 Fed. 498; Spare v. Home Ins. Co. 15 Fed. 707, 708.

California.—Whitney Estate Co. v. Northern Assur. Co. 155 Cal. 521, 524, 18 Am. & Eng. Annot. Cas. 512, 23 L.R.A.(N.S.) 123n, 101 Pac. 911 (*quoting* in part Cal. Civ. Code, sec. 2551); Davis v. Phœnix Ins. Co. 111 Cal. 409, 415, 43 Pac. 1115.

Connecticut.—Bevin v. Connecticut Mut. Life Ins. Co. 23 Conn. 244, 251; Glendale Woolen Co. v. Protection Ins. Co. 21 Conn. 19, 30, 31, 54 Am. Dec. 309.

Illinois.—Illinois Mutual Fire Ins. Co. v. Andes Ins. Co. 67 Ill. 362, 16 Am. Rep. 620.

Indiana.—State v. Willett, 171 Ind. 296, 23 L.R.A.(N.S.) 197, 86 N. E. 68.

Kentucky.—Home Ins. Co. v. Gaddis, 3 Ky. L. Rep. 160.

Louisiana.—Marchesseau v. Merchants Ins. Co. 1 Rob. (La.) 438.

Maine.—Getchell v. Mercantile & Manufacturers Mut. F. Ins. Co. 109 Me. 274, 42 L.R.A.(N.S.) 135, 83 Atl. 801, Am. & Eng. Ann. Cas. 1913E, 648n.

Maryland.—Palatine Ins. Co. v. O'Brien, 107 Md. 341, 16 L.R.A. (N.S.) 1055, 68 Atl. 484; Heller v. National Marine Bk. 89 Md. 602, 73 Am. St. Rep. 212, 45 L.R.A. 438, 43 Atl. 800 (policy against loss by fire is a personal contract of indemnity); Bosley v. Chesapeake Ins. Co. 3 Gill & J. (Md.) 468, per Dorsey, J.

Massachusetts.—Eager v. Atlas Ins. Co. 14 Pick. (31 Mass.) 141, 25 Am. Dec. 363; Wilson v. Hill, 3 Met. (44 Mass.) 66, 68.

Minnesota.—State v. Federal Investment Co. 48 Minn. 110, 111, 50 N. W. 1028 ("the very essence of any definition of insurance is indemnity for loss in respect to a specified subject").

Mississippi.—Natchez Ins. Co. v. Buckner, 4 How. (5 Miss.) 63, 79.

Missouri.—Morrison v. Tenn. Ins. Co. 18 Mo. 262, 59 Am. Dec. 299.

Nebraska.—Bassett v. Farmers & Merchants Ins. Co. 85 Neb. 85, 19 Am. & Eng. Ann. Cas. 252, 122 N. W. 703; Stanisics v. Hartford Fire Ins. Co. 83 Neb. 768, 120 N. W. 435.

New Hampshire.—Hunt v. New Hampshire Fire Underwriters Assoc. 68 N. H. 305, 308, 73 Am. St. Rep. 602, 38 L.R.A. 514, 38 Atl. 145; Cummings v. Cheshire County Mut. Fire Ins. Co. 55 N. H. 457, 458.

New York.—Cross v. National Fire Ins. Co. 132 N. Y. 133, 135, 30 N. E. 390; Embler v. Hartford Steam Boiler Inspection & Ins. Co. 40 N. Y. Supp. 450, 452, 8 App. Div. 186, case aff'd 158 N. Y. 431, 44 L.R.A. 512, 53 N. E. 212; Rawls v. American Life Ins. Co. 36 Barb. (N.

to recover being commensurate with the loss sustained.[3] or with the amount specified, as in cases of life insurance and valued policies. It is not intended by insurance that the party insured shall be put in exactly the same situation as he might have been, had there been no loss, although he may be restored as nearly as may be to the condition he was at the outset.[4] So in marine insurance

Y.) 357, 362, 84 Am. Dec. 280. See Holmes v. Gilman, 138 N. Y. 369, 381, 34 Am. St. Rep. 463, 20 L.R.A. 566, 34 N. E. 205.

Ohio.—Farmers' Ins. Co. v. Butler, 38 Ohio St. 128, 133; Commercial Mutual Ins. Co. v. Detroit Fire & Marine Ins. Co. 38 Ohio St. 11, 15, 43 Am. Rep. 413; McDonald v. Black, 20 Ohio St. 185, 55 Am. Dec. 448.

Pennsylvania.—Scheel v. German-American Ins. Co. 228 Pa. 44, 76 Atl. 507; Meigs v. Insurance Co. of North America, 205 Pa. 378, 385, 54 Atl. 1053; Eureka Ins. Co. v. Robinson, 56 Pa. St. 256, 269, 94 Am. Dec. 65; Commonwealth Ins. Co. v. Sennett, 37 Pa. St. 205, 208, 78 Am. Dec. 418. See Kauffman Bros. v. Standard Fire Ins. Co. 21 Lancaster Law. Rev. 249.

South Carolina. — Graham v. American Fire Ins. Co. 48 S. Car. 218, 59 Am. St. Rep. 707, 26 S. E. 323; Annely v. De Saussure, 26 S. Car. 497, 505, 4 Am. St. Rep. 725, 2 S. E. 490. See Crosswell v. Connecticut Indemnity Assoc. 51 S. Car. 103, 112, 28 S. E. 200.

Tennessee.—Deming v. Merchants Cotton Press & Storage Co. 90 Tenn. 306, 13 L.R.A. 518, 17 S. W. 89.

Vermont.—Plimpton v. Farmers Mut. Fire Ins. Co. 43 Vt. 497, 500, 5 Am. Rep. 297.

Virginia.—Harris v. Commonwealth, 113 Va. 746, 38 L.R.A.(N.S.) 458, 73 S. E. 561.

Wisconsin.—Stanhilber v. Mutual Mill Ins. Co. 76 Wis. 285, 291, 45 N. W. 221; Johannes v. Phœnix Ins. Co. 66 Wis. 56, 53, 57 Am. Rep. 248, 27 N. W. 414.

England.—Castellain v. Preston, L. R. 11 Q. B. D. 380, 386; Lloyd v. Fleming, L. R. 7 Q. B. 299, 302; Darrell v. Tibbitts, L. R. 5 Q. B. D. 560, 562, 563; Powles v. Innes, 11 Mees. & W. 10, 13, 13 Eng. Rul. Cas. 356; Dalby v. India & London Life Assur. Co. 15 Comm. B. 365, 387, 13 Eng. Rul. Cas. 383. See Aitchison v. Lohre, 4 L. R. App. C. 755, 761, 49 L. J. Q. B. D. 123, 41 L. T. 323, 14 Eng. Rul. Cas. 449.

[3] *United States.* — Carpenter v. Providence Washington Ins. Co. 16 Pet. (41 U. S.) 503, 10 L. ed. 1044.

Connecticut.—Glendale Woolen Co. v. Protection Ins. Co. 21 Conn. 19, 54 Am. Dec. 309.

Indiana.—State v. Willett, 171 Ind. 296, 23 L.R.A.(N.S.) 197, 86 N. E. 68.

Maryland.—Franklin F. Ins. Co. v. Hamill, 6 Gill & J. (Md.) 87, 95.

Ohio.—State (ex rel. Physicians Defense Co.) v. Layton, 73 Ohio St. 90, 97, 76 N. E. 567.

Pennsylvania. — Commonwealth Ins. Co. v. Sennett, 37 Pa. St. 205, 78 Am. Dec. 418.

England.—Kulen Kemp v. Vigne, 1 Term. Rep. 309.

Insurance is a contract of indemnity, the object being to reimburse insured for his actual loss not exceeding an agreed sum. Getchell v. Mercantile & Manufacturers Mut. Fire Ins. Co. 109 Me. 274, 42 L.R.A. (N.S.) 135, 83 Atl. 801.

The general object or purpose of an insurance company is to afford indemnity or security against loss. Commonwealth v. Equitable Beneficial Assoc. 137 Pa. 412, 419, 18 Atl. 1112, distinguishing between insurance companies and benevolent societies as to indemnity etc.

[4] Commonwealth Ins. Co. v. Sennett, 37 Pa. St. 205, 208, 78 Am. Dec.

the recovery may exceed or be less than a complete indemnity, and therefore it is not a perfect contract of indemnity.[5]

§ 24a. Standard fire policy is contract of indemnity; collateral contracts; mortgages.—A contract for fire insurance in the form prescribed by the Massachusetts statute is a contract of indemnity, and assured is only entitled to be put in the same condition pecuniarily that he would have been in had there been no fire. Nor are his damages to be diminished because he has collateral contracts or relations with third persons which relieve him wholly or partly from the loss against which the insurance company agreed to indemnify him. This principle, as applied to mortgages is now unimportant in that state by reason of the standard policy provisions requiring the mortgagee to assign his mortgage to the insurance company if so requested upon payment of the mortgage debt to the mortgagee.[6]

§ 25. Indemnity—stipulation as to value in policy.—It has been said that insurance is not a perfect contract of indemnity in that the parties may agree beforehand in estimating the value of the subject assured as the measure of damages.[7] The fact, however, that the sum to be paid is agreed upon beforehand makes in itself the contract no less one of indemnity, because the value is so fixed in order that the insured may have an indemnity and no more, since if there be a gross and fraudulent overvaluation it may be inquired into, and it is ordinarily to the insured's advantage to see

418; Hopkins' Marine Ins. (ed. 1867) 59; 2 Phillips on Ins. (3d ed.) 36, sec. 1220. See Woods' Mayne on Damages (1st. Am. ed.) sec. 439; 2 Sedgwick on Damages (8th ed.) secs. 722 et seq.; Times Fire Assur. Co. v. Hawke, 1 Fost. & F. 406.

[5] 17 Earl of Halsbury's Laws of England, p. 336, note; Id. pp. 380, 462, et seq. See also 15 Id. pp. 443, 444, title "Guarantee."

[6] Tabbut v. American Ins. Co. 185 Mass. 419, 202 Am. St. Rep. 353, 70 N. E. 430 (case is *cited* in Ryan v. Agricultural Ins. Co. 188 Mass. 11, 13, 73 N. E. 849, where facts almost identical). See also on last point Jenks v. Liverpool, & London & Globe Ins. Co. 206 Mass. 591, 597, 92 N. E. 998.

[7] "A policy of assurance is not a perfect contract of indemnity. It must be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject assured by way of liquidated damages, as indeed they may in any other contract to indemnify:" Irving v. Manning, 1 H. L. Cas. 303, 307, opinion of the judges. This case is *cited* in Aitchison v. Lohre, L. R. 4 App. Cas. 755, 761, per Blackburn, J., and one of the qualifications stated is that of the allowance of one third new for old in marine risks: See Hamilton v. Mendes, 2 Burr. 1198, 1210, per Lord Mansfield; 17 Earl of Halsbury's Laws of England, p. 336, note; Id. pp. 380, 462 et seq.; 15 Id. pp. 443, 444, title "guarantee."

See also Delaware Ins. Co. v. Hill (1910) — Tex. Civ. App. —, 127 S. W. 283, 292, 39 Ins. L. J. 908, 927.

Valued policies, see §§ 159–168 herein. On law governing as to extent of recovery on policy, see note in 63 L.R.A. 868.

that there is not an undervaluation, and that the amount be fixed sufficiently large to constitute an indemnity.[8] If, however, a valued policy is bona fide meant as an indemnity, the courts will not inquire very minutely whether the valuation be very near the true interest of the assured. This is the rule stated by Marshall, and accords with that given by the courts.[9] So it is held in New York that an overvaluation does not per se render a valued marine policy void. In the absence of fraud, accident, or mistake the valuation agreed upon is conclusive and binding, however largely in excess of the true value. Overvaluation is simply presumptive evidence of fraudulent intent strong in proportion to the excess, which presumption may be repelled by proof;[10] and it must appear, in order to avoid a policy for overvaluation, that such overvaluation was intentional, fraudulent, and not an honest expression of opinion.[11]

Again, in case of partial loss in valued policies an inquiry may be made as to the amount of loss as a basis upon which to indemnify the assured.[12] Therefore, the fact that the amount is fixed in a

[8] *United States.*—Marine Ins. Co. v. Hodgson, 6 Cranch (10 U. S.) 206, 220, 3 L. ed. 201, 204, 7 Cranch (11 U. S.) 332, 3 L. ed. 362.

Colorado.—Duncan v. National Mutual Fire Ins. Co. 44 Colo. 472, 20 L.R.A.(N.S.) 340, 98 Pac. 634.

Louisiana.—Natchez & New Orleans Packet & Navigation Co. v. Louisville Underwriters, 44 La. Ann. 714, 11 So. 54, where actual value exceeded value specified, and assured was held bound by value stated.

Massachusetts.—Clark v. Ocean Ins. Co. 16 Pick. (33 Mass.) 289; Wolcott v. Eagle Ins. Co. 4 Pick. (21 Mass.) 429.

New York.—See Voison v. Commercial Mutual Ins. Co. 62 Hun (N. Y.) 10, 11, per Daniels, J., 41 N. Y. 889.

Texas.—Delaware Ins. Co. v. Hill (1910) — Tex. Civ. App. —, 127 S. W. 283, 39 Ins. L. J. 908, 927.

England.—Lewis v. Rucker, 2 Burr. 1171, 14 Eng. Rul. Cas. 215; Shawe v. Felton, 2 East, 109.

See Marshall on Ins. (ed. 1810) 288, 291. See also §§ 159–168 herein.

[9] Marshall on Marine Ins. (ed. 1810) 291; Miner v. Tagert, 3 Binn. (Pa.) 204. See also Marine Ins. Co. v. Hodgson, 6 Cranch (10 U. S.) 206, 3 L. ed. 201, 7 Cranch (10 U. S.) 332, 3 L. ed. 262; Hodgson v. Marine Ins. Co. 5 Cranch (9 U. S.) 100, 110, 3 L. ed. 48. See §§ 159–168 herein.

[10] Helbig v. Svea Ins. Co. 54 Cal. 156, 35 Am. Rep. 72 and note, 74, 76; Borden v. Hingham Mutual Fire Ins. Co. 18 Pick. (35 Mass.) 523, 29 Am. Dec. 614, and note, 616, 621. Under following heads: "'Overvaluation of insured property,' 'fraudulent overvaluation avoids policy,' 'rule applies both to valued and to open policies,' 'where overvaluation not fraudulent,' 'overvaluation contrary to warranty or condition in policy,' 'examinations of property by agent;'" Sturm v. Atlantic Mutual Ins. Co. 63 N. Y. 77; Watson v. Insurance Co. of North America, 3 Wash. (U. S. C. C.) 1, 2. See Insurance Co. of North America v. Coombs, 19 Ind. App. 331, 49 N. E. 471; Delaware Ins. Co. v. Hill (1910) — Tex. Civ. App. —, 127 S. W. 283, 292, 39 Ins. L. J. 908, 927.

[11] Wheaton v. North British & Mercantile Ins. Co. 76 Cal. 415, 9 Am. St. Rep. 216, 18 Pac. 758.

[12] Watson v. Insurance Co. of North America, 3 Wash. (U. S. C.

valued policy where the pecuniary value of the subject of insurance is capable of being estimated makes the contract none the less one of strict indemnity, the only difference being that the money value or indemnity is, as far as may be possible, determined before instead of after the loss. So Mr. Phillips [13] says: "The valuation in a valued policy is a mere substitute as between the parties for the computation or estimate of the value of the subject in an open policy." [14] Nor does the valuation preclude an inquiry as to the amount of interest at stake, for it may be shown that only part of the property was at risk,[15] the valuation being assumed to be based upon the principles of indemnity in all valued policies.

§ 26. Life insurance not a contract of indemnity.—Although the question of indemnity as related to life insurances has been prolific of much discussion by both text-writers and the courts, yet the weight of authority is that life insurance is not a contract of indemnity. In Godsall v. Boldero,[16] which was for a long time a leading case, a creditor insured his debtor's life. After the debtor's death and before action brought, his executors paid the debt, and the court held that such payment took away the ground of action.[17] The court relied upon the case of Hamilton v. Mendes,[18] which was a case of marine insurance. The ruling was followed in other cases, although there were conflicting decisions until the law became settled upon the authority of Dalby v. India and London Life Assurance Company,[19] which expressly overruled Godsall v. Boldero. The question was well considered both by the court and in the arguments of counsel, and it was there determined that life insurance in no way resembled a contract of indemnity.[20] While a

C.) 1, 2; Clark v. United Ins. Co. 7 Mass. 365, 5 Am. Dec. 50. See 1 Arnould on Marine Ins. (Perkins' ed.) 309, *304 et seq.

[13] 2 Phillips on Ins. (3d ed.) sec. 1188.

[14] See also 1 Arnold on Marine Ins. (Perkins' ed. 1850) 315, *309 et seq.; Id. (Maclachlan's ed. 1887) 299 et seq.; Forbes v. Aspinall, 13 East, 327, 13 Eng. Rul. Cas. 673.

[15] Forbes v. Aspinall, 13 East, 327, 13 Eng. Rul. Cas. 673. See §§ 159–168 herein.

[16] 9 East, 72.

[17] Lord Ellenborough, C. J., declared "that if, before the action was brought, the damage which was at first supposed likely to result to the creditor from the death of Mr. Pitt (the insured) were wholly obviated by the payment of his debt to them, the foundation of any action on their (the plaintiffs') part, on the ground of such insurance, fails:" Godsall v. Boldero, 9 East, 72, 81.

[18] 2 Burr. 1210, 1 Eng. Rul. Cas. 112.

[19] 15 Com. B. 365, 13 Eng. Rul. Cas. 383.

[20] It was there declared that "the contract commonly called life assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance according to the probable duration of the life;

life is not a subject of valuation itself.[1] nor the loss adjustable on any principle of indemnity, still the amount of insurable interest in a life can sometimes be estimated as in case of the insurance by a creditor of the life of his debtor, so much so that it has been held that in case of a gross disproportion between the amount of the insurance and the debt secured thereby it may be declared a wager policy.[2] So, perhaps, in other cases where the insurable interest is a pecuniary one it may be valued in the sense that the interest might be assumed to be equal in amount to the sum insured,[3] and therefore a life policy might be said to resemble a valued marine policy, and in so far as the insurable interest in the former is capable of being approximately estimated upon a pecuniary basis that that establishes a measure of indemnity, and therefore constitutes life insurance a contract of indemnity, and that the fact that the amount is fixed in a life policy makes it differ in no wise from a valued marine policy. This conclusion, however, cannot follow when it is considered that the nature of the two contracts differs in many respects. Thus, in life risks the premium depends upon data based upon the duration of human life, and the event must

and when once fixed it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always, except when bonuses have been given by prosperous offices, the same on the other. This species of insurance in no way resembles a contract of indemnity." The reasoning in this case seems to be based upon the construction of the statute 14 George III., chapter 48, clause 3, which provides "that in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the assured in such life or lives or other event or events." This was held to mean that "if there is an interest at the time of the policy, it is not a wagering policy, and that the true value of that interest may be recovered in exact conformity with the words of the contract itself;" that "the only effect of the statute is to make the assured value his interest at its true amount when he makes the contract," and that the contract "really is what it is on the face of it, a contract to pay a certain sum in the event of death. It is valid at the common law, and if it is made by a person having an interest in the duration of the life, it is not prohibited by the statute 14 George III. c. 48." Dalby v. India & London Life Assur. Co. 15 Comm. B. 365, 13 Eng. Rul. Cas. 383, per opinion, Parke, B.

[1] The court in Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 460, 24 L. ed. 251, declares that "In life insurance the loss can seldom be measured by pecuniary values." Per Bradley, J.

Life insurances are, says Mr. Bunyon, independent of the value of the subject-matter: Bunyon on Life Ins. (ed. 1867) 7.

[2] Cooper v. Schaeffer (Pa.) 11 Atl. 548, 20 Week. Notes Cas. 123, 9 Cent. 601. But see Grant v. Kline, 115 Pa. St. 618, 9 Atl. 150, where the insurance was for $3,000, and the debt less than $800, and the disproportion was not considered too great.

[3] See 2 Phillips on Ins. (3d ed.) 35, secs. 1216, 1217.

happen. In other risks the data for fixing rates of premium depends upon an uncertain event which may or may not happen.[4] Again, in the one case the contract is based on a pecuniary interest, while in a life risk the interest need not necessarily be strictly and exclusively a pecuniary one, as in case of consanguinity or affinity.[5] Another distinction is that in marine, fire, and other insurances of like nature the interest must exist at the time of the loss, or there

[4] Loss certain to occur in life and not in fire and marine insurances. Nye v. Grand Lodge A. O. U. W. 9 Ind. App. 131, 140, 36 N. E. 429, per Lotz, J.

[5] "An insurance upon life has in fact but a remote resemblance to a marine or fire insurance. In the latter the particular object is to indemnify against a pecuniary loss; and the event upon which the money is made payable is the happening of the loss, the contract being in terms to pay whatever is lost, not exceeding a specified sum. But a life insurance is a contract to pay a specific sum on the happening of a particular event which may or may not occasion a pecuniary loss. Where that event is the death of the insured himself, there is nothing like an indemnity against loss to him, for he can never receive the money." Trenton Mutual Life Ins. Co. v. Johnson, 24 N. J. L. 576, 585, per Elmer, J. See Warnock v. Davis, 104 U. S. 775, 779, 26 L. ed. 924, per Field, J.; Phoenix Mutual Life Ins. Co. v. Bailey, 13 Wall. (80 U. S.) 616, 618, 619, 20 L. ed. 501, per Clifford, J.; Loomis v. Eagle Life & Health Ins. Co. 6 Gray (72 Mass.) 396); Mechanics Nat. Bk. v. Comins, 72 N. H. 12, 101 Am. St. Rep. 660; Corson's Exr. Appeal of, 113 Pa. St. 438, 443, 444, 6 Atl. 213, per Clark, J.; Halford v. Kymer, 10 Barn. & C. 724. As to pecuniary etc. interest, see § 899 herein. See also note 128 Am. St. Rep. 303. Held, in Mutual Life Ins. Co. v. Allen, 138 Mass. 27, 5 Am. Rep. 246, 247, that pecuniary interest in life not necessary. See as to necessity of pecuniary interest, Carpenter v. United States Life Ins. Co. 161 Pa. St. 9, 15, 16, 28 Atl. 943, per Dean, J.; Nye v. Grand Lodge, 9 Ind. App. 131, 142, 36 N. E. 429. Insurable interest is not dependent on pecuniary loss. Hess v. Segenfeiter, 127 Ky. 348, 32 Ky. L. Rep. 225, 128 Am. St. Rep. 343, 14 L.R.A. (N.S.) 117, 105 S. W. 476. It was, however, held in England under the statute 14 George III., c. 48, that there must be a pecuniary interest in the life or event insured. Halford v. Kymer, 10 Barn. & C. 724; 1 Phillips on Ins. (3d ed.) 201, sec. 356; (Statute 14 George III. c. 48, was never in force in Wisconsin. Hurd v. Doty, 86 Wis. 1, 21 L.R.A. 746, 56 N. W. 371). "But the better opinion is that the decided cases which proceed upon the ground that the insured must necessarily have some pecuniary interest in the life of the cestui qui vie are founded in an erroneous view of the nature of the contract." Phoenix Mutual Life Ins. Co. v. Bailey, 13 Wall. (80 U. S.) 616, 618, 619, 20 L. ed. 501.

A wife, however, might in England insure the life of her husband without other proof of interest than the relation between them. Reed v. Royal Exchange Assur. Co. Peake Add. Cas. 70. Peake N. C. 3d ed. pt. ii. See Bunyon on Life Ins. (ed. 1868) 6. On wife's right to insure life of husband, see note in 54 L.R.A. 225. See note in 54 L.R.A. 225, on insurable interest in life of relative by blood.

can be no recovery,[6] while in life insurance the interest need only exist at the time the insurance is effected,[7] unless such be the necessary effects of the provisions of the insurance itself.[8] Again, in life policies there is no distinction between total and partial losses, but upon the loss occurring the insurer is bound to pay, according to the terms of his agreement, the full sum insured.[9]

Still again, in a life policy the element of damages is not dependent upon the payment or nonpayment of the debt, nor the payment of the amount of pecuniary interest by third parties. *The insurable interest is inquired into beforehand by the insurers to prevent speculative insurances which are against public policy, and it is sufficient in all life policies that the contract is not involved as a wager policy, although, of course, it may be voided for fraud, but as we have said, the question as to interest is limited in case of loss to that of whether the policy is within that class denominated wagers.*[10] The question of fraud should be eliminated in determining whether life insurance is or not a contract of in-

[6] Chrisman v. State Ins. Co. 16 Or. 283, 18 Pac. 466; Saddlers' Co. v. Badcock, 2 Atk. 554, when insurable interest must exist under fire policies, see notes 52 L.R.A. 330, 332, 336, 340, 341.

[7] *United States.*—Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251.

Missouri.—McKee v. Phœnix Ins. Co. 28 Mo. 383, 75 Am. Dec. 129.

Pennsylvania.—Rawls v. American Mutual Life Ins. Co. 27 N. Y. 282, 36 Barb. (N. Y.) 357, 84 Am. Dec. 280; Corson's Exr., Appeal of, 113 Pa. St. 438, 447, 6 Atl. 213.

Rhode Island.—Mowry v. Home Life Ins. Co. 9 R. I. 346.

England.—Dalby v. India & London Life Assur. Co. 15 Com. B. 365, 13 Eng. Rul. Cas. 383.

As to time when insurable interest must exist, see § 901 herein.

[8] Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251; Sides v. Knickerbocker Life Ins. Co. 16 Fed. 650; Scott v. Dickson, 108 Pa. St. 6, 56 Am. Rep. 192.

[9] Kennedy v. New York Life Ins. Co. 10 La. Ann. 809, 811, *citing* Annesley, 207; Loomis v. Eagle Life & Health Ins. Co. 6 Gray (72 Mass.) 396, 399, per Shaw, C. J., *quoting* from Park on Ins. (7th ed.) 645; St. John v. American Mut. L. Ins. Co. 2 Duer (N. Y.) 419, 434. In the last case the court, notwithstanding it admits that there is no distinction between total and partial losses in life insurance, nevertheless asserts that life insurance is a contract of indemnity. This case, however, is not the law of New York, since the rule there seems to be that life insurance is not a contract of indemnity. Ferguson v. Massachusetts Mutual Life Ins. Co. 32 Hun (N. Y.) 306, 310, 311, et seq., affirmed 102 N. Y. 647; Rawls v. American Mutual Life Ins. Co. 36 Barb. (N. Y.) 357, 362, 84 Am. Dec. 280, affirmed, 27 N. Y. 282, 289. See § 24a herein.

[10] Mr. Richards says: "We are easily led to approve the better doctrine that the valid life insurance contract is in so far one of indemnity that the necessity of an insurable interest, and an interest actually or presumptively of a valuable character, lies at its foundation." Richards on Ins. (3d ed.) p. 40, sec. 34.

demnity, for fraud vitiates all contracts. But in the case of a valued marine policy the inquiry is not thus restricted, as where the owner's interest in a valued policy is diminished to the extent of a loan on bottomry to pay for repairs.[11] So in a valued marine policy the insurer may show that either by mistake or design the whole of the property insured was not shipped, and thus entitle himself to a proportionate deduction from the valuation of the policy.[12] To carry the argument still further, if life insurance is a contract of indemnity in any case whatsoever, then since by indemnity is meant a full indemnity, and no more, it must be conceded that the question may be opened to the extent of determining whether the party intended to be benefited has been indemnified or not, as in the case of Godsall v. Boldero,[13] and that ruling must then be held to govern. This conclusion is irresistible, as was fully realized by the six judges who in the exchequer chamber expressly overruled that case in Dalby v. India & London Life Assurance Company,[14] and held unequivocally that life insurance was not a contract of indemnity, and how an agreement to pay a fixed sum, and one in which the premium is based upon the duration of human life and an event which is bound to occur and which differs in so many essentials, can be held to be a contract of indemnity is hardly conceivable without also conceding that Godsall v. Boldero [15] determines the law, and if so, the rule stare decisis should obtain, notwithstanding the injustice of that decision was so great that Mr. Bunyon,[16] evidently speaking for the profession, attacked it on that ground, among others, and predicted that it would be overruled,[17] as was thereafter done in Dalby v. India & London Life

[11] Read v. Mutual Safety Ins. Co. 3 Sand. (N. Y.) 54.

[12] Atlantic Ins. Co. v. Lunar, 1 Sand. (N. Y.) 91.

[13] 9 East, 72.

[14] 15 Com. B. 365, 13 Eng. Rul. Cas. 383. See Ferguson v. Massachusetts Mut. Life Ins. Co. 32 Hun (N.Y.) 312, per Hardin, J., (affirming Dalby v. India & London Life Assur. Co.) affirmed 102 N. Y. 647.

[15] 9 East, 72.

[16] Bunyon on Life Assur. sec. 7.

[17] This author, who wrote (1853) before the decision in Dalby v. India & London Life Assur. Co. 15 Com. B. 365, 13 Eng. Rul. Cas. 383 (1854), gives much consideration to this question, and determines that life insurance is not a contract of indemnity. He strongly disapproves the ruling in Godsall v. Boldero, 9 East, 72, and says that there are the greatest difficulties in considering the contract as that of an indemnity apart from the statute 14 George III., chapter 48, and that the principle upon which the decision is based is the assumed common-law doctrine rather than the words of the act, and he adds: "So great is the injustice involved in it that in practice it is universally rejected. . . . The officers themselves . . . have not found it to be for their benefit to act upon the rigid rule of law, but generally pay without inquiry." He further says: "So strong appears the feeling at the present time in the profession against this decision, that it is by no means

Assurance Company,[18] wherein the judges also declared that the injustice of the decision was so great that but a few offices had availed themselves of it. We have shown in a prior section [19] that although the amount may be agreed upon beforehand, as in case of valued marine policy, nevertheless that does not alter the fact that an indemnity is intended in such policies, and although a life policy may be a valued one, the similarity extends no further. We conclude, therefore, as we first asserted, that the weight of authority is that life insurance is not a contract of indemnity.[20] It is also de-

improbable that it may be shortly reviewed in a higher court than that in which it was decided." This author also asserts: "A whole life policy is not like a fire or marine assurance made for a short period, and renewable with the consent of both parties, but is a contract to receive a sum of money upon an event which, although deferred, will certainly happen, and, although renewed from year to year by the payment of an annual premium the premium is so calculated that the right of renewal rests with the assured, and is a portion of the consideration for which all past premiums have been paid." Bunyon on Life Assur. 79 Law Library, *22, *24.

[18] 15 Com. B. 365, 13 Eng. Rul. Cas. 383.

[19] § 25.

[20] *The following authorities hold that it is not a contract of indemnity:*

United States.—Central Bank of Washington v. Hume, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. 41.

Georgia.—Exchange Bank v. Loh, 104 Ga. 446, 469, 470, 44 L.R.A. 372, 382, 31 S. E. 459.

Indiana.—Nye v. Grand Lodge, 9 Ind. App. 131, 139, 36 N. E. 429, per Lotz, J.

Maryland.—Emeriek v. Coakley, 35 Md. 188, 193; Whiting use of Sun Mut. Ins. Co. v. Independent Mutual Ins. Co. 15 Md. 297, 327.

Massachusetts.—Mutual Life Ins. Co. v. Allen, 138 Mass. 24, 27, 52 Am. Rep. 246, 247.

Missouri.—Wayland v. Western Life Indemnity Co. 166 Mo. App. 221, 148 S. W. 626, 630.

New Jersey.—Campbell v. Supreme Conclave Improved Order of Heptasophs, 66 N. J. L. 274, 280, 54 L.R.A. 576, 49 Atl. 550; Trenton Mut. Life & Fire Ins. Co. v. Johnson, 24 N. J. L. 585.

New York.—Embler v. Hartford Steam Boiler Inspection & Ins. Co. 40 N. Y. Supp. 450, 452, 8 App. Div. 186, case aff'd 158 N. Y. 431, 44 L.R.A. 512, 53 N. E. 212; Rawls v. American Mutual Life Ins. Co. 36 Barb. (N. Y.) 357, 27 N. Y. 282, 289, 84 Am. Dec. 284; Algase v. Horse Owners Mut. Indemnity Assoc. 77 Hun, 472, 29 N. Y. Supp. 101, 102; Ferguson v. Mutual Life Ins. Co. 32 Hun, 311, 312, aff'd 102 N. Y. 647.

Ohio.—Keckley v. Coshocton Glass Co. 86 Ohio St. 213, 99 N. E. 299, Am. & Eng. Ann. Cas. 1913D, 607.

Pennsylvania.—Scott v. Dickson, 108 Pa. St. 6, 56 Am. Rep. 192. See also Little's Appeal, 162 Pa. 586, 29 Atl. 660, 42 Am. St. Rep. 844.

Rhode Island.—Mowry v. Home Life Ins. Co. 9 R. I. 346, 354.

Wisconsin.—Gatzweiler v. Milwaukee Elect. Ry. & Light Co. 136 Wis. 34, 37, 18 L.R.A.(N.S.) 211, 16 Amer. & Eng. Annot. Cas. 633, 116 N. W. 633, 37 Ins. L. J. 647.

England.—Dalby v. India & London Life Assur. Co. 15 Com. B. 365, 13 Eng. Rul. Cas. 383; Law v. London Indisputable Life Policy Co. 1 Kay & J. 223, 228, 229.

Bunyon on Life Ins. (79 Law Library) *7-24; 17 Earl of Halsbury's

Laws of England "Insurance," p. 544. See Id. p. 513, where it is said: "Life insurance is not a contract of indemnity and the principle of subrogation does not apply to it." See also Sweet's Dict. Eng. Law (ed. 1882) "Insurance." *Examine* note 128 Am. St. Rep. 303, 304.

"Policies of life insurance are governed in some respects by different rules of construction from those applied by the courts in case of policies against marine risks or policies against loss by fire. Marine and fire policies are contracts of indemnity by which the claim of the insured is commensurate with the damages he sustained by the loss of or injury to the property insured. . . . Life insurances have sometimes been construed in the same way, but the better opinion is that the decided cases which proceed upon the ground that the insured must necessarily have some pecuniary interest in the life of the cestui qui vie are founded in an erroneous view of the nature of the contract, that the contract of life insurance is not necessarily merely one of indemnity for a pecuniary loss, as in marine and fire policies, that it is sufficient to show that the policy is not invalid as a wager policy if it appear that the relation, whether of consanguinity or affinity, was such between the person whose life was insured and the beneficiary named in the policy as warrants the conclusion that the beneficiary had an interest, whether pecuniary or arising from dependence or natural affection, in the life of the person insured. Insurers, in such a policy, contract to pay a certain sum in the event therein specified, in consideration of the payment of the stipulated premium or premiums, and it is enough to entitle the assured to recover if it appear that the stipulated event has happened, and that the party effecting the policy had an insurable interest such as is described in the life of the person insured at the inception of the contract, as the contract is not merely for an indemnity, as in marine and fire policies." Phoenix Mutual Life Ins. Co. v. Bailey, 13 Wall. (80 U. S.) 616, 618 et seq. 20 L. ed. 501, per Clifford, C. J.

United States.—Manhattan Life Ins. Co. v. Hennessy, 99 Fed. 64, 68, 39 C. C. A. 629; Sides v. Knickerbocker Life Ins. Co. (C. C.) 16 Fed. 650, 652.

Georgia.—Exchange Bank v. Loh, 104 Ga. 446, 470, 44 L.R.A. 372, 382, 31 S. E. 459.

Illinois.—Guardian Mutual Life Ins. Co. v. Hogan, 80 Ill. 45, 22 Am. Rep. 180.

Indiana.—Nye v. Grand Lodge A. O. U. W. 9 Ind. App. 131, 139, 36 N. E. 429.

Iowa.—Farmers & Traders Bank v. Johnson, 118 Iowa, 282, 284, 91 N. W. 1074 (cited to point of insurable interest of daughter and assignment).

Louisiana.—Rombach v. Piedmont & A. L. Ins. Co. 35 La. Ann. 233, 234, 48 Am. Rep. 239 (cited to insurable interest).

New York.—Olmstead v. Keyes, 85 N. Y. 593, 598; Waldheim v. John Hancock Mut. Life Ins. Co. 8 Misc. 509, 28 N. Y. Supp. 766; Grattan v. Natural Life Ins. Co. 15 Hun, 77 (cited to insurable interest).

Pennsylvania.—Corson's Appeal, 113 Pa. 447, 57 Am. Rep. 479, 6 Atl. 213 (cited to insurable interest); Corson v. Garnier, 17 Phila. 342.

South Carolina.—Crosswell v. Connecticut Indemnity Assoc. 51 S. Car. 103, 112, 28 S. E. 200.

Virginia.—Clemmitt v. New York Life Ins. Co. 76 Va. 360 (cited to insurable interest).

A life insurance policy is not by the great weight of authority a contract of indemnity, but is strictly a valued policy; "a stipulation to pay a sum certain upon the happening of a specified contingency. Under such a policy the amount payable has no necessary relation to damages actually suffered by the beneficiary. The insured buys and pays for the right to have from another a specified sum

cided that as to a creditor paying premiums of a policy upon his debtor's life, the contract is one of indemnity, but it is not so where the premiums are paid by the insured.[1]

upon the happening of a specified event. Payment for the insurance *is in the nature of an investment.* The money value of the thing covered by the insurance does not enter into the transaction at all." (Italics are ours.) Gatzweiler v. Milwaukee Electric Ry. & Light Co. 136 Wis. 34, 37, 18 L.R.A.(N.S.) 211, 16 Amer. & Eng. Annot. Cas. 633, 116 S. W. 633, per Marshall, J.

The following authorities hold that it is not strictly a contract of indemnity, or, in other words, it is in the nature of an indemnity, as in case where a creditor insures his debtor's life. Bacon's Benefit Societies and Life Ins. sec. 163; Miller v. Eagle Life & Health Ins. Co. 2 E. D. Smith, 294, 295.

The following authorities hold that it is a contract of indemnity: Bevin v. Connecticut Mutual Life Ins. Co. 23 Conn. 244, 251; Kennedy v. New York Life Ins. Co. 10 La. Ann. 809, 810, where Merrick, C. J., says: "The contract of insurance is one of indemnity, but in life insurance the amount of the indemnity, we think, like a valued policy, is agreed upon beforehand;" St. John v. American Mutual Ins. Co. 2 Duer (N. Y.) 419, 434, not the law of New York as noted in the text; Godsall v. Boldero, 9 East, 72, which was overruled as noted in the text. See note 2 Smith's Lead. Cas. (44 Law Lib. 203, 207) 165, 170. Mr. Marshall speaks of life insurance as an expedient by which a pecuniary indemnity may be secured to the beneficiaries. (Book 3, c. 1, p. 766, ed. 1810); and he notes (Id. p. 777) the case of Godsall v. Boldero, 9 East, 72, which at that time had not been overruled, and says: "They hold that this insurance, like every other to which the law gives effect, is in its nature a contract of indemnity as distinguished from a wager.

"A distinction has sometimes been taken between marine and other insurances and life insurance, on the ground that while the former have for their object to indemnify for loss, the latter is an absolute engagement to pay a fixed sum on the happening of a certain event, without reference to any damage in fact suffered by the insured in consequence. But this distinction is superficial, and rests rather upon the mode of determining the amount of indemnity than upon any difference in principle. There is the same difference, having reference to the question of indemnity, between valued and open policies, in both fire and marine insurance, that there is between an open policy in either and a policy of life insurance. In open policies the question of the amount of indemnity is left to be determined when the contingency upon which it becomes due shall have happened, while in valued policies and policies on lives the value of the interest which the insured seeks to protect is agreed upon by the parties, and inserted in the policy, and so the amount of indemnity which shall become due on the happening of the given contingency is predetermined. The purpose in all cases is alike—indemnity for the loss of a valuable interest." May on Ins. (3d ed.) sec. 7. See also id. sec. 117.

Mr. Phillips (1 Phillips on Ins. sec. 3), says that the contract is now considered "as extending not only to indemnity against sea risks, fire, or land, and death, but," etc. This author, however, wrote before Godsall v. Boldero, 9 East, 72, was overruled.

The code definition of insurance in California is thought by Mr. Deering to imply that life insurance is a contract of indemnity in that state (Deering's Annot. Civ. Code Cal. sec. 2527, and note), although he does not discuss the question.

[1] Central Bank of Washington v. Hume, 128 U. S. 195, 9 Sup. Ct. 41,

§ 27. Accident insurance is not a contract of indemnity in all cases.—Accident insurance is not a contract of indemnity in all cases. It only indemnifies against the effect of accidents resulting in bodily injuries. In case of death occasioned thereby it can in no sense be said to indemnify, because in such case there is a close analogy between accident and life insurance.[2] A policy of accident insurance ordinarily has much the same features as one of life insurance, though, it more nearly than one of life insurance has the indemnity feature. The amount stipulated to be paid is a fixed sum as to each particular injury specified, or is computable without any such definite data as in case of the loss of property. And it is decided that an accident insurance policy is to be regarded as an investment contract in which the only parties concerned are the insurer and the insured or the beneficiary. It is not a contract of indemnity giving right to subrogation in the absence of a provision expressly making it such[3] nor is an accident insurance contract a contract of indemnity, even though the stipulated sum to be paid is called an "indemnity." Calling such payment an indemnity is a matter only of nomenclature, which does not affect the substance of the contract, nor change its legal effect, nor render the policy an indemnity contract.[4] It is said, however, that accident insurance indemnifies in a certain sense against the pain and loss connected with the immediate accident, except in case of death.[5] It is also decided that a policy of accidental insurance is issued and accepted for the purpose of furnishing indemnity against accidents and death caused by accidental means, and the language of the

32 L. ed. 370 (*cited* in West Norfolk Lumber Co., In re, 112 Fed. 764; Exchange Bank v. Loh, 104 Ga. 446, 449, 44 L.R.A. 374, 31 S. E. 459; Crosswell v. Connecticut Indemnity Assoc. 51 S. Car. 103, 112, 28 S. E. 200).

[2] See Bradburn v. Great Western Ry. Co. 23 Week. Rep. 48, 8 Eng. Rul. Cas. 439. *Examine* Gatzweiler v. Milwaukee Elect. Ry. & Light Co. 136 Wis. 34, 37, 16 Amer. & Eng. Annot. Cas. 633, 18 L.R.A.(N.S.) 211, 116 S. W. 633, 37 Ins. L. J. 647: Accident insurance not a contract of indemnity, 17 Earl of Halsbury's Laws of England, p. 566.

[3] Gatzweiler v. Milwaukee Electric Ry. & Light Co. 136 Wis. 34, 16 Am. & Eng. Ann. Cas. 633, 18 L.R.A. (N.S.) 211, 116 N. W. 633, 37 Ins. L. J. 647, *quoted* from in Suttles v. Railway Mail Assoc. 141 N. Y. Supp. 1024, 156 App. Div. 435.

[4] Suttles v. Railway Mail Assoc. 141 N. Y. Supp. 1024, 156 App. Div. 435.

[5] Theobald v. Railway Passenger's Assur. Co. 26 Eng. L. & Eq. 432, 437, 440. But in Healey v. Mutual Accident Assn. 133 Ill. 556, 560, 25 N. E. 52, 31 Cent. L. J. 419, 23 Am. St. Rep. 637, 9 L.R.A. 371, where it is said that the purpose of accident insurance is to furnish indemnity against accidents and death caused by accidental means. This, however, appears to be a mere general statement of the court, made incidentally in connection with the question of construction.

policy must be construed with reference to the subject to which it is applied.[6]

§ 27a. That employers' liability insurance is contract of indemnity.—A policy issued by a casualty company against employers' liability is a contract of indemnity to the amount agreed upon, but it does not necessarily relieve the assured from all responsibility whatever for damages resulting from injuries to its employees.[7] A casualty insurance policy providing that no action shall lie against the company as respects any loss under the policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment, within sixty days from date of such judgment and after trial of the issues, constitutes a contract of indemnity and not one of insurance.[8] And under a like provision the contract is held to be one of indemnity for the benefit of assured.[9] Again, all cases of indemnity against future contingencies, and this applies to an employer's liability policy against liability for personal injuries to employees, are included in a statutory provision whereby one who indemnifies another against an act to be done by the latter is liable jointly with the person indemnified, and separately to every person injured by such act.[10]

§ 27b. Same subject: whether contract one of indemnity or liability or both.—Whether an employer's liability policy is a contract of indemnity merely, or of liability, or both, depends necessarily upon the terms and conditions of the instrument. A distinction is made between contracts for indemnity against liability and those of indemnity against loss. In the former case the insurer's obligation becomes fixed when liability attaches to the insured. In the latter case the insurer's liability does not attach until loss has been suffered, that is, when the insured has paid the damages. And where the agreement is to indemnify against loss from common law or statutory liability, and there is also a provision in the contract that no action shall lie against the insurer as respects

[6] Healey v. Mutual Acc. Assn. 133 Ill. 556, 23 Am. St. Rep. 637, 9 L.R.A. 371, 25 N. E. 52.

[7] Rumford Falls Paper Co. v. Fidelity & Casualty Co. 192 Me. 574, 43 Atl. 503; 17 Earl of Halsbury's Laws of England, p. 571.

[8] Kennedy v. Fidelity & Casualty Co. 100 Minn. 1, 117 Am. St. Rep. 658, 9 L.R.A.(N.S.) 478n, 10 Am. & Eng. Ann. Cas. 673, 110 N. W. 97, 36 Ins. L. J. 224, *distinguishing* Anoka Lumber Co. v. Fidelity & Casualty Co. 63 Minn. 286, 30 L.R.A. 689, 65 N. W. 353.

[9] Carter v. Ætna Life Ins. Co. 76 Kan. 275, 11 L.R.A.(N.S.) 1155, 91 Pac. 178.

[10] Moore v. Los Angeles Iron & Steel Co. (U. S. C. C.) 89 Fed. 73, under Cal. Civ. Code, sec. 2777, *distinguished* in Northern v. Casualty Co. of America (U. S. C. C.) 177 Fed. 981.

loss under the policy, unless it is brought by the assured himself to reimburse him for loss actually sustained and paid by him within a certain time in satisfaction of a judgment after trial of the issue, it is determined that a fair conclusion is that the policy is one of indemnity against loss, and that the insurer's liability does not become fixed until the assured has paid the judgment as provided in the policy.[11] So it is declared in a Tennessee case, that "there is a difference between the effect of a policy which insures directly against liability, and one that insures against loss or damage by reason of liability. Under contracts of the first description, the amount of the policy, up to the extent of the liability incurred by an employer on account of an accident to an employee, becomes, immediately upon the happening of the event on which the liability depends, and the giving of such notice as the policy provides for, an asset of the assured, which, in the absence of any provisions to the contrary in the policy, may be assigned by him, or taken for his debt, subject, of course, to the making of such proofs to perfect the demand as the policy may provide for. Under the policies of the second kind, to which the one before us belongs, the amount of the insurance does not become available until the assured has paid the loss, and is not even then available unless proper notice has been given as provided in the policy." [12] In a Wisconsin case the insurer agreed to pay the employer all sums for which he "shall become liable to his employees" on account of personal injuries, etc.; and it was held to be a contract of indemnity against liability, so that

[11] Conqueror Zinc & Lead Co. v. Ætna Life Ins. Co. 152 Mo. App. 332, 133 S. W. 156, 40 Ins. L. J. 721; Cayard v. Robertson & Hobbs, 123 Tenn. 382, 30 L.R.A.(N.S.) 1224 and note, 131 S. W. 864, 40 Ins. L. J. 144. The above case in 152 Mo. App. 721, *cites* the following decisions:

United States.—Maryland Casualty Co. v. Omaha Electric Light & Power Co. 157 Fed. 514, 85 C. C. A. 106; Allen v. Ætna Life Ins. Co. (U. S. C. C.) 137 Fed. 136.

Iowa.—Cushman v. Carbondale Fuel Co. 122 Iowa, 656, 98 N. W. 509.

Maine.—Frye v. Bath Gas & Electric Co. 97 Me. 241, 94 Am. St. Rep. 500, 59 L.R.A. 444, 54 Atl. 395, 32 Ins. L. J. 656.

Massachusetts.—Davison v. Maryland Casualty Co. 197 Mass. 167, 83 N. E. 407; Connolly v. Bolster, 187 Mass. 266, 72 N. E. 981.

Michigan.—Stephens v. Pennsylvania Casualty Co. 135 Mich. 189, 97 N. W. 685, 33 Ins. L. J. 180.

New Jersey.—Travelers Ins. Co. v. Moses, 63 N. J. Eq. 260, 92 Am. St. Rep. 663, 49 Atl. 720.

New York.—Munroe v. Maryland Casualty Co. 96 N. Y. Supp. 705, 48 Misc. 183.

Tennessee.—Finley v. United States Casualty Co. 113 Tenn. 592, 83 S. W. 2, 34 Ins. L. J. 179.

Washington.—Puget Sound Imp. Co. v. Frankfort Marine Accident & Plate Glass Co. 52 Wash. 124, 100 Pac. 190.

[12] Finley v. United States Casualty Co. 113 Tenn. 592, 83 S. W. 2, 34 Ins. L. J. 179.

payment by the employer, of a claim for personal injury, was not a condition precedent to his right to recover against the insurer.[13] Under an Ohio decision it is determined than an employer's liability policy is not a contract to pay a liability, but one of indemnity against loss, under a provision that no action should lie against the company to recover for any loss under the policy, unless brought by assured for loss actually sustained and paid in money by him, in satisfaction of a judgment, after trial of the issue, "nor, unless such action is brought within ninety days after final judgment against him has been satisfied."[14] So in equity an employers' liability insurance is not an insurance against liability, but of indemnity against loss by reason of liability, the contracting parties' intention being, where the contract so provides, to reimburse or make whole the insured against loss sustained by it on account of its liability to its employees for negligence; and, independently of such a condition as to reimbursement of the insured, in an action brought by him the contract would be construed as one of indemnity only.[15] If a clause in a policy undertakes to indemnify assured against loss by reason of liability on account of injuries to employees, and the insurer agrees to defend proceedings against assured, or settle the same, unless it elects to pay the provided indemnity to assured, it does not make the contract one guaranteeing payment of an obligation of insured, rather than one of indemnity, where another clause provides that no action shall be brought against the insurer

[13] Hoven v. Employers Liability Assur. Corp. 93 Wis. 201, 32 L.R.A. 388, 67 N. W. 46, *compare* Fenton v. Fidelity & Casualty Co. 36 Or. 283, 48 L.R.A. 770, 56 Pac. 1096.

[14] Garrett v. Traveler's Ins. Co. 20 Ohio Dec. 181, 55 Ohio Law Bull. 181.

[15] Frye v. Bath Gas & Electric Co. 97 Me. 241, 94 Am. St. Rep. 500, 59 L.R.A. 444, 54 Atl. 395. The court, per Wiswell, C. J., said: "The contract was with the gas company to indemnify that company 'against loss' from liability for damages on account of bodily injuries accidentally suffered by an employee and caused by the negligence of the assured. The use of the word 'indemnify' shows the object and nature of the contract. It was to reimburse, or make whole, the assured against loss on account of such liability. There can be no reimbursement where there has been no loss. The contract of insurance contains nothing to show that it was the object or intention of the contracting parties that the insurer should guaranty the gas company's liability for negligence to its employees. It was not a contract of insurance against liability, but of indemnity against loss by reason of liability. . . . In this case as we have seen, the contract was one of indemnity only. It was not obtained by the gas company for the benefit of its employees, but for its own benefit exclusively, to reimburse it for any sum that the company might be obliged to pay, and had paid on account of injuries sustained by an employee through its negligence. Independently of the condition in the contract of insurance above quoted, we should be compelled to construe this contract as one of indemnity only."

unless by the insured himself to reimburse him for loss actually sustained and paid, the former clause being merely an additional privilege for insured's protection.[16] Where the insurer expressly binds himself to pay all damages with which insured may be legally charged or required to pay, or for which he may become legally liable, it is not only a contract of indemnity, but also a contract to pay liabilities, and a recovery may be had thereon as soon as the liability attaches to insured and before it is discharged. The measure of damages is the amount of the accrued liability.[17] Again, it is held that an employee's liability policy is not one of indemnity merely, on which suit could not be brought until assured had paid a judgment against it for personal injuries to an employee, but in equity the insurer becomes the principal debtor to an injured employee, and the assured the surety so that a bill would lie by the

[16] Allen v. Ætna Life Ins. Co. 145 Fed. 881, 76 C. C. A. 265, 7 L.R.A. (N.S.) 958, *cited* in Maryland Casualty Co. v. Omaha Electric Light & Power Co. 157 Fed. 514, 85 C. C. A. 106. In this case the parties agreed that the assured shall not settle any claim "except at its own cost." An action was brought against assured resulting in a judgment against it for $5,000, which was, after being affirmed on appeal, paid by assured. The court, per Adams, Cir. J., said: "As modified by the condition just referred to, the contract is one of indemnity against loss to the extent of $5,000, together with any further sum which the insurer defending the same in the name of the assured might force the assured to pay as outlays or expenditures incident to making the defense. It clearly indemnified against the court costs in question. The contract remains one of indemnity loss only and to the limited extent just specified. The limitation is as much a part of the contract as the covenant of indemnity, and the defendant is as much entitled to the full protection of the agreed limit as the plaintiff is to the protection of the agreement to indemnify." In this case the parties agreed that the defendant's limit of liability should be $5,000, except as it might be increased by failure on its part to pay the cost of making the defense. Case followed in Vindicator Consol. Gold Mining Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.; Frankfort Marine, Accident & Plate Glass Ins. Co. v. Vindicator Consol. Gold Mining Co., 158 Fed. 1023, 86 C. C. A. 674.

[17] American Employers' Liability Ins. Co. v. Fordyce, 62 Ark. 562, 54 Am. St. Rep. 305, 36 S. W. 1051. In this case it is said: "The difference between a contract of indemnity and to pay legal liabilities is that, upon the former, an action cannot be brought and a recovery had until the liability is discharged, whereas, upon the latter, the cause of action is complete when the liability attaches,"—quoted in Frye v. Bath Gas & Electric Co. 97 Me. 241, 94 Am. St. Rep. 500, 59 L.R.A. 444, 54 Atl. 395, 32 Ins. L. J. 656. See Anoka Lumber Co. v. Fidelity & Casualty Co. 63 Minn. 286, 30 L.R.A. 689, 65 N. W. 353. Held, that from the very terms of the instrument itself the contract was not merely an agreement to indemnify the plaintiff against any act of the employee, but that in case of an accident of such a character as to injure him, whereby a cause of action should arise against assured,

latter to establish the principal's liability and compel it to perform the contract of indemnity.[18]

§ 27c. Injury to property or to employees and others: to what extent contract is one of indemnity.—Insurance against loss or damage to property, whether owned by assured or others, caused by explosion of steam boilers, and for which assured may be liable, and also against loss of life or injury to person, whether to assured, to employees, or to any other person, caused by such explosion or rupture, and payable to assured for the benefit of the injured person or persons, or their legal representatives in case of death, and not contingent upon the legal liability of assured, is a contract of indemnity in so far as it covers injury to the property, but in view of the provision as to nonlegal liability of the assured for injury to the person, it is not a contract of indemnity, especially so where the sum paid is to be for the benefit of the injured person, and it is to be deemed as having been intended, at most, as a pecuniary indemnity to the legal representatives of an employee for the loss sustained by them in consequence of death.[19]

§ 27d. English workmen's compensation act grants complete indemnity.—A policy taken out insuring against accidents to employees under the English Workmen's Compensation Act of 1906 grants a complete indemnity under that act, the fatal accidents act of 1846, and the common law, and applies to all employees in the assured's immediate service.[20]

the insurer or company would assume the liability. *Distinguished* in Kennedy v. Fidelity & Casualty Co. 100 Minn. 1, 117 Am. St. Rep. 658, 9 L.R.A.(N.S.) 478n, 10 Am. & Eng. Annot. Cas. 673, 110 N. W. 97, 36 Ins. L. J. 224.

[18] Beacon Lamp Co. v. Travelers Ins. Co. 61 N. J. Eq. 59, 47 Atl. 579.

[19] Embler v. Hartford Steam Boiler Inspection & Ins. Co. 40 N. Y. Supp. 450, 8 App. Div. 186, aff'd. 158 N. Y. 431, 44 L.R.A. 512, 53 N. E. 212. Policy was issued prior to N. Y. Ins. Law 1892, c. 690. See Chicago Sugar Refining Co. v. American Steam-Boiler Co. (U. S. C. C.) 48 Fed. 198, case rev'd American Steam-Boiler Co. v. Chicago Sugar Refining Co. 57 Fed. 294, 6 C. C. A. 336, 9 U. S. App. 186, 21 L.R.A. 572. Policy was upon steam boilers and provided against explosion and accident and resulting loss to property, and against accidental personal injury and loss of human life, for which insured might be liable to his employees or to any other person. The court said: "On its face it is for indemnity against explosion and accident, and loss or damage resulting therefrom to the property, real and personal, of the assured, and to all property of others for which the assured may be liable, and against accidental personal injury and loss of life for which the assured may be liable to its employees or to any other person, caused by the boilers, or any machinery connected with and operated by them." Id. p. 200.

[20] Bradley & Essex & Suffolk Accident Indemnity Soc., In re, 81 L. J. K. B. 523, 526, [1912] 1 K. B. 415, 105 L. T. 919, 28 T. L. R. 175, [1912] W. C. Rep. 6, per Fletcher Moulton,

§ 27e. Insurance of carriers against losses from injuries to passengers is contract of indemnity.—A contract to indemnify a common carrier of passengers against losses occurring from injuries to passengers is not against public policy, and is treated, without discussion by the court, as a contract of indemnity.[1]

§ 27f. Insurance against burglary and loss or damage to property are contracts of indemnity.—And "are subject to the same principles as fire insurance, which is only a particular instance of insurance against accident to property." [2]

§ 27g. Insurance against accidents, death, and theft of animals is contract of indemnity.—The fact that a corporation's purpose is to indemnify its members for loss or damage by accidents, death, and theft of animals belonging to its members, and that its members pay a membership fee and annual dues, and are assessed for losses, makes it a contract of indemnity and a co-operative insurance company. It comes within the definition of insurance, and this is so even though the promisor is a corporation and its promise is only to those who become members, and it has no accumulated funds out of which to pay losses, but relies exclusively upon assessments therefor.[3]

§ 27h. Fidelity guaranty insurance is contract of indemnity.—An employers' fidelity bond insuring against loss caused by "fraudulent or dishonest acts . . . amounting to embezzlement or larceny" is essentially a contract of indemnity against loss; and the general rules governing the construction of life and fire insurance are applicable to it.[4]

L. J., a case of construction of a policy and the proposal. See 17 Earl of Halsbury's Laws of England, p. 571.

[1] Trenton Passenger Ry. Co. v. Guarantors Liability Indemnity Co. 60 N. J. L. 246, 44 L.R.A. 213, 37 Atl. 609. See also American Casualty Ins. Co.'s case (Boston & A. R. Co. v. Mercantile Trust & Deposit Co.) 82 Md. 535, 38 L.R.A. 97n, 34 Atl. 778.

[2] 17 Earl of Halsbury's Laws of England, "Insurance," p. 512n.

[3] State v. Vigilant Ins. Co. 30 Kan. 585, 2 Pac. 840.

[4] Ætna Indemnity Co. v. J. R. Crowe Coal & Mining Co. 154 Fed. 545, 83 C. C. A. 431 (*citing* Jackson v. Fidelity & Casualty Co. 75 Fed. 359, 365, 21 C. C. A. 394 [point here is construction]; Guarantee Co. of North America v. Mechanics' Savings Bk. & Trust Co. 80 Fed. 766, 772, 26 C. C. A. 146 [points of construction, and that contract is one of full indemnity]; Champion v. American Bonding & Trust Co. 115 Ky. 863, 872, 103 Am. St. Rep. 356, 75 S. W. 197 [point here is construction]; American Surety Co. v. Pauly, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. 552 [not directly so held. But the court in determining the construction of the bond said: "The object of the bond in suit was to indemnify or insure the bank against loss arising from any fraud or dishonesty on the part of O'Brien in connection with his duties as cashier, or with the duties to which in

§ 27i. Title guaranty insurance is contract of indemnity.—A contract of guaranty insurance of title is a contract of indemnity similar to that of insurance and is governed by the same rule as to right of action not accruing until time of loss.[5] So a title policy is a contract of indemnity where the plainly expressed intent is to indemnify against loss from defects or unmarketability of title, and that if any loss should be sustained by assured by reason of the noncompletion of certain buildings, such loss should come under the indemnification covenants of the policy; as, where the policy indemnified the assured in a certain amount against loss on a mortgage given as collateral security upon ground rents, and the policy also "guaranteed" the completion of certain buildings within a specified time with municipal improvements, free of municipal liens: and in such case the guarantee does not change the nature of the contract as one of indemnity, and make it a guarantee.[6] In another case the bond guaranteed the completion of certain buildings under a contract. Advances had been made for building operations, the consideration being the conveyance of ground rents on land to be improved and the furnishing of said bond. The principle of indemnity was applied, limiting the damages to the actual loss in the value of the ground rents, not exceeding the amount of insurance; the loss being the difference in the market

his employer's service he might be subsequently appointed. That object should not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company if there be another construction equally admissible under the terms of the instrument executed for the protection of the bank." Id. p. 144, per Mr. Justice Harlan]; Fidelity & Casualty Co. v. Eickhoff, 63 Minn. 170, 56 Am. St. Rep. 464, 30 L.R.A. 586, 65 N. W. 351 [in this case the action was brought to recover money alleged to have been paid to defendant's employer upon a bond, executed at defendant's request and in the form requested by him, by which the plaintiff, a guarantee insurance company, obligated itself to make good, and reimburse to the employer such pecuniary loss as it might sustain by reason of the infidelity of defendant as employee and it was held that the obligation of defendant to indemnify the plaintiff was coextensive with that of the latter to reimburse the employer]); Remington v. Fidelity & Casualty Co. 27 Wash. 429, 435, 72 Pac. 432.

[5] Purcell v. Land Title Guarantee Co. 94 Mo. App. 5, 67 S. W. 726.

[6] Wheeler v. Equitable Trust Co. 221 Pa. 276, 70 Atl. 750, 37 Ins. L. J. 1037, s. c. 206 Pa. 428, 55 Atl. 1065. The syllabus in this case (221 Pa. 276) reads as follows: Where a policy of title insurance of a mortgage is by its terms a general contract of indemnity against loss from defects or unmarketability "of the title of the insured to the estate, mortgage or interest" in the real estate included in the mortgage, and the policy contains in a note to a schedule a guaranty to complete certain buildings according to plans and specifications mentioned, the court will construe the whole contract to be one of indemnity; and where it also appears that the in-

value of the ground rents if the buildings had been completed and their value with the buildings in their incompleted state.[7]

§ 27j. Rent or rent guaranty insurance is contract of indemnity.—A fire policy insuring against loss of rents is within a Code provision defining insurance, and providing that the sole object of insurance is indemnity, and it is a contract of indemnity. Such a policy may validly stipulate for a method of ascertaining and computing the loss without violating in anyway the principle that insurance shall furnish only indemnity against loss.[8]

§ 27k. Insurance on "use and occupancy" of an elevator: when not a contract of indemnity.—A policy insuring the use and occupancy of an elevator, issued to a grain elevating company, under which the liability is fixed at a specified sum per day, and wherein the insurer agrees to pay absolutely and unconditionally the amount or sum fixed in its contract for the loss to the insured by reason of its suspension of business by fire, partakes of the nature of a valued policy and it is not unqualifiedly a contract of indemnity. The stipulated sum agreed to be paid is the measure of liability.[9]

§ 27l. Credit guaranty insurance is contract of indemnity.—Credit guaranty insurance, or contract to indemnify against loss of claims or against loss by insolvency of debtors, is one of indemnity against loss of property. It is a contract of insurance.[10]

sured, who held the mortgage as collateral for a loan, had bought it in at his own sale, permitted by the terms of the loan, at a price equal to the loan, and thereafter had foreclosed the mortgage and bought in the real estate, the insured will not be permitted in an action on the policy to show a defect in title, or that the houses had not been completed in accordance with the plans and specifications. In such case it is immaterial that the insured, and not a stranger, bid the mortgage up and bought it in at an amount equal to the loan, and it is also immaterial that the only other bidder was the insolvent borrower. The insured, having bought the mortgage at a price equal to the loan, suffered no loss, and is therefore entitled to no indemnity.

[7] German American Title & Trust Co. v. Citizens Trust & Surety Co. 190 Pa. 247, 42 Atl. 682.

[8] Whitney Estate Co. v. Northern Assurance Co. 155 Cal. 521, 23 L.R.A.(N.S.) 123, 18 Am. & Eng. Ann. Cas. 512, 101 Pac. 911, under Cal. Civ. Code, secs. 2527, 2551, 2558. See Young v. American Bonding Co. 228 Pa. 373, 77 Atl. 623, where the business of surety companies is held to be essentially that of insurance,—a case of contract to indemnify vendors against loss of rentals, etc. See notes in 16 L.R.A. (N.S.) 1055, 23 L.R.A.(N.S.) 123, on construction of policy or contract insuring against loss of rents.

[9] Buffalo Elevating Co. v. Prussian National Ins. Co. 71 N. Y. Supp. 918, 64 App. Div. 182, aff'd in Michael v. Prussian National Ins. Co. 171 N. Y. 25, 63 N. E. 810.

[10] State v. Phelan, 66 Mo. App. 548; Shakman v. United States Credit System, 92 Wis. 366, 32 L.R.A. 383, 53 Am. St. Rep. 920, 91 N. W. 304. See Rice v. National Credit Co. 164 Mass. 285, 41 N. E. 276 (policy insuring against loss by

§ 27m. Whether contract to defend physician against suits for malpractice is one of insurance and indemnity.—A company incorporated for the purpose of aiding and protecting the medical profession in the practice of medicine and surgery by the defense of physicians and surgeons against civil prosecution for malpractice, which issues a contract, for an agreed and stipulated annual payment, and agrees to defend said civil suits, for alleged malpractice, during a stated time, at its own expense, not exceeding a certain amount, but limiting its liability by not assuming or agreeing to pay any judgment for damages rendered in any such suit for malpractice against the holder of the contract, is held an insurance company within the meaning of the Code of California defining insurance and specifying what events may be insured against,[11] as such contract provides indemnity against a contingent liability, and the corporation is amenable to regulation under the state insurance laws.[12] The court, per Van Fleet, District Judge, says:[13] "Complainant relies, in support of the contention advanced by it, upon Vredenburgh v. Physicians Defense Co.[14] and State (ex rel. Physicians Defense Co.) v. Laylin,[15] both involving a construction of the same contract, and wherein conclusions were reached in harmony with complainants claim that the contract is merely one for personal services. I am unable to acquiesce in the views expressed in these cases. The reasoning proceeds from a consideration of the formal terms of the contract in suit as affected by certain general definitions of the essentials of a contract of insurance as stated in the text books; and both cases ignore the consideration that the liability to loss, incurred in the contingency as to which the contract relates, involves a liability beyond the naked amount of the judgment that may be recovered. On the other hand, the views herein expressed will be found fully sustained in the later case of Physicians Defense Co. v. O'Brien Ins. Comm'r,[16] where the supreme court of Minnesota, interpreting the same contract in the light of a statutory definition very similar to, and no broader than our own, held it to be clearly a contract of insurance." In the Illinois case,

insolvency of debtors considered as contract of indemnity, but no discussion on this point), *cited* in American Credit Indemnity Co. v. Champion Coated Paper Co. 103 Fed. 609, 614, 43 C. C. A. 340, no discussion, but bonds of this character declared to be essentially insurance contracts.

[11] Cal. Civ. Code, secs. 2527, 2531.

[12] Physicians Defense Co. v. Cooper (U. S. C. C.) 188 Fed. 832, 40 Ins. L. J. 2062. Application for injunction denied; demurrer sustained and bill dismissed. Case aff'd 199 Fed. 576, 118 C. C. A. 50, 47 L.R.A.(N.S.) 290 and note.

[13] Id. 836.

[14] 126 Ill. App. 509.

[15] 73 Ohio St. 90, 76 N. E. 567.

[16] 100 Minn. 490, 111 N. W. 396.

above-mentioned.[17] the contract was decided not to be one of indemnity, as it did not possess that element, and that the corporation did not conduct an insurance business: "applicant does not insure the holder against suits for malpractice. It merely makes a business of defending against them when they are brought, provides legal services for its patrons." In the Ohio case, above noted,[18] the court declared that the contract was "neither in form nor legal effect, anything more than a contract for services. And said contract imposes upon the company no duty or obligation other than that of defending the physician or surgeon who may hold such contract against any action that may be brought against him for alleged malpractice . . . 'said company does not obligate itself to pay, or to assume, or to secure the payment of any judgment against the holder thereof in any suit defended by it.' The undertaking of the company is not that it will compensate the physician or surgeon for loss or injury he may actually sustain, but only that it will, after suit brought against him, undertake and conduct for him his defense, and thereby, if may be, protect him against liability for loss, by preventing judgment being obtained against him. If the company successfully performed its contract no loss or injury results to the defendant. But if not, and judgment be obtained against him, there is no obligation or liability on the part of the company to pay or satisfy said judgment or any part of it. Obviously, we think, such contract is not one of *indemnity*, for under it the liability of the company ceases, at the precise point and time that the right to indemnity attaches or begins. We are of opinion therefore, that the plaintiff company is not an insurance company, nor the contract it issues an insurance contract." [19] This case further turned upon the point that the business was a professional one expressly prohibited to corporations under the Ohio statutes.[20] and such corporation was not entitled to receive a certificate of authority to transact business in the state. In the Minnesota case [1] it was held that the contract was one of insurance, and that the corporation making such a contract was engaged in the insurance business; also that the essential purpose of such a contract is not to render personal services, but to indemnify against loss or damage resulting from the defense of an action for malpractice, and

[17] Vredenburgh v. Physicians Defense Co. 126 Ill. App. 509.

[18] State (ex rel. Physicians Defense Co.) v. Laylin, 73 Ohio St. 90, 76 N. E. 567. The action was to compel the Secretary of State to admit the company to do business in the state.

[19] Id. 99, per Crew, J.

[20] Rev. Stat. Ohio, 1903, sec. 3235.

[1] Physicians Defense Co. v. O'Brien, 100 Minn 490, 111 N. W. 396.

that the company agreed within the statutory definition of insurance to "do some act of value to the insured in case of such loss or damage," and that it was otherwise within the statutory definition.[2]

§ 27n. Employees' benefit and relief association: contract not one of indemnity.—It is held in Pennsylvania that the great underlying purpose of a beneficial association or organization is not to indemnify or secure against loss, but that its design is to accumulate a fund from the contribution of its members for beneficial and protective purposes to be used in their own aid or relief in the misfortunes of sickness, injury or death. The benefits although secured by contract, and for that reason to a limited extent assimilated to the proceeds of insurance are not so considered. This applies to a beneficial association for the protection of employees or firms and corporations against sickness accident or death.[3]

§ 28. Reinsurance is a contract of indemnity.—Reinsurance is a contract of indemnity and binds the reinsurer to pay the reinsured the whole loss sustained in respect of the subject insured to the extent for which he is reinsured.[4] The object of reinsurance is said to be indemnity to the insurer against his own act, since he may have the sum he has insured reassured to him by some other insurer.[5]

§ 29. Other incidents of the doctrine of indemnity.—Since the doctrine of indemnity contemplates that the insured shall be indemnified, but shall never be more than fully indemnified, for a

[2] Lewis, J., dissented.

[3] Beneficial Associations, 32 Pa. County Ct. Rep. 457, following Commonwealth v. Equitable Beneficial Assoc. 137 Pa. St. 412, 18 Atl. 1112. See §§ 344-346 herein.

[4] Allemannia Fire Ins. Co. v. Firemen's Ins. Co. 209 U. S. 326, 52 L. ed. 815, 28 Sup. Ct. 544, 37 Ins. L. J. 316, 14 Am. & Eng. Annot. Cas. 948; Providence-Washington Fire Ins. Co. v. Atlanta-Birmingham Fire Ins. Co. (U. S. C. C.) 166 Fed. 548, 38 Ins. L. J. 461. See also Eagle Ins. Co. v. Lafayette Ins. Co. 9 Ind. 443; Illinois Mutual Fire Ins. Co. v. Andes Ins. Co. 67 Ill. 362, 16 Am. Rep. 620; Mutual S. Ins. Co. v. Hone, 2 N. Y. 235, 240; Hone v. Mutual Safety Ins. Co. 1 Sand. (N. Y.) 137. Commercial Mutual Ins. Co. v. Detroit Fire & Marine Ins. Co. 38 Ohio St. 11, 15, 16, 43 Am. Rep. 413. *Examine* Bartlett v. Fireman's Ins. Co. 77 Iowa, 155, 158, 41 N. W. 601 (where it was said an agreement to reinsure is an undertaking entered into with the insurer "to indemnify the owner of the insured property in case a loss occurs"); Hunt v. New Hampshire Fire Underwriters Assoc. 68 N. H. 305, 308, 73 Am. St. Rep. 602, 38 L.R.A. 514, 38 Atl. 145. See §§ 97, 113, 131 et seq. herein.

Reinsurance is an indemnity to the insurer for the loss up to the amount, whether for the whole or part of the risk stipulated, and for which the premium is paid. Chalaron v. Insurance Co. of North America, 48 La. Ann. 1582, 1590, 36 L.R.A. 742, 21 So. 267.

[5] Insurance Co. of North America v. Hibernia Ins. Co. 140 U. S. 565, 573, 35 L. ed. 517, 11 Sup. Ct. 909.

loss, there have necessarily arisen many incidents or corollaries thereto, such as the doctrines of constructive total loss, of abandonment, of subrogation, coinsurance, contribution, and apportionment of loss, etc., which will be noticed hereafter under their appropriate heads.[6]

[6] Brett, J., in Castellain v. Preston, L. R. 11 Q. B. D. 380; Cincinnati Ins. Co. v. Dufficld, 6 Ohio St. 200, 67 Am. Dec. 339, where it is held that the legal effect of an abandonment in the sense in which it is used in policies of marine insurance and in the law regulating that subject, is to operate as a transfer to the underwriter by the party insured, but only to the extent of the indemnity contemplated by the policy: See chapters herein on Abandonment and Total Loss. As to repairs, particular average adjustment, and one third new for old, as qualifying the principle of indemnity, see § 3078 herein.

CHAPTER III.

PAROL CONTRACTS.

§ 31. Contract need not be in writing: parol contract and rule in England.
§ 31a. Parol contracts: life insurance: industrial life insurance.
§ 31b. Parol contracts: accident insurance.
§ 31c. Parol contracts: "workman's collective policy:" custom.
§ 31d. Parol contract: where policy partly written at time of loss: contract binding.
§ 32. Parol contracts: the common-law rule.
§ 33. Parol contracts: statutory regulations: English stamp acts.
§ 33a. Parol contracts: standard policy.
§ 33b. Statutory regulations: contract partly in writing and partly by parol.
§ 34. Parol contracts: mutual benefit societies.
§ 35. Parol contracts: corporations: statutory or charter provisions.
§ 36. Parol contracts: corporations: statutory or charter provisions: continued.
§ 37. Parol contract for insurance subject to usual provisions of policy.
§ 38. Parol agreement for insurance may be specifically enforced, or court may award damages.
§ 38a. Same subject: standard policy: rule in New York.
§ 38b. Same subject: life insurance: industrial life insurance.
§ 38c. Evidence: oral contract must be clearly established.
§ 39. Parol contracts: statute of frauds.
§ 40. How far parol contract merged in written agreement.
§ 41. Parol contract: renewal.
§ 41a. Same subject: standard policy: agent's authority.
§ 41b. Parol contract: renewal: contract must be complete: recovery: evidence to establish.
§ 41c. Parol contract: renewal: standard policy: equitable estoppel.
§ 41d. Parol contract: reinsurance: validity.
§ 41e. Parol agreement for reinsurance may be specifically enforced.

§ 31. Contract need not be in writing: parol contract and rule in England.—The contract of insurance need not be a specialty nor even in writing, for it is well-settled law that a parol contract of insurance is valid in the absence of a statutory requirement or other

positive regulation to the contrary, and this rule covers not only agreements to insure, but the completed contract.[7] There is a well-

[7] *United States.*—Eames v. Home Ins. Co. 94 U. S. 621, 24 L. ed 298 (valid contract for a policy created); Relief Fire Ins. Co. v. Shaw, 94 U. S. 574, 24 L. ed. 291; Franklin Fire Ins. Co. v. Colt, 20 Wall. (87 U. S.) 560, 22 L. ed. 423 (preliminary contract for insurance); Merchants' Mutual Ins. Co. v. Lyman, 15 Wall. (82 U. S.) 664, 21 L. ed. 246; Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co. 19 How. (60 U. S.) 318, 15 L. ed. 636 (agreement to issue policy binding); Union Mutual Ins. Co. v. Commercial Mutual Ins. Co. 2 Curt. (U. S. C. C.) 524, Fed. Cas. No. 14,372 (parol acceptance of written proposal is binding contract in absence of any statute contra); Humphrey v. Hartford Fire Ins. Co. 15 Blatchf. (U. S. C. C.) 35, 37, 511, Fed. Cas. Nos. 6874, 6875 (contract to insure and to issue policy binding).

Alabama.—Insurance Co. of North America v. Thornton, 130 Ala. 222, 55 L.R.A. 547, 89 Am. St. Rep. 30, 30 So. 614, 31 Ins. L. J. 305 (liable for loss before issue of policy); Commercial Fire Ins. Co. v. Morris, 105 Ala. 498, 18 So. 34 (contract to insure: renewal); Home Ins. Co. v. Adler, 77 Ala. 242, 71 Ala. 521 (valid contract of insurance may be made in parol; verbal agreement to issue policy); Mobile Marine Dock & Mutual Ins. Co. v. McMillan, 31 Ala. 711 (agreement to insure valid; need not be reduced to writing).

California.—American Can Co. v. Agricultural Ins. Co. 12 Cal. App. 133, 106 Pac. 720, 39 Ins. L. J. 518 (parol contract of insurance valid; but facts did not establish one); Crawford v. Transatlantic Fire Ins. Co. 125 Cal. 609, 58 Pac. 177, 28 Ins. L. J. 935 (liability; may attach on oral agreement to issue policy; question of evidence); Harron v. City of London Fire Ins. Co. 88 Cal. 16, 25 Pac. 982 (parol contract for insurance by special agent); Gold v. Sun Ins. Co. 73 Cal. 216, 14 Pac. 786 (parol agreement to issue policy, valid.)

Illinois.—Insurance Co. of North America v. Bird, 175 Ill. 42, 51 N. E. 686; Firemens' Ins. Co. v. Knessner, 164 Ill. 275, 45 N. E. 540; Hartford Fire Ins. Co. v. Farrish, 73 Ill. 166 (parol contract of, valid); Hartford Fire Ins. Co. v. Wilcox, 57 Ill. 180 (parol contracts of, valid); Fire Ins. Co. of Phila. County v. Sinsabaugh, 101 Ill. App. 55; Concordia Fire Ins. Co. v. Heffron, 84 Ill. App. 610 (oral contract of insurance); Stoelke v. Hahn, 55 Ill. App. 497 (verbal contract of, valid in absence of statute to contrary).

Indiana.—Commercial Union Assurance Co. v. State, 113 Ind. 331, 15 N. E. 518 (agents may make parol as well as written contracts); Posey County Fire Assoc. v. Hogan, 37 Ind. App. 573, 77 N. E. 670 ("it has long been settled that an oral contract for insurance is valid"); Western Assur. Co. v. McAlpin, 23 Ind. App. 220, 77 Am. St. Rep. 423, 55 N. E. 119 (valid contract to insure).

Iowa.—Revere Fire Ins. Co. v. Chamberlain, 56 Iowa, 508, 8 N. W. 338 ("that insurance may be effected by parol is well settled," per Adams, Ch. J.); Hubbard v. Hartford Fire Ins. Co. 33 Iowa, 325, 11 Am. Rep. 125 (case of agreement to issue a policy on a certain date; issued but not delivered).

Kansas.—Wilson v. German-American Ins. Co. 90 Kan. 355, 133 Pac. 715 (binding contract of insurance may be made without issuance of policy); Preferred Accident Ins. Co. v. Stone, 61 Kan. 48, 59 Pac. 586 (execution and delivery of policy not essential); Phoenix Ins. Co. v. Ireland, 9 Kan. App. 644, 58 Pac. 1024 (parol contract to insure, valid in absence of statutory provision, contra).

defined distinction between a parol contract to insure or to issue an

Kentucky.—Hartford Fire Ins. Co. v. Trimble, 117 Ky. 583, 25 Ky. L. Rep. 1497, 78 S. W. 462, 33 Ins. L. J. 348 ("well settled law in this state that a parol contract of insurance is valid and enforceable"); Commercial Union Assur. Co. v. Urbansky, 113 Ky. 624, 24 Ky. L. Rep. 462, 68 S. W. 653, 31 Ins. L. J. 728 (oral contracts of insurance are valid) *citing* National Fire Ins. Co. v. Rowe, 20 Ky. L. Rep. 1473, 49 S. W. 422; Fidelity & Casualty Co. v. Ballard & Ballard Co. 105 Ky. 253, 20 Ky. L. Rep. 1169, 48 S. W. 1074, 28 Ins. L. J. 227; Howard Ins. Co. v. Owen's Admr. 94 Ky. 191, 14 Ky. L. Rep. 881, 21 S. W. 1037.

Maine.—Walker v. Metropolitan Ins. Co. 56 Me. 371 (nothing in nature of contract of fire insurance which requires it to be in writing).

Maryland.—Mallette v. British-American Assur. Co. 91 Md. 471, 46 Atl. 1005, 29 Ins. L. J. 966 (contract to insure valid; pleading oral contract and demurrer).

Massachusetts.—Goodhue v. Hartford Fire Ins. Co. 175 Mass. 187, 55 N. E. 1039, 29 Ins. L. J. 207 (oral contract valid; temporary here to cover removal); Sanford v. Orient Ins. Co. 174 Mass. 416, 75 Am. St. Rep. 358, 54 N. E. 883 (may make preliminary contract. See note to this case 49 Cent. L. J. 467); Brown v. Franklin Mutual Fire Ins. Co. 165 Mass. 565, 52 Am. St. Rep. 534, 43 N. E. 512 (evidence of custom of agent to bind company by oral contract of insurance admissible; stock company may undoubtedly make oral contract of insurance); Emery v. Boston Marine Ins. Co. 138 Mass. 398 (secretary held to have authority to make binding oral agreement to indorse a risk upon an open policy); Dodd v. Gloucester Ins. Co. 120 Mass. 468 (marine; valid contract of insurance held to have existed); Sanborn v. Firemen's Ins. Co. 16 Gray (82 Mass.) 448, 77 Am. Dec. 419 (where no statutory requirement, contract need not be in writing).

Michigan.—Michigan Pipe Co. v. Michigan Fire & Mar. Ins. Co. 92 Mich. 482, 491, 20 L.R.A. 277, 52 N. W. 1070 ("it is well settled that where a contract of insurance has been agreed upon, no policy need be made out. Its delivery is not essential to the validity of the contract"); Roger Williams Ins. Co. v. Carrington, 43 Mich. 252, 5 N. W. 303, 9 Ins. L. J. 577.

Missouri.—King v. Phœnix Ins. Co. 195 Mo. 290, 113 Am. St. Rep. 678, 6 Amer. & Eng. Ann. Cas. 618, 92 S. W. 892 (oral contract of insurance valid); Baile v. St. Joseph Fire & Marine Ins. Co. 73 Mo. 371, 383 (also *considered* at length in above case); McIntyre v. Federal Life Ins. Co. 142 Mo. App. 256, 126 S. W. 227 (contract of insurance need not be evidenced by a written policy); Sheppard v. Boone County Home Mutual Fire Ins. Co. 138 Mo. App. 20, 119 S. W. 984 (but facts here showed no oral contract was made).

Nebraska.—Carter v. Bankers Life Ins. Co. 83 Neb. 810, 120 S. W. 455 (written application and counter proposal; no policy issued; contract valid).

New Hampshire.—Goodall v. New England Mutual Fire Ins. Co. 25 N. H. 169 (policy need not be actually issued).

New Jersey.—Smith & Wallace Co. v. Prussian Nat. Ins. Co. 68 N. J. L. 674, 58 Atl. 458 (complete temporary contract existed).

New York.—International Ferry Co. v. American Fidelity Co. 207 N. Y. 350, 101 N. E. 160 (a parol agreement by an insurance company to effect a stipulated insurance by issue of a valid policy is binding in absence of constitutional or legislative requirement contra. A case of marine vessel liability insurance); Ruggles v. American Cent. Ins. Co. 114 N. Y. 415, 11 Am. St. Rep. 674, 21 N. E.

insurance policy, and a parol contract of insurance; and in Ohio a

1000 (complete and valid contract from date of conversation with agent); Van Loan v. Farmers Mutual Fire Ins. Assoc. 90 N. Y. 280 (valid agreement for insurance); Angell v. Hartford Fire Ins. Co. 59 N. Y. 171, 17 Am. Rep. 322 (agent may make preliminary contract to issue policy); Ellis v. Albany City Ins. Co. 50 N. Y. 402, 10 Am. Rep. 495 (valid preliminary contract with agent to issue policy); Fish v. Cottenett, 44 N. Y. 538, 4 Am. Rep. 715 (parol contract for insurance valid); Trustees of First Baptist Church v. Brooklyn Fire Ins. Co. 19 N. Y. 305; Reynolds v. Westchester Fire Ins. Co. 40 N. Y. Supp. 336, 8 App. Div. 193. But *compare* §§ 33a, 38a herein.

North Carolina.—Floars v. Ætna Ins. Co. 144 N. C. 232, 11 L.R.A. (N.S.) 867n, 56 S. E. 916 (oral contract of insurance or to insure will, in absence of some statutory provisions, be upheld if otherwise binding).

North Dakota.—Boos v. Ætna Ins. Co. 22 N. Dak. 11, 132 N. W. 222, 40 Ins. L. J. 1787 (breach of parol contract to insure; recovery may be had); following McCabe Bros. v. Ætna Ins. Co. 9 N. Dak. 19, 47 L.R.A. 641, 81 N. W. 426.

Ohio.—Newark Machine Co. v. Kenton Ins. Co. 50 Ohio St. 549, 22 L.R.A. 768 and note, 35 N. E. 1060 (parol contract of insurance valid).

Oregon.—Sproul v. Western Assurance Co. 33 Oreg. 98, 54 Pac. 180, 28 Ins. L. J. 718 (oral preliminary contract to insure); North British & Mercantile Ins. Co. v. Lambert, 26 Or. 199, 37 Pac. 909 (oral contract for insurance by agent binding).

Pennsylvania.—Benner v. Fire Assoc. of Phila. 229 Pa. 75, 140 Am. St. Rep. 706, 78 Atl. 44, 40 Ins. L. J. 84 (law permits oral contracts of insurance; oral executory contract valid); Patterson v. Benjamin Franklin Ins. Co. 81½ Pa. St. 454 (there may be a parol contract before issuing policy, but evidence here insufficient); Smith v. Odlin, 4 Yeates (Pa.) 468; Ripka v. Mutual Fire Ins. Co. 36 Pa. Super. Ct. 517 (agent may bind company by contracts by parol before issuing policy, unless specific charter requirements preclude).

South Carolina.—Strickley v. Mobile Ins. Co. 37 S. Car. 56, 16 S. E. 280 (company bound where local agent received insured's money on promise to issue policy).

Texas.—Cohen v. Continental Fire Ins. Co. 67 Tex. 325, 60 Am. Rep. 24, 3 S. W. 296 (agent may contract by parol renewal); Austin Fire Ins. Co. v. Brown (Tex. Civ. App.) 160 S. W. 973 (preliminary oral contract binding); State Mutual Fire Ins. Co. v. Taylor, — Tex. Civ. App. —, 157 S. W. 950 (contract of insurance by parol valid in absence of charter or statutory provisions).

Utah.—Idaho Forwarding Co. v. Firemen's Fund Ins. Co. 8 Utah 41, 17 L.R.A. 586, 29 Pac. 826 (agreement to execute policy in futuro; question of pleading and evidence, held that plaintiff could not recover).

Virginia.—Interstate Fire Ins. Co. v. McFall, 114 Va. 207, 76 S. E. 293 (completed contract undelivered policy); Haskin v. Agricultural Fire Ins. Co. 78 Va. 700; Woody v. Old Dominion Ins. Co. 31 Gratt. 362, 31 Am. Rep. 732.

Washington.—Thompson v. Germania Fire Ins. Co. 45 Wash. 482, 88 Pac. 941, 36 Ins. L. J. 400 (complete oral contract made).

West Virginia.—Croft v. Hanover Fire Ins. Co. 40 W. Va. 508, 52 Am. St. Rep. 902, 21 S. E. 854 (oral executory contract valid).

Wisconsin.—Whitman v. Milwaukee Fire Ins. Co. 128 Wis. 124, 116 Am. St. Rep. 25, 5 L.R.A.(N.S.) 680n, 107 N. W. 291 (oral contract against fire, valid); John R. Davis Lumber Co. v. Scottish Union &

parol contract of insurance, as distinguished from a parol agreement to issue a policy, must not be executory, but must take effect *in præsenti*.[8]

National Ins. Co. 94 Wis. 472, 69 N. W. 156 (binding verbal contract of insurance may be made); Stehlick v. Milwaukee Mechanics' Ins. Co. 87 Wis. 322, 58 N. W. 35 (parol contract to insure valid); Mathers v. Union Mutual Accident Assn. 78 Wis. 588, 11 L.R.A. 83, 47 N. W. 1130 (oral agreement for present insurance, valid); Northwestern Ins. Co. v. Ætna Ins. Co. 23 Wis. 160, 99 Am. Dec. 145. See Strohn v. Hartford Ins. Co. 33 Wis. 648.

Wyoming.—Summers v. Mutual Life Ins. Co. 12 Wyo. 369, 109 Am. St. Rep. 952, 66 L.R.A. 812, 75 Pac. 937 (parties bound though terms not reduced to writing).

England.—See Coulter v. Equity Fire Ins. Co. 24 Canadian L. T. 88. *As to English decisions*, see note 22 L.R.A. 772. *When contract deemed to be concluded*, see marine ins. act 1906, 6 Edw. VII. c. 41, sec. 21; Butterworth's 20th Cent. Stat. (1900–1909) p. 404.

See further as to validity of oral contracts of insurance, notes 22 L.R.A. 768–773; 6 Am. & Eng. Ann. Cas. 624, 69 Am. St. Rep. 143, 77 Am. Dec. 402.

"Although there is a difference of opinion in the various jurisdictions and among the text-writers as to whether or not an executory contract can be made to insure in the future, yet the clear preponderance of authority seems to be that such contracts are valid." Benner v. Fire Assoc. of Phila. 229 Pa. 75, 140 Am. St. Rep. 706, 78 Atl. 44; 40 Ins. L. J. 84, per Moschzisker J., citing numerous cases.

Policy need not be issued, and if no date is mentioned takes effect immediately. Potter v. Phœnix Ins. Co. 63 Fed. 382. See note 10 Am. Rep. 502.

As to marine insurances, see 1 Duer on Ins. (ed. 1845) 60, § 5. See Morgan v. Mather, 2 Ves. Jr. 15 and n. Contra, Bell v. Western Marine & Fire Ins. Co. 5 Rob. (La.) 423, 39 Am. Dec. 542; Cockerill v. Cincinnati Mutual Ins. Co. 16 Ohio, 148. In this case the court says: "It is universal commercial usage that the policy shall be in writing, and there is no exception to it in positive decision or municipal regulation. Such a thing as a verbal policy is unknown to the law of insurance, and the books upon the subject and decisions unite in declaring that a policy must be in writing." It here appeared that the act incorporating the company required their contract to be in writing, but the court also said that "without the act we should hold that a policy of insurance upon the principle of general usage must be in writing, as supported and declared by universal authority." But see Dayton Ins. Co. v. Kelly, 24 Ohio St. 345, 15 Am. Rep. 612.

It should be remembered that a policy is the contract reduced to writing. See Hicks v. British American Assur. Co. 162 N. Y. 284, 48 L.R.A. 424, 56 N. E. 743, where the court says: "It is usual for the company to issue a policy of insurance evidencing the contract between the parties, but the policy accomplishes nothing more than that," per Parker, C. J. So the issuing of a policy furnishes a convenient mode of proving contract but it is not essential to its validity. Walker v. Metropolitan Ins. Co. 56 Me. 371, 376.

Prepayment of premium not prerequisite oral contract. See fifth note under § 41 herein. See § 72 herein.

[8] Hartford Fire Ins. Co. v. Whitman, 75 Ohio St. 312, 9 Amer. & Eng. Ann. Cas. 218, 79 N. E. 450; Hartford Fire Ins. Co. v. Trimble, 117

A parol contract by a duly authorized agent of an insurance company is binding on the company before issuing the policy.[9] In a Massachusetts case the plaintiff made an application for fire insurance to defendant's local agent, who orally agreed to place a certain amount at a certain rate upon the risk at once, and to bind it, and immediately made a memorandum to that effect in the "binding book." The risk was specially hazardous, and in view thereof a special agent was to inspect and approve the risk. The agent had written authority to receive proposals for insurance, and was accustomed to fill and deliver policies signed in blank by the company's officers and left with him for that purpose. The same class of risks had been frequently taken by the agent, and he had issued policies thereon without consulting the company, and agents were accustomed to bind their principals by preliminary oral agreements until policies could be conveniently issued. Upon action brought it was decided that the agent had made an oral agreement for insurance within the apparent scope of his authority.[10] So an oral agreement

Ky. 583, 25 Ky. L. Rep. 1497, 78 S. W. 462, 33 Ins. L. J. 348 (where the court said: "We recognize the distinction between parol contracts of insurance in præsenti, and in futuro, but consider it unnecessary to consider this question").

A distinction exists between a contract of insurance which comprehends the issued policy, and a contract to insure. The one is executory in its nature, and the other executed. Sproul v. Western Assur. Co. 33 Oreg. 98, 54 Pac. 180.

"It is contended by counsel for appellee that the authorities distinguish between verbal agreements for insurance in futuro, and verbal contracts for insurance in præsenti, and have rejected the former, but sustained the latter, character of contracts. We concede there is a conflict of authority upon this question." The court then considers whether a contract for renewal can validly rest in parol, holds that it can, and adds: "The conclusion we have reached is supported by King v. Cox, 63 Ark. 204, 37 S. W. 877, and Home Ins. Co. v. Adler, 71 Ala. 516 (521, 77 Ala. 242). In those cases it appeared that the contract was made within a few days of the expiration of the policies which were to be renewed. Counsel for appellee argue that the contracts in those cases were made so near the date of the expiration of the old policies the court regarded them as contracts of insurance in præsenti. The court in those cases did not hold that the contracts were enforcible because the contracts for renewal were made but a short time before the expiration of the old policies, and, therefore, were contracts in præsenti. They simply adjudged that parol contracts for the renewal of policies, which were made before the expiration of the old policies" were binding. Baldwin v. Phoenix Ins. Co. 107 Ky. 356, 21 Ky. L. Rep. 1090, 54 S. W. 13, 29 Ins. L. J. 78, per Paynter, J. See Taylor v. Phoenix Ins. Co. 47 Wis. 365, 2 N. W. 559, as to contract to renew in præsenti (*quoted* from in American Can Co. v. Agricultural Ins. Co. 12 Cal. App. 133, 106 Pac. 720, 39 Ins. L. J. 518); Western Assurance Co. v. McAlpin, 23 Ind. App. 220, 55 N. E. 119.

[9] Ripka v. Mutual Fire Ins. Co. 36 Pa. Super. Ct. 517.

[10] Putnam v. Home Ins. Co. 123 Mass. 324, 25 Am. Rep. 93. But see

may be binding on the company when by agreement with the assured the agent is to fix the amount of indemnity as he sees proper and does fix it, as shown by memorandum made by him.[11] And an agent who is intrusted with blank policies, signed by the president and secretary of the insurance corporation, with authority to fill up and negotiate the same, may bind it by an oral contract of insurance.[12] It is held in Connecticut that an insurance company cannot ordinarily insure by parol, but that the parties may, however, agree by parol as to the terms upon which a policy may be issued.[13] In another case an application was made to an agent of several insurance companies for insurance, and the amount was specified, the rate fixed, the premium paid, and a receipt given therefor by the agent, who promised to draw the policy the second following day, and stated that if it burned before then "we will call it" the property "insured," and these negotiations were reduced to writing, and a policy was issued by the insurer and accepted by the insured, and afterwards the property burned, in an action brought upon the oral contract to insure, it was held that there was no such oral contract with the company; that at the most it was an oral contract on the part of the agent to insure.[14] Guarantee insurance, however, is declared to be excepted from the rule first above stated.[15]

In England, however, the act 35 George III., chapter 63, section 2, expressly provided for an engrossed, printed or written contract in case of every agreement for any marine insurance, and that the same shall specify the premium or consideration, the character of the risk, the sums insured, and the names of the insurers.[16] And by act 1867, 30 Victoria, chapter 23, section 7, every contract or agreement for sea insurance [17] must be expressed in a policy, other-

Daniels v. Citizens' Ins. Co. 5 Fed. 425, 430; Taylor v. Germania Ins. Co. 2 Dill. (U. S. C. C.) 282, Fed. Cas. 13,793; Home Ins. Co. v. Adler, 71 Ala. 516; Warner v. Milford Mutual Fire Ins. Co. 153 Mass. 335, 11 L.R.A. 598, 26 N. E. 877; Franklin Fire Ins. Co. v. Taylor, 52 Miss. 441; Ruggles v. American Cent. Ins. Co. 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. Rep. 674, and note, 678, and note, 21 Am. St. Rep. 883.

As to agent's power to make oral contract, see § 525 herein.

[11] Croft v. Hanover Fire Ins. Co. 40 W. Va. 508, 21 S. E. 854.

[12] King v. Phoenix Ins. Co. 195 Mo. 290, 113 Am. St. Rep. 678, 6 Amer. & Eng. Ann. Cas. 618, 92 S. W. 892.

[13] Bishop v. Clay Fire & Marine Ins. Co. 49 Conn. 167.

[14] Kleis v. Niagara Fire Ins. Co. 117 Mich. 469, 5 Det. L. N. 337, 76 N. W. 155, 27 Ins. L. J. 912.

See as to merger of parol contract in written agreement, § 40 herein.

[15] Floars v. Aetna Life Ins. Co. 144 N. Car. 232, 11 L.R.A.(N.S.) 867n, 56 S. E. 916.

[16] See also 25 Geo. III. c. 44; 28 Geo. III. c. 56 (whole act repealed so far as relates to marine insurance by marine ins. act, 1906, 6 Edw. VII. c. 41) which imply a written contract; Abbott on Shipping, Story's ed. 2, n. 1. As to English Statutes, see § IV. herein.

[17] Other than that referred to in

wise it is null and void, and in addition, under section 9 of said act, no policy shall be pleaded or given in evidence, or admitted in any court to be good and available in law or in equity, unless duly stamped.[18] Under the same act policies effected abroad and chargeable with duty by virtue of the 28 and 29 Victoria, chapter 96, section 15, may be stamped within the time specified in that act. Again, under an English decision, it is held that although there is no positive law in New South Wales necessitating that marine contracts of insurance be in writing, yet an agent authorized to make contracts in the ordinary way must make them in writing,[19] and although the slip be initialed, and would otherwise be a contract of marine insurance, it is not an enforceable policy in England under the provisions of the act above noted.[20]

§ 31a. Parol contracts: life insurance: industrial life insurance.—The rule as to parol contracts stated under the preceding section applies to life insurance.[1] And even though a policy is never issued, a contract for life insurance will come into existence immediately where a proposition is accepted and the premium paid.[2] But a contract for present insurance is not made by an applicant who gives his note for the first premium in consideration that a policy shall be issued, where his examination is to be made in the future, and he expressly stipulates that the note shall not be negotiated until the policy has been delivered and accepted.[3] Again, in a Wisconsin case where an action was brought on an al-

merchant shipping am'd. act 1862, 25 & 26 Vict. c. 63, sec. 55. As to English Statutes, see § IV. herein. See also as to stamp acts: 1 Arnould on Marine Ins. (9th ed. Hart & Simey) secs. 28 et seq. pp. 41 et seq. (where it is said: "The rigour of the law has been considerably modified," etc. and cases are noted in which assured recovered without a policy); 17 Earl of Halsbury's Laws of England, pp. 338 & notes, 505 et seq. 515, 517 and § 33 herein.

[18] But see Teignmouth General Mutual Ship. Assoc., In re (Martin's Claim) L. R. 14 Eq. 148.

[19] Davies v. National Fire & Marine Ins. Co. of New Zealand App. Cas. L. R. (H. L. P. C. Eng. 1891) 485.

[20] Fisher v. Liverpool Marine Ins. Co. L. R. 8 Q. B. 469; L. R. 9 Q. B. 418. Validity of oral contract of insurance: English decisions, see note 22 L.R.A. 772.

As to shipmen's clubs or associations, see 30 & 31 Vict. c. 26, sec. 9; 25 & 26 Vict. c. 89, secs. 3, 6, 180, 193, 194, 196, 206. For English Statutes, see § IV. herein.

[1] Knights of Maccabees of the World v. Gordon, 83 Ark. 17, 102 S. W. 711, 36 Ins. L. J. 628; McIntyre v. Federal Life Ins. Co. 142 Mo. App. 256, 126 S. W. 227; Pacific Mutual Ins. Co. v. Shaffer, 30 Tex. Civ. App. 313, 70 S. W. 566.

[2] Carter v. Bankers Life Ins. Co. 83 Neb. 810, 120 N. W. 455 (a ten-payment policy). See also Knights of Maccabees of the World v. Gordon, 83 Ark. 17, 102 S. W. 711, 36 Ins. L. J. 628.

[3] Summers v. Mutual Life Ins. Co. 12 Wyo. 369, 66 L.R.A. 812, 109 Am. St. Rep. 952, 75 Pac. 937.

leged oral contract of prudential life insurance, the validity of such a contract was evidently conceded, at least there appears no discussion as to that point, the only question being whether there was such an oral contract upon the evidence and it was determined that there was not.[4]

§ 31b. Parol contracts: accident insurance.—Within the rule above stated.[4a] an oral agreement for present or immediate insurance covering an accident risk is valid and binding.[5] And the general rule applies that when a contract of insurance has been agreed on, the execution of a policy is not essential to its validity, unless it is part of the contract that execution and delivery are prerequisites to its taking effect.[6] So in an action of assumpsit upon an accident insurance policy, it is held that a contract of insurance is to be treated by the principles applicable to the making of contracts in general.[7] In a Georgia case it was claimed that an oral contract was made with defendant's agent for immediate insurance, and that the written policy had been fraudulently dated so as to post date the accident. It was held that it was unnecessary to decide whether or not a valid contract of accident insurance could be made in that state, as it was apparent from the evidence that no parol contract was consummated; that the plaintiff had expressly agreed, in writing, that the basis of the contract between him and the company should be the application and the premium paid by him; that no statements made by him to the agents should bind the company unless written upon the application; that the application itself should not be binding upon the company until accepted by its secretary, and that the policy itself should not be in force until actually issued from the company's office. It further appeared that the insured had knowledge of the limitations upon the agent's authority and that he was not empowered to write any binding contract and that no statements made by him to the applicant were to bind the company. It was also held that a mere verbal assurance by the agent of the insurer to the applicant that he was insured from the date of the application and the giving by the former to the latter of a receipt purporting

[4] Chamberlain v. Prudential Ins. Co. of America, 109 Wis. 4, 83 Am. St. Rep. 851, 85 N. W. 128, 30 Ins. L. J. 427.

[4a] See § 31 herein.

[5] Mathers v. Union Mutual Accident Assoc. 78 Wis. 588, 11 L.R.A. 83, 47 N. W. 1130. See Washburn v. United States Casualty Co. 106 Me. 411, 76 Atl. 902.

[6] Preferred Accident Ins. Co. v. Stone, 61 Kan. 48, 53, 58 Pac. 586.

[7] Washburn v. United States Casualty Co. 106 Me. 411, 76 Atl. 902, 108 Me. 429, 81 Atl. 575.

to be for the first quarterly premium did not constitute a contract of insurance on which an action could be maintained.[8]

§ 31c. Parol contracts: "workman's collective policy;" custom.—The rule that a contract of insurance may be by parol, and need not be in writing,[9] has been applied where a "workman's collective policy," for which application was made, was one by which the insurer agreed to pay one year's full wages to the party injured in case of death, and one half wages in fifty-two weeks for certain injuries. This policy was to be issued to an employer for the benefit of its operatives, and the insurer agreed through its agent, in consideration of the employer's application and promise to pay the premium, that the insurance should be in force until the application was rejected and notice thereof given, that is, the policy was not to be issued unless the application was approved, and until it was disapproved and the employer received notice to that effect the insurance was to be in force. It did not appear that the application was signed. The agent was authorized to and did make such contracts, although it was his custom to give a writing to that effect. An employee lost his life between the time the application was made and notification of its rejection. It was also held that inasmuch as there existed no right to have a policy issued the remedy was not in equity, but by an action at law to recover on the parol contract.[10]

§ 31d. Parol contract: where policy partly written at time of loss: contract binding.—In a late case the owner of property contracted with an agent representing several insurance companies to insure property for a certain amount, but did not designate the particular company in which the insurance should be taken, and at the same time he paid the premium and arranged with the agent to hold the policy, and thereafter to keep the property insured. A policy was issued in a company, which policy shortly afterwards was canceled, and the agent then placed the insurance in another

[8] Fowler v. Preferred Accident Ins. Co. 100 Ga. 330, 28 S. E. 398, 27 Ins. L. J. 168. See also Fireman's Fund Ins. Co. v. Rogers, 108 Ga. 191, 33 S. E. 954, 28 Ins. L. J. 1025. *Examine* § 34 herein.

Contract of fire insurance to be binding must be in writing under Georgia Statute. Delaware Ins. Co. v. Pennsylvania Fire Ins. Co. 126 Ga. 380, 7 Amer. & Eng. Annot. Cas. 1134, 55 S. E. 330; Ga. Civ. Code secs. 2022, 2089. See Lippman v. Ætna Ins. Co. 108 Ga. 391, 33 S. E. 897, 28 Ins. L. J. 886, as to writing being necessary to alter insurance contract.

As to agent's power to make oral contract, see § 525 herein.

[9] See § 31 herein.

[10] Fidelity & Casualty Co. v. Ballard & Ballard Co. 105 Ky. 253, 20 Ky. L. Rep. 1169, 48 S. W. 1074, 28 Ins. L. J. 227.

Agent's agreement: Liability not to attach till approval, see § 59 herein.

company represented by him, and that policy, too, was canceled. He then placed the insurance in the defendant company, and began to write out a policy, but an interruption prevented its completion at the time, and before it was finished the property was destroyed by fire. It was held that the steps taken by the authorized agent of the company constituted a binding contract of insurance, and also that the agent's agreement with the property owner to hold the policy and keep his property insured was not repugnant to the duty of the agent to defendant, nor did it affect the validity of the contract of insurance.[11]

§ 32. Parol contracts: the common-law rule.—Formerly, contracts of insurance were not required to be in writing, and this was the common law in England.[12] The earliest English statute, 43 Elizabeth, chapter 12, enacted in 1601, mentions policies of insurance, as does also the statute 6 George I., chapter 18, which was the act securing to the two great companies of assurance in 1719 the monopoly of making these contracts, subject to certain exceptions. In this latter act the preamble declares that this contract "or course of dealing is commonly called a policy of assurance." But there is nothing in these statutory regulations which can be construed as making the acts requiring a written policy in England declaratory of the common law, and in fact the earlier statutes in that country sought only to remedy or restrain certain abuses in insurance rather than to declare old principles. It was no doubt a well-established usage to have policies of assurance in England from the day of the Lombards, and Maylnes[13] asserts that it was customary to register verbatim policies of assurance in the office of assurances in order to preserve evidence of the contract in case the policy should become lost. But these and other like facts go no farther than to establish a usage to have policies as an evidence of the contract. An examination of Lord Mansfield's decisions and of the cases subsequent thereto fails to discover that a policy or writing was necessary to the validity of a contract of insurance at the common law, and it is admitted that formerly the contract was not required to be in writing.[14] Emerigon declares that "Valin and Pothier agree in saying that in insurance the writing is only required for proof of the contract; that the writing is extrinsic to

[11] Wilson v. German-American Ins. Co. 90 Kan. 355, 133 Pac. 715; Warren v. Franklin Fire Ins. Co. (Iowa, 1913) 143 N. W. 554.

[12] Northwestern Iron Co. v. Ætna Ins. Co. 23 Wis. 160; Sanborn v. Fireman's Ins. Co. 16 Gray (82 Mass.) 448, 77 Am. Dec. 419; Trustees of First Baptist Church v. Brooklyn Fire Ins. Co. 19 N. Y. 305; 1 Smith's Mercantile Law (M. & H. 1890), 494.

[13] Lex Mercatoria, 115.

[14] See 1 Wood on Fire Ins. (2d ed.) sec. 1; 1 Phillips on Ins. (3d ed.) secs. 8, 9.

the substance of the agreements. They are reduced to writing for the purpose of more easily preserving their proof. . . . But this common-law rule ceases its operation in all cases where writing is expressly required by law. . . . The Guidon [15] informs us that formerly insurances were made without writing; they were termed 'in confidence,' because the person stipulating for insurance did not make his bargain in writing, but trusted to the good faith and honesty of his insurer. But this practice, because of the abuses and disputes it engendered, was subsequently prohibited in all commercial places." [16] And the court in Sandford v. Trust Fire Insurance Company [17] declared in 1845 that it had not been able to find anything in the common law of England rendering it necessary that contracts of insurance should be in writing.[18] So it was held in a case in the United States Supreme Court [19] that

[15] Chapter 1, art. 2, p. 223.

[16] Emerigon on Ins. (Meredith's ed. 1805) c. ii. sec. 1, pp. 25, 26. See 1 Wood on Fire Ins. (2d ed.) p. 2, sec. 1.

[17] 11 Paige (N. Y.) 547.

[18] See also Sanborn v. Fireman's Ins. Co. 16 Gray (82 Mass.) 448, 77 Am. Dec. 419.

[19] Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co. 19 How. (60 U. S.) 318, 321, 322, 15 L. ed. 636.

Cited in United States.—McElroy v. British America Assur. Co. 36 C. C. A. 622, 94 Fed. 997; London & Lancashire Fire Ins. Co. v. Storrs, 17 C. C. A. 650, 36 U. S. App. 327, 71 Fed. 125; Fireman's Fund Ins. Co. v. Norwood, 16 C. C. A. 140, 32 U. S. App. 490, 69 Fed. 75; Scranton Steel Co. v. Ward's Detroit & L. S. Line, 40 Fed. 870; Humphrey v. Hartford F. Ins. Co. 15 Blatchf. 37 Fed. Cas. No. 6,874; Cary v. Nagel, 2 Biss. 246, Fed. Cas. No. 2,403.

Illinois.—Continental Ins. Co. v. Roller, 101 Ill. App. 80; Firemen's Ins. Co. v. Knessner, 164 Ill. 280, 45 N. E. 540; Hartford Fire Ins. Co. v. Wilcox, 57 Ill. 182.

Indiana.—Peoria Marine & Fire Ins. Co. v. Walser, 22 Ind. 83.

Iowa.—Viele v. Germania Ins. Co. 26 Iowa, 9, 96 Am. Dec. 83.

Kansas.—Phoenix Ins. Co. v. Ireland, 9 Kan. App. 649, 58 Pac. 1024; Western Massachusetts Ins. Co. v. Duffey, 2 Kan. 355.

Kentucky.—Fidelity & Casualty Co. v. Ballard, 105 Ky. 256, 48 S. W. 1074; Security F. Ins. Co. v. Kentucky Marine & Fire Ins. Co. 7 Bush, 86, 3 Am. Rep. 301.

Louisiana.—Trager v. Louisiana Equitable L. Ins. Co. 31 La. Ann. 239.

Maryland.—Phoenix Ins. Co. v. Ryland, 69 Md. 447, 1 L.R.A. 550, 16 Atl. 109.

Massachusetts.—Brown v. Franklin Mut. F. Ins. Co. 165 Mass. 568, 52 Am. St. Rep. 535, 43 N. E. 512; Emery v. Boston M. Ins. Co. 138 Mass. 412; Sanborn v. Fireman's Ins. Co. 16 Gray (82 Mass.) 453.

Missouri.—Griswold v. American Cent. Ins. Co. 1 Mo. App. 102.

New Hampshire.—Morrison v. North America Ins. Co. 64 N. H. 140, 7 Atl. 378.

New York.—Van Loan v. Farmers' Mut. F. Ins. Asso. 90 N. Y. 285; Trustees of First Baptist Church v. Brooklyn F. Ins. Co. 19 N. Y. 308; Rhodes v. Railway Pass. Ins. Co. 5 Lans. 74; Van Loan v. Farmers' Mut. F. Ins. Asso. 24 Hun, 134; Hotchkiss v. Germania F. Ins. Co. 5 Hun, 98; Post v. Ætna Ins. Co. 43 Barb. 362; see Hicks v. British Amer-

under the common law a promise for a valuable consideration to make a policy of insurance is no more required to be in writing than a promise to execute and deliver a bond or a bill of exchange or a negotiable note.[20] In the case of Cockerill v. Cincinnati Mutual Insurance Company [1] the court, relying upon usage and upon the fact that the charter of the company required a writing, holds that such a thing as a verbal policy was unknown to the law of insurance, and that a policy must be in writing "as supported and declared by universal adjudication." But the policy is the writing. This case was substantially overruled by a later Ohio case: that is, in so far as relates to the contract being in writing.[2] The opinions of Mr. Duer and Mr. Millar [3] are to the same purport as the Ohio case. The court of appeals in New York [4] has held that a contract of insurance is not required to be in writing by the general principles of law. Under a Wisconsin decision neither the common law nor any statutory provision in force in that state requires that an agreement to insure against loss by fire should be reduced to writing.[5] Referring again to the statutory regulations in England, Mr. May [6] doubts whether the stamp laws require a writing and whether a parol agreement to insure would be void. The statements in this section as to the common-law rule relate also to cases of contracts by other than corporations. The rule as to them will be considered hereafter.[7]

§ 33. Parol contracts: statutory regulations: English stamp acts.—Where a statute requires the stipulations to be in writing, it is held in Georgia that it is indispensable that they should be.[8] So

ica Assur. Co. 13 App. Div. 445, 43 N. Y. Supp. 623, rev'd 162 N. Y. 284, 48 L.R.A. 424, 56 N. E. 743.

North Dakota.—McCabe Bros. v. Ætna Ins. Co. 9 N. D. 25, 47 L.R.A. 645, 81 N. W. 426.

Ohio.—Elstner v. Cincinnati Equitable Ins. Co. 1 Disney (Ohio) 411, 420.

Tennessee.—American Cent. Ins. Co. v. McCrea, 8 Lea, 524, 41 Am. Rep. 647.

Texas.—Splawn v. Chew, 60 Tex. 522, 537.

Wisconsin. Campbell v. American F. Ins. Co. 73 Wis. 108, 40 N. W. 661.

Wyoming.—Summers v. Mutual L. Ins. Co. 12 Wyo. 390, 66 L.R.A. 818, 107 Am. St. Rep. 952, 75 Pac. 937.

[20] See also Walker v. Metropolitan Ins. Co. 56 Me. 371; Baile v. St. Joseph Fire & Marine Ins. Co. 73 Mo. 383.

[1] 16 Ohio, 148. See, also, Bell v. Western Fire Ins. Co. 5 Rob. (La.) 423, 39 Am. Dec. 542.

[2] Dayton Insurance Co. v. Kelly, 24 Ohio St. 345, 15 Am. Rep. 612. See § 31 herein.

[3] 1 Duer on Ins. (ed. 1845) 60; Millar on Ins. 30.

[4] Trustees of First Baptist Church v. Brooklyn Fire Ins. Co. 19 N. Y. 305.

[5] Mobile Marine Dock & Mut. Ins. Co. v. McMillan & Son, 23 Wis. 160, 99 Am. Dec. 145.

[6] 1 May on Ins. (3d ed.) sec. 25.

[7] See §§ 36, 37 herein.

[8] Clark v. Brand, 62 Ga. 23 (under Ga. Code, sec. 2794. See Ga. Civ.

it has been decided in that state,[9] where the Code requires a writing, that an insurance company was not estopped from insisting that the contract was not in writing in a case where the insured, while removing his insured stock of goods to another house, requested the insurance agent to transfer his policy if necessary, and the agent consented to the removal and promised to make the necessary entry on the books, and that equity would not relieve the party acting on a parol contract unless his act was in pursuance of the contract, on the faith of it, and induced by it.[10] But a Massachusetts statute which required the conditions of insurance against loss by fire to be stated in the body of the policy was held to apply only to written contracts of insurance, and not to parol insurance.[11]

It is said by the court in a Kansas case that subsequent to the passage of the revenue laws requiring a stamp it might be necessary that a contract of insurance should be in writing.[12] And in Fish v. Cottenet [13] it is held that a stamp does not affect the validity of a parol contract for insurance. In that case the court says: "Contracts of this character when put in writing certainly require a stamp. If the defendant had performed its agreement and issued a policy the government would have received the aid to its revenue which is so much required. It is not the making of the agreement that defrauds the revenue, but its breach by the defendant. Agreements, when in writing, must be stamped. A stamp upon an oral agreement is an impossibility." And Mr. May [14] asserts that the stamp laws do not go to the validity of the contract. He also says that the doctrine of the Kansas case above referred to "seems not to be well founded," and "that the state courts do not recognize the constitutional right of the general government to determine the rules of evidence by which the former shall be governed, and hold pretty uniformly" that the laws of Congress in regard to using or admitting in evidence only stamped instruments applies only to United States courts,[15] and that author doubts the

Code secs. 2022, 2089; Delaware Ins. Co. v. Pennsylvania Fire Ins. Co. 126 Ga. 380, 7 Amer. & Eng. Annot. Cas. 1134, 55 S. E. 230. See also § 31b herein, and note 8.

[9] Simonton v. Liverpool & London & Globe Ins. Co. 51 Ga. 76.

[10] See Southern Life Ins. Co. v. Kempton, 56 Ga. 339. See §§ 31 et seq. herein.

[11] Relief Fire Ins. Co. v. Shaw, 94 U. S. 574, 24 L. ed. 291; Mass. Stat. 1864, c. 196.

[12] West Massachusetts Ins. Co. v. Duffey, 2 Kan. 347.

[13] 44 N. Y. 538, 543.

[14] 1 May on Ins. (3d ed.) sec. 25.

[15] *Citing* the following cases:

United States.—Twitchell v. Commonwealth, 7 Wall. (74 U. S.) 321, 19 L. ed. 223.

Connecticut.—Griffin v. Ranney, 35 Conn. 239.

Illinois.—United States Express Co. v. Haines, 48 Ill. 248; Bunker v. Green, 48 Ill. 243; Craig v. Dimock, 47 Ill. 308.

power of Congress to declare unstamped instruments wholly void, and cites cases from Illinois and Kentucky holding that it has not such power.[16] And he adds: "But it is doubtful if this will become the settled view of the law upon mature consideration.[17] It is also very generally held that under United States Statutes 1864, chapter 173, section 163, and 1865, chapter 78, only those unstamped instruments can be said to be void where the stamp has been omitted with intent to defraud the revenue, and such is the law under the statute of 1866, chapter 184, section 9." [18] In South Dakota the want of a revenue stamp on a policy cannot be questioned in a state court.[19] So in Iowa the validity of a deed is not, in the ab-

Maine.—Dudley v. Wells, 45 Me. 145.

Massachusetts.—Green v. Holway, 101 Mass. 243, 3 Am. Rep. 339; Carpenter v. Snelling, 97 Mass. 452.

Pennsylvania.—McGovern v. Hoesback, 53 Pa. St. 176, 177.

Vermont.—Hitchcock v. Sawyer, 39 Vt. 412.

Contra; see Chartiers & Rob Turnp. Co. v. McNamara, 72 Pa. St. 228, 13 Am. Rep. 673. See cases, in 7 Alb. L. J. 49; Edeck v. Rainer, 2 Johns. (N. Y.) 423; Plessinger v. Depuy, 25 Ind. 419. "Where unstamped instruments were excluded the question of constitutional competency was not raised."

The failure to affix a revenue stamp to the transcript of a foreign judgment of a justice of the peace does not preclude its admissibility in evidence. Tomlin v. Woods, 125 Iowa, 367, 101 N. W. 135.

[16] *Citing* Latham v. Smith, 45 Ill. 29; Hunter v. Cobb, 1 Bush (Ky.) 239.

[17] *Citing* License Tax cases, 5 Wall. (72 U. S.) 462, 18 L. ed. 497; Pevear v. Commonwealth, 5 Wall. (72 U. S.) 475, 18 L. ed. 608.

[18] *Citing* numerous cases. *Examine* the following cases:

Alabama.—Blunt v. Bates, 40 Ala. 470.

Georgia.—Green v. Lowry, 38 Ga. 548.

Illinois.—Jacquin v. Warren, 40 Ill. 459; Israel v. Redding, 40 Ill. 362.

Kentucky.—Hunter v. Cobb, 1 Bush (Ky.) 239.

Louisiana.—Blake v. Hall, 19 La. Ann. 49; McLean v. Skelton, 18 La. Ann. 514.

Massachusetts.—Carpenter v. Snelling, 97 Mass. 452.

Nevada.—Maynard v. Johnson, 2 Nev. 16.

Wisconsin.—Sayles v. Davis, 22 Wis. 225.

If one fails to affix the stamp, the presumption arises that such act is wilful. Howe v. Carpenter, 53 Barb. (N. Y.) 382. Contra, New Haven & Northampton Co. v. Quintard, 6 Abb. Pr. N. S. (N.Y.) 128; Weltner v. Riggs, 3 W. Va. 445; act June 30, 1864, which only declared those instruments invalid where there was an intent to evade the provisions of the act; Hallock v. Jaudin, 34 Cal. 167, declares internal revenue stamps no part of a note.

Instrument not stamped when made may be stamped subsequently, so as to be admissible in evidence, as where stamped in presence of the court. Patersen v. Eames, 54 Me. 203; Cooke v. England, 27 Md. 14; Dorris v. Grace, 24 Ark. 326. See further as to stamps, Hitchcock v. Sawyer, 39 Vt. 412; Corbin v. Tracy, 34 Conn. 325.

[19] Wheaton v. Liverpool & London & Globe Ins. Co. 20 S. Dak. 62, 104 N. W. 850.

sence of fraud affected by the failure to affix a revenue stamp.[20] And a deed is valid and effectual in Illinois even though a revenue stamp is not affixed and canceled as required by the Federal statute.[1] And where an objection is made to admitting in evidence an unstamped instrument, the burden is upon the person objecting, to show that the stamp was omitted with intent to evade the act of Congress.[2] Justice Cooley says: "It has been repeatedly decided that the act of Congress which provided that certain papers not stamped should not be received in evidence must be limited in its operation to the Federal courts.[3] Several of these cases have gone still further, and declared that Congress cannot preclude parties from entering into contracts permitted by the state laws, and that to declare them void was not the proper penalty for the enforcement of tax laws."[4] And in a case which arose in Massachusetts the court said: "We entertain grave doubts whether it is within the constitutional authority of Congress to enact rules regulating the competency of evidence on the trial of cases in the courts of the several states which shall be obligatory upon them. We are not aware that the existence of such a power has been judicially sanctioned. There are numerous weighty reasons against its existence."[5] In Missouri it is decided that the Federal stamp act requiring all insurance contracts to have an internal revenue stamp thereon does not make invalid parol contracts of insurance.[6] But where the "war revenue act"[7] required a stamp upon instruments, documents, or papers of any kind or description whatsoever, and also provided that it should not be received in evidence without such stamp in any court, and it is the duty of the party issuing and of the party receiving the instrument to cancel the affixed stamp, it is held that if a policy of insurance is delivered for examination and in case of acceptance revenue stamps are required

[20] Dorr Cattle Co. v. Des Moines National Bank, 127 Iowa, 153, 4 Am. & Eng. Annot. Cas. 519, 98 N. W. 918, 103 N. W. 836.

[1] Thompson v. Calhoun, 216 Ill. 161, 74 N. E. 775.

[2] Ohio River Junction Rd. Co. v. Pennsylvania Co. 222 Pa. 573, 72 Atl. 271; act of Congress June 13, 1898, c. 448, 30 Stat. 448 (U. S. Comp. Stat. 1901, p. 2286).

[3] *Citing* numerous cases. See also Knox v. Rossi, 25 Nev. 96, 48 L.R.A. 305 and note, 57 Pac. 179; Ratliff v. Ratliff, 131 N. Car. 425, 63 L.R.A. 963, 42 S. E. 887; Wheaton v. Liverpool & London & Globe Ins. Co. 20 S. Dak. 62, 104 N. W. 850; Southern Ins. Co. v. Estes, 106 Tenn. 472, 52 L.R.A. 915, 62 S. W. 149, and note, 84 Am. St. Rep. 185–189.

[4] Cooley's Constitutional Limitations (6th ed.) 592, n. 2, *citing* several cases.

[5] Green v. Holway, 101 Mass. 243, 3 Am. Rep. 339.

[6] King v. Phoenix Ins. Co. 195 Mo. 290, 113 Am. St. Rep. 678, 92 S. W. 892, 6 Am. & Eng. Annot. Cas. 618.

[7] Section 7 of internal revenue act June 13, 1898, c. 448, 30 Stat. 452 (U. S. Comp. Stat. 1901, p. 2292).

to be attached and canceled by the agent or if returned, stamps enclosed for the purpose of being attached must accompany the policy, such requirements must be complied with, and after death of the insured the internal revenue collector has no authority to affix the required stamps to the policy, cancel them and thereby give it life.[8]

In England, however, the statute, 35 George III., chapter 63, which repealed all former stamp duties on marine insurances, and which did not extend to fire or life insurances, provided that every contract for marine insurance should be "printed or written," and that an insurance contract or agreement therefore should be void unless stamped, and prescribed a penalty for noncompliance.[9] As we have stated under a prior section [1] the English act of 1867, 30 Victoria, chapter 23, page 9, requires that every policy of sea insurance be duly stamped to be admissible in evidence, and also provides that policies made abroad may be stamped. Other sections of this act make provisions in relation to the stamping of policies, covering time and voyage policies, mixed policies, and insurances by carriers, and making certain exceptions in case of mutual insurances, and providing penalties for noncompliance.[2] Again: "a contract for sea insurance other than such insurance as is referred to in the merchant shipping act [3] is not valid unless the same is expressed in a policy, which cannot be given in evidence unless it is stamped, and this must, except in certain specified cases, be done before it is executed; but a policy, although not duly stamped may for the purposes of production in evidence, be stamped after execution on payment of a penalty of £100." [4] Under a decision

[8] Amos-Richia v. Northwestern Mutual Life Ins. Co. 143 Mich. 684, 107 N. W. 707, s. c. (U. S. C. C.) 152 Fed. 982, 36 Ins. L. J. 549.

[9] See Kensington v. Inglis, 8 East, 273; Morgan v. Mather, 2 Ves. Jr. 15, 18; Rogers v. McCarthy, 3 Esp. 106; 3 Phillips on Evidence (5th ed.) 232.

[1] See § 31 herein.

[2] See also 33 & 34 Vict. c. 97, sec. 117; 44 & 45 Vict. c. 12, sec. 44; 47 & 48 Vict. c. 62, sec. 8. See also list of acts in force in England. See § IV. herein, 39 & 40 Vict. c. 6, sec. 2, provides for stamping after execution.

[3] 1894, sec. 506.

[4] 17 Earl of Halsbury's Laws of England, p. 338 and notes. *As to stamps on other than marine policies,* see Id. p. 515. As to statutory provisions as to *stamping of mutual insurance policies,* etc., see Id. p. 505 et seq. Stamp acts *fire insurance,* see Id. p. 517. *When contract deemed concluded* see marine ins. act, 1906; 6 Edw. VII. c. 41, sec. 21; Butterworth's 20th Cent. Stat. (1900-1909) "Insurance," p. 404.

Settlement of life policies: when indenture chargeable with stamp duties under stamp act 1891, sec. 104, sub-sec. 2 (A) of sec. 104. See Duke of Northumberland v. Commissioners of Inland Revenue, [1911] 2 K. B. (Law Rep.) 343.

Practice as to admission in evidence of unstamped documents traced and explained. Coolgardie Gold Fields, In re; Fleming, Ex parte, 69

rendered in 1891 the words "ship or vessel," in the customs and inland revenue act of 1870 (which imposes a stamp duty upon policies of sea insurance made on any ship or vessel), will be construed "ships or vessels." Under the interpretation of statutes act of 1889, providing that in statutes enacted after 1850 words in the singular shall include the plural, so that where one hundred and nineteen vessels were insured under a time policy, it was held that the stamp duty must be calculated upon the aggregate amount insured, even though a specific sum was appropriated to each vessel.[5] And it was decided in 1911 that no obligation to pay a loss relative to sea insurance existed, although the verbal agreement constituted such a contract, where it was not expressed in a duly stamped policy of sea insurance and was therefore invalid.[6] But a "contract note" which does not contain the essentials of a marine policy, or policy of sea insurance, as required by statute, is not a contract of sea insurance, even if stamped.[7]

§ 33a. Parol contracts: standard policy.—Although in many of the states a standard form of fire policy is provided for by statute, and some of the states have statutory provisions concerning the form or substance of life and accident policies, still it is held in Massachusetts that it is settled that a statute requiring such standard form does not preclude a temporary oral contract for insurance.[8]

L. J. Ch. 215, [1900] 1 Ch. 475, 82 L. T. 23, 48 W. R. 461, Cozens-Hardy J. See also as to admissibility of unstamped instruments, Mason v. Motor Traction Co. 74 L. J. Ch. 273, [1905] 1 Ch. 419, 92 L. T. 234, 12 Manson, 31, 21 T. L. R. 238.

Illegal Insurance Companies— Necessity of being registered—companies acts—England. Soon after 1824 "a great number of insurance companies were formed, either by charter from the Crown or by Special Statutes or under the provisions of a partnership deed. But a part from banking companies, no company, association, or partnership consisting of more than twenty persons, formed on or after the 2d November, 1862, for the acquisition of gain by the company, association, or partnership or its members, is legal, and therefore no marine insurance company is legal unless registered under the companies acts 1862–1908, or formed in pursuance of some other act or letters patent." 17 Earl of Halbury's Loans of England, pp. 339, 340 and notes. Registration of insurance companies, see 5 Id. p. 617. As to insurance clubs being registered see § 178 herein notes 19, 20; § V. herein note 16, p. 32.

[5] Great Britain Steamship Premium Assn. v. White (Scot. Ch. Sess. 1891) 29 Scot. L. R. 104.

[6] Genforsikrings Aktieselskabet (Skandinavia Reinsurance Co. of Copenhagen) v. Da Costa (Eng. C. A.) [1911] 1 K. B. (Law Rep.) 137, under stamp act 1891, secs. 93, 97. For a fuller statement of this case, see § 41d herein.

[7] Mackay v. Scottish Boat Ins. Co. Ltd. (Scot. C. S. 2d Div. 1903) 40 Scottish Law. Rep. 675; stamp act 1891, secs. 92, 93.

[8] Goodhue v. Hartford Fire Ins. Co. 175 Mass. 187, 55 N. E. 1029, 29 Ins. L. J. 207, under Stat. 1894, c. 522, sec. 59; Pub. Stat. c. 119, sec. 138. *Citing* Sanford v. Orient Ins. Co. 174 Mass. 416, 75 Am. St. Rep.

In another case in that state it is declared that a valid contract of insurance might rest only in parol. In this case there was a claimed agreement with an agent to issue certain policies in the standard form, but upon the facts it was held that there was not a consummated or final agreement constituting such parol contract, as certain essential elements of the contract of insurance were not fixed in advance or subsequently agreed to, but that the relations between the parties rested in negotiations.[9] And in New York a verbal contract of present insurance, since 1886, constitutes a contract of insurance which embraces, however, the provisions of the standard fire policy.[10] In Tennessee the terms of the standard policy are construed in connection with a local agent's commission in determining the extent of his authority to make oral contracts of insurance or renewals thereof, and no recovery is permitted, either on an executed contract of insurance or an executory contract to renew when not made within the terms of the agent's authority thus limited.[11] In North Carolina the enactment which establishes a standard form for a policy, the statute being only affirmative in its terms, will not invalidate an oral contract.[12] Under an Illinois decision the insurer was held liable upon a "binder," even though no policy was issued; and the contract was held subject to the terms of a standard policy to which it was attached as a part thereof.[13] And under a Georgia decision the property described in the memorandum or binder was held insured during the term specified therein upon the terms and conditions of the regular standard policy of the company.[14] It is important also to consider here as a governing principle the effect of a decision in Maine, where it is determined that a policy of fire insurance, in the standard

358, 54 N. E. 883. See Brown v. Franklin Mutual Fire Ins. Co. 165 Mass. 565, 52 Am. St. Rep. 534, 43 N. E. 512.

[9] Cunningham v. Connecticut Fire Ins. Co. 200 Mass. 333, 86 N. E. 787, 38 Ins. L. J. 315, the court, per Rugg, J., said: "nor can it be argued that there may not be a valid contract of insurance resting only in parol." This was a case of action of contract, upon appeal on agreed facts, with no stipulation that trial or appellate court might draw inferences of fact.

[10] Hicks v. British-America Assur. Co. 162 N. Y. 284, 48 L.R.A. 424, 56 N. E. 743, 30 Ins. L. J. 14. But see as to *marine vessel liability policy*, International Ferry Co. v. American Fidelity Co. 207 N. Y. 350, 101 N. E. 160, noted under § 31 herein.

[11] Caldwell v. Virginia Fire & Marine Ins. Co. 124 Tenn. 593, 139 S. W. 698, 40 Ins. L. J. 1899. See §§ 41a, 41c herein.

[12] Floars v. Ætna Life Ins. Co. 144 N. Car. 232, 11 L.R.A.(N.S.) 867n, 56 S. E. 916, *quoted* in Gazzam v. German Union Fire Ins. Co. 155 N. Car. 330, 339, Ann. Cas. 1913E, 282, 286, 71 S. E. 434.

[13] Jacobs v. Atlas Ins. Co. 148 Ill. App. 325. See also St. Paul Fire & Marine Ins. Co. v. Balfour. 168 Fed. 212, 93 C. C. A. 498.

[14] Queen Ins. Co. v. Hartwell Ice & Laundry Co. 7 Ga. App. 787, 68 S. E. 310, 39 Ins. L. J. 1125.

form is to be treated as a voluntary contract which, like any other, derives its force and efficacy from the consent of the parties.[15]

§ 33b. Statutory regulations: contract partly in writing and partly by parol.—Where a statute positively requires that a contract of fire insurance shall be in writing, it precludes a contract made partly in writing and resting partly in parol.[16]

§ 34. Parol contracts: mutual benefit societies.—Some doubt has been expressed whether or not the rule that a contract of insurance need not be in writing except when required by statute applies to mutual benefit societies.[17] The cases for the most part are those of marine and fire insurances, with some authorities in accident and life insurance on other than the mutual plan.[18] But we see no reason why the rule should not obtain in cases of an agreement for insurance on the mutual plan as in other contracts, and it has been held in New York that a mutual fire insurance company could bind itself by parol to issue a valid policy of insurance. The court said, referring to the plaintiff, that "it must be assumed that she knew the character of defendant and the purpose for which it was organized, and her application for insurance was an application to become a member of the defendant upon the terms and conditions prescribed in its charter, and its constitution and by-laws. She must have expected a policy in the usual form issued by the defendant, and must be deemed to have agreed to accept such a policy. She must also be deemed to have agreed in advance to pay the consideration in the mode prescribed by the defendant's charter, constitution, and by-laws. The agreement for this insurance was binding, therefore, not only on defendant, but also upon the plaintiff. Defendant could have issued and tendered its policy to the plaintiff." [19] So an oral promise by the president of an insurance

[15] Dunton v. Westchester Fire Ins. Co. 104 Me. 172, 20 L.R.A.(N.S.) 1058, 71 Atl. 1037.

[16] Athens Mutual Ins. Co. v. Evans, 132 Ga. 703, 64 S. E. 903, Civ. Code Ga. secs. 2022, 2089.

As to alteration, by parol, see § 272 herein.

[17] Bacon's Benefit Societies and Life Ins. (ed. 1888) sec. 172; Id. (ed. 1894) sec. 172.

[18] *Life:* Sheldon v. Conn. Mutual Life Ins. Co. 25 Conn. 219, 65 Am. Dec. 565; Trustees of First Baptist Church v. Brooklyn Ins. Co. 19 N. Y. 305; *Accident:* Rhodes v. Railway Pass. Ins. Co. 5 Lans. (N. Y.) 71; *Fire:* Strohn v. Hartford Fire Ins. Co. 33 Wis. 649, 37 Wis. 625, 19 Am. Rep. 777; *Marine:* Northwestern Ins. Co. v. Ætna Ins. Co. 23 Wis. 160, 99 Am. Dec. 145; *Same to ship goods on deck instead of hold:* Northwestern Iron Ins. Co. v. Ætna Ins. Co. 26 Wis. 78.

As to mutual companies: Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co. 19 How. (60 U. S.) 318, 15 L. ed. 636; Belleville Mutual Ins. Co. v. Van Winkle, 12 N. J. Eq. 333; Schaffer v. Lehigh Mutual Fire Ins. Co. 89 Pa. St. 296.

[19] Van Loan v. Farmers' Mutual Fire Ins. Assn. 90 N. Y. 280. *Compare* § 38a herein as to standard policy: rule in New York. See also § 33a herein.

company to make a policy of insurance is a contract binding on the company, and a court of equity will compel its specific performance.[20]

It is true that mutual benefit societies differ in some respects from other mutual insurance corporations, and the powers of such organizations are restricted either by statute or by charter,[1] and these restrictions relate not only to membership, but to the designation of beneficiaries. The laws, however, of these societies have been construed liberally in many cases,[2] although some courts are inclined to limit such corporations strictly to their statutory or charter powers;[3] and where a certificate is not delivered to the insured nor signed by him or certain officers as required under the by-laws as conditions precedent to liability for loss, there is held to be no operative contract of insurance.[4] So in case of a fraternal benefit society even a certificate has been held of no force prior to initiation, where initiation is under the by-laws, a condition precedent to membership.[5] But it is also decided that the absence of a con-

[20] Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co. 19 How. (60 U. S.) 318, 15 L. ed. 636. See also Union Mutual Ins. Co. v. Commercial Mutual Ins. Co. 2 Curt. (U. S. C. C.) 524; New England Fire & Marine Ins. Co. v. Robinson, 25 Ind. 536; Trustees of First Baptist Church v. Brooklyn Ins. Co. 18 Barb. (N. Y.) 69; Kelly v. Commonwealth Ins. Co. 10 Bosw. (N. Y.) 82.

[1] Elsey v. Odd Fellows' Mutual Relief Assn. 142 Mass. 224, 7 N. E. 844; Kentucky Masonic Mutual Life Ins. Co. v. Miller, 13 Bush (Ky.) 489.

[2] Bloomington Mutual Ben. Assn. v. Blue, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558; Covenant Mutual Ben. Assn. v. Sears, 114 Ill. 108, 29 N. E. 430; Supreme Lodge Knights of Pythias v. Schmidt, 98 Ind. 374, 381; Maneely v. Knights of Birmingham, 115 Pa. St. 305, 9 Atl. 41.

[3] *United States.*—Worley v. Northwest Masonic Aid Assoc. 10 Fed. 227.

Illinois.—Fraternal Tribunes v. Steele, 114 Ill. App. 194; Steele v. Fraternal Tribune, 215 Ill. 190, 74 N. E. 121.

Kentucky.—Van Bibber v. Van Bibber, 82 Ky. 347; Kentucky Masonic Mutual Life Ins. Co. v. Miller, 13 Bush (Ky.) 489.

Massachusetts.—Daniels v. Pratt, 143 Wash. 516, 10 N. E. 166; Elsey v. Odd Fellows' Mutual Relief Assoc. 142 Mass. 224, 7 N. E. 844. *Compare* Sanford v. Orient Ins. Co. 174 Mass. 416, 75 Am. St. Rep. 350, 54 N. E. 883; Brown v. Franklin Mutual Fire Ins. Co. 165 Mass. 565, 52 Am. St. Rep. 534, 43 N. E. 512; Emory v. Boston Marine Ins. Co. 138 Mass. 398.

Michigan. — Supreme Lodge Knights of Honor v. Nairn, 60 Mich. 44, 26 N. W. 826.

Ohio.—National Mutual Aid Assoc. v. Gonser, 43 Ohio St. 1, 1 N. E. 11, 1 West Rep. 4; State v. Moore, 38 Ohio St. 7.

[4] Sterling v. Head Camp Pacific Jurisdiction Woodmen of the World, 28 Utah, 505, 80 Pac. 375, 1110. See Pfeifer v. Supreme Lodge Bohemian Benevolent Slavonian Soc. 37 Misc. 71, 74 N. Y. Supp. 720, aff'd (Mem.) 77 N. Y. Supp. 1125, 74 App. Div. 630, revd. 173 N. Y. 418, 66 N. E. 108 s. c. aff'd (mem.) 91 App. Div. 613, 86 N. Y. Supp. 1144, s. c. aff'd (mem.) 179 N. Y. 588, 72 N. E. 1149.

[5] Lord v. Modern Woodmen of America, 113 Mo. App. 19, 87 S. W. 530. See also Supreme Lodge Knights & Ladies of Honor v. John-

trolling provision of its by-laws, or an agreement of the parties to the contrary a binding contract of insurance, may be consummated with a mutual fire insurance company without the issuance of a policy of insurance.[6]

Public policy is the basis of the prohibition by law of acts which are unauthorized by the charter of a company,[7] and there are numerous cases which uphold contracts, even when made in violation of a provision contained in the charter, and which involve an unauthorized exercise of corporate powers. Especially is this true where it appears that the provision so contravened was not intended by the legislature to operate as an imperative prohibition of the contract violating such charter provision; or where the charter provision was intended for the benefit of the corporation rather than the protection of the public; or where the provision is merely directory;[8] or where the contract is made in violation of the charter, and third persons acting in good faith and without notice would be injured thereby.[9] And even the provisions of the statute under which a mutual benefit society is incorporated may be waived so far as to preclude the defense of ultra vires.[10] Such cases also involve questions as to the nature and extent of the powers of agents, and also whether the party dealing with the agent had notice of facts which if known to him would make the contract not only ultra vires, but void. The point under consideration also comprehends the question of estoppel, as where the party has relied upon the apparent authority of an agent, or the company has received the

son, 81 Ark. 512, 99 S. W. 834; Shartle v. Modern Brotherhood of America, 139 Mo. App. 433, 122 S. W. 1139. *Compare* Bruner v. Brotherhood of American Yeoman, 136 Iowa, 612, 111 N. W. 977.

[6] Alliance Co-operative Ins. Co. v. Corbett, 69 Kan. 564, 77 Pac. 108.

[7] Morawetz on Private Corp. (ed. 1882) sec. 100.

[8] *United States.*—National Bank v. Matthews, 98 U. S. 621, 627, 25 L. ed. 188, 189; Gold Mining Co. v. National Bank, 96 U. S. 640, 24 L. ed. 648; Zabriskie v. Cincinnati R. R. Co. 23 How. (64 U. S.) 381, 16 L. ed. 488.

Alabama.—Bates & Hines v. Bank of Alabama, 2 Ala. 451, 462.

Connecticut.—Bulkley v. Derby Fish Co. 2 Conn. 252, 7 Am. Dec. 271.

Massachusetts.—Dodd v. Gloucester Ins. Co. 120 Mass. 408. See Brown v. Franklin Mutual Ins. Co. 165 Mass. 565, 52 Am. St. Rep. 534, 43 N. E. 512; Emery v. Boston Marine Ins. Co. 138 Mass. 398.

New York.—Palmer v. Cypress Hill Cemetery, 122 N. Y. 429, 25 N. E. 983; Leslie v. Lorillard, 110 N. Y. 519, 18 N. E. 363, 1 L.R.A. 456, *compare* § 38a herein. See § 33a herein.

England.—Ayres v. South Australian Banking Co. L. R. 3 P. C. 548.

See notes 22 Am. St. Rep. 768; article "Ultra Vires Contracts of Corporations," 32 Am. Law. Reg. 43.

[9] Morawetz on Private Corp. (ed. 1882) sec. 50; Id. rule VI. sec. 62 et seq. See next section herein.

[10] Coulson v. Flynn, 86 N. Y. Supp. 833, 90 App. Div. 613, aff'd 181 N. Y. 62, 79 N. E. 507.

benefits arising from unauthorized acts. While there are certain leading principles which aid in a solution of the question of what is and is not a valid contract within the charter or articles of association, yet each case must rest in a large measure upon its particular facts. Many of the decisions are arbitrary and seemingly rendered without regard to principle or authority.[11]

Again, as a general rule, the doctrine of waiver is applicable equally to mutual benefit societies as to other insurance companies where the charter or constitution of a society does not render it inapplicable,[12] for, in general, by-laws may be waived which are intended as a protection to the company.[13] So waiver of a by-law may arise from a course of dealing.[14] It is also held that the doctrine of estoppel applies to mutual benefit associations in regard to their insurance contracts, substantially the same as against ordinary insurance companies and other corporations.[15] So the fact

[11] See notes 51 Am. Dec. 341–45; 13 Am. Dec. 108, 109; Morawetz on Corp. (ed. 1882) secs. 28–148, 165, 209; Angell & Ames on Corp. (9th ed.) secs. 256–65. See next section herein.

[12] Millard v. Supreme Council American Legion of Honor, 81 Cal. 340, 22 Pac. 864. In this case the society had continued to levy and receive assessments from the member after the date when it claimed the member ceased to be in good standing.

See also the following cases:

United States.—Modern Woodmen of America v. Tevis, 111 Fed. 113, 49 C. C. A. 256, 117 Fed. 370.

Arkansas.—Mosaic Templars of America v. Jones, 99 Ark. 204, 137 S. W. 812.

Illinois.—Johnson v. Modern Woodmen of America, 160 Ill. App. 37, 42 Nat. Corp. Rep. 122.

Indiana.—Brotherhood of Painters, Decorators, & Paperhangers of America v. Barton, 46 Ind. App. 160, 92 N. E. 64.

Kentucky.—Modern Brotherhood of America v. Phelps, 142 Ky. 544, 134 S. W. 892, 40 Ins. L. J. 710.

Michigan.—Lord v. Natural Protective Soc. 129 Mich. 335, 88 N. W. 876, 32 Ins. L. J. 1038.

Minnesota.—Johnson v. Modern Brotherhood of America, 113 Minn. 411, 131 N. W. 471; Schoenau v. Grand Lodge, A. O. U. W. 85 Minn. 349, 88 N. W. 999.

Missouri.—Francis v. Supreme Lodge A. O. U. W. 150 Mo. App. 347, 130 S. W. 500, 39 Ins. L. J. 1391.

Massachusetts. — *Compare* Mass. cases *cited* under § 36 herein.

Texas.—Supreme Lodge United Benevolent Assoc. v. Lawson (1911) — Tex. Civ. App. —, 133 S. W. 907; Grand Fraternity v. Mulkey (1910) 62 Tex. Civ. App. 147, 130 S. W. 242.

[13] Union Mutual Fire Ins. Co. v. Keyser, 32 N. H. 313, 64 Am. Dec. 375. Here, by the charter and by-laws, the directors were required to divide the risks into four classes, and to determine the rates of insurance and the issuing of all policies; with full knowledge of all facts the directors insured property which should have been insured as belonging to another class. See also Cline v. Sovereign Camp Woodmen of the World, 111 Mo. App. 601, 86 S. W. 501.

[14] Downs v. Knights of Columbus, 76 N. H. 165, 80 Atl. 227.

[15] Wuerfler v. Trustees Grand Grove Wis. Order of Druids, 116 Wis. 19, 96 Am. St. Rep. 940, 92 N. W. 433. See also, as to same principle, Kidder v. Supreme Assembly of

that the relief department of a railroad corporation, organized for the benefit and protection of railroad employees, is a mutual insurance company, does not relieve it from the operation of the rules of equitable estoppel.[16]

Where a mutual benefit society issues a policy which is in its terms in conflict with the by-laws of the society, the presumption is that the society has waived its by-laws in favor of assured.[17] So it is held that a regulation or by-law of a fire insurance company cannot make void a policy issued by the directors in contravention thereof if the policy is not voidable upon other grounds,[18] and a mutual company may bind itself by a contract of insurance without issuing a written policy, although the by-laws require that all applications for insurance shall be examined and approved by the directors or a committee before a policy is issued and that the secretary shall, after approval of the applications, issue and deliver all policies and keep a list thereof.[19] So the omission to sign or countersign a policy has been held not to render a policy invalid, notwithstanding such requirement of the corporation.[20] And a by-law restricting membership in a certain class to persons under a certain age may be waived.[1] And where an agent has acted within the apparent scope of his authority, the principal is estopped to allege specific instructions not known to the party,[2] or to deny the agent's power or its own power to contract where the contract has

American Stars of Equity, 154 Ill. App. 489; Modern Brotherhood of America v. Phelps, 142 Ky. 544, 134 S. W. 892, 40 Ins. L. J. 710; Timberlake v. Supreme Commandery United Order of the Golden Cross of the World, 208 Mass. 411, 94 N. E. 685; Johnson v. Modern Brotherhood of America, 113 Minn. 411, 131 N. W. 471.

[16] Burlington Voluntary Relief Department v. White, 41 Neb. 547, 43 Am. St. Rep. 701, 59 N. W. 747.

[17] Davidson v. Old People's Mutual Ben. Soc. 39 Minn. 303, 39 N. W. 803, 1 L.R.A. 482.

[18] Campbell v. Merchants' & Farmers' Mutual Fire Ins. Co. 37 N. H. 35, 72 Am. Dec. 324; Merchants' & Manufacturers Ins. Co. v. Curran, 45 Mo. 142, 100 Am. Dec. 361.

[19] Zell v. Herman Farmers' Mutual Ins. Co. 75 Wis. 521, 44 N. W. 828.

[20] Myers v. Keystone Mutual Life Ins. Co. 27 Pa. St. 268, 67 Am. Dec. 462; Union Ins. Co. v. Smart, 60 N. H. 458.

[1] Morrison v. Wisconsin Odd Fellows Mutual L. Ins. Co. 59 Wis. 162, 18 N. W. 13. See also Supreme Lodge Knights of Honor v. Davis, 26 Colo. 252, 58 Pac. 595; Wood v. Supreme Ruling of Fraternal Mystic Circle, 212 Ill. 532, 72 N. E. 783, rev'g Supreme Ruling of Fraternal Mystic Circle v. Wood, 114 Ill. App. 431. See § 1992 herein. *Compare* Fraternal Tribunes v. Steele, 114 Ill. App. 194, aff'd Steele v. Fraternal Tribunes, 215 Ill. 190, 74 N. E. 121. Pirrung v. Supreme Council of Catholic Mutual Ben. Assoc. 93 N. Y. Supp. 575, 104 App. Div. 571; Elliott v. Knights of the Modern Maccabees, 46 Wash. 320, 13 L.R.A. (N.S.) 856, 89 Pac. 929.

[2] Emery v. Boston Marine Ins. Co. 138 Mass. 398, 412. In this case under the by-laws the president was required to sign all policies. In case,

been executed by the other party.[3] And an unrestricted authority to an agent of a fire insurance company to negotiate a contract of insurance by issuing a policy includes authority to make a valid preliminary contract for such issue; and a parol agreement to that effect upon his part and the receipt of the premium therefor binds the company.[4] It may also be stated in this connection that an applicant for insurance in a mutual company is a stranger to the by-laws, and is not chargeable with knowledge thereof until he becomes a member.[5]

In view, therefore, of these principles why cannot a corporation of this character bind itself by a completed agreement of insurance not in writing? Certainly in those cases where the society is one which does not issue certificates,[6] it could not be urged that the contract must be in writing. And assume the case where an agent, within the apparent scope of his authority, makes an oral agreement of insurance in a corporation which does issue certificates, and such party is received into the corporation, and the right to certain benefits matures before any certificate is issued, can the corporation impeach its own want of power to make such contract where not contrary to public policy? To hold that it could would hardly seem to be founded in the reason and justice of the law.[7]

however, of his absence, inability, or death, policies were to be signed by two directors. The secretary of the company contracted orally with the plaintiff to insure him. The company claimed a want of authority, but it was held that the evidence showed a sufficient binding authority: New England Fire & Marine Ins. Co. v. Schettler, 38 Ill. 166; Union Mutual Ins. Co. v. Wilkinson, 13 Wall. (80 U. S.) 222, 20 L. ed. 617. Here the court said: "The powers of the agent are prima facie coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals."

[3] Bloomington Mutual Ben. Assoc. v. Blue, 120 Ill. 127, 11 N. E. 331, 58 Am. Rep. 852, 60 Am. Rep. 558; Fuller v. Boston Ins. Co. 4 Met. (45 Mass.) 206; Lamont v. Grand Lodge Iowa, Legion of Honor, 31 Fed. 177.

[4] Ellis v. Albany Ins. Co. 50 N. Y. 402. The agent was authorized to receive proposals for insurance, and to make and countersign policies and to renew the same.

[5] See § 393 herein. See Court of Honor v. Hering (1914) 178 Mich. 377, 144 N. W. 843, *noted* under § 53 herein.

[6] Grand Lodge Order of Hermann-Soehne v. Elsner, 26 Mo. App. 108.

[7] See Bloomington Mutual Ben. Assoc. v. Blue, 120 Ill. 127, 11 N. E. 331, 58 Am. Rep. 852, 60 Am. Rep. 558; Chicago Building Soc. v. Crowell, 65 Ill. 454. In this case Crowell borrowed money of the society, and the latter procured insurance upon the property, and shortly before the expiration of the policy Crowell told the secretary that he wished to insure his own property; but the secretary replied that the society preferred to procure the insurance and would do so, but before the insurance was effected the property was destroyed. It was held that though the procuring of insurance was not an express right conferred by charter, yet as the society had exercised these

It will be seen, therefore, that the decided cases offer herein no certain and unvarying rule for the determination of the proposition before us. It is held that when an accepted applicant for membership pays his membership fee and promises in his written application to pay the further sum of one dollar and ten cents whenever any other member dies, or to forfeit his own claim to a benefit, and the by-laws provide that the association within thirty days after satisfactory proof of his death, will pay to his "widow" as many dollars not exceeding one thousand as there are surviving members at the time of the death, a contract of life insurance is completed.[8] So where the intestate has complied with all other provisions of the society, the fact that he had not taken out a certificate nor designated to whom his benefit should be payable does not preclude a recovery against the society, but in the absence of such certificate the family of the deceased will be entitled to the benefit,[9] and where the supreme lodge of the Knights of Honor sends a benefit certificate, properly signed and sealed, to a subordinate lodge for a person who has applied for membership, been balloted for, elected, and had a degree conferred upon him, and has paid his fees and passed a medical examination which has been approved, the contract relations between him and the supreme lodge are complete, although the subordinate lodge has not delivered to him the certificate;[10] and in Zell v. Herman Farmers' Mutual Insurance Company[11] it was held that under its by-laws the company could bind itself by a contract of insurance without issuing a written policy.[12]

powers they would be estopped from claiming it as ultra vires.

See the following cases:

United States.—Southern Life Ins. Co. v. McCain, 96 U. S. 84, 24 L. ed. 653; Lamont v. Hotelmen's Mutual Ben. Assoc. 30 Fed. 817; Bennett v. Maryland Fire Ins. Co. 14 Blatchf. (U. S. C. C.) 422, Fed. Cas. No. 1321.

Connecticut.—Bulkley v. Derby Fish. Co. 2 Conn. 252, 254, 7 Am. Dec. 271.

Florida.—Southern Life Ins. Co. v. Lanier, 5 Fla. 110, 58 Am. Dec. 448.

Illinois.—New England Fire & Marine Ins. Co. v. Schettler, 38 Ill. 166.

Iowa.—Matt v. Roman Catholic Mut. Prot. Soc. 70 Iowa, 455, 30 N. W. 799.

Massachusetts.—Emery v. Boston Marine Ins. Co. 138 Mass. 410.

Missouri.—Shepard v. Boone County Mutual Fire Ins. Co. 138 Mo. App. 20, 119 S. W. 984, 38 Ins. L. J. 904.

New York.—Connecticut Mutual Life Ins. Co. v. Cleveland Co. 41 Barb. (N. Y.) 9.

Wisconsin.—Germantown Farmers' Mutual Ins. Co. v. Dhein, 43 Wis. 420, 28 Am. Rep. 549.

England.—Gordon v. Sea Fire & Life Assur. Co. 1 Hurl. & N. 599; Port of London Assur. Co. In re, 5 De Gex, M. & G. 465, 481; County Life Assur. Co., In re, L. R. 5 Ch. 288.

[8] Bolton v. Bolton, 73 Me. 299.

[9] Bishop v. Grand Lodge of Empire Order of Mut. Aid, 112 N. Y. 627, 20 N. E. 562.

[10] Lorscher v. Supreme Lodge Knights of Honor, 72 Mich. 316, 2 L.R.A. 206, 40 N. W. 545.

[11] 75 Wis. 521, 44 N. W. 828.

[12] For a full consideration of the principles discussed in this section,

Again, parol contracts of insurance by mutual benefit societies are held to be valid, wherever the agreement has been entered into and completed except as to the issuance of a certificate or policy, and it is also declared that there is no reason why such contracts should not be valid.[13] So where the by-laws of a mutual insurance company do not specifically require that all of its insurance contracts shall be in writing, and there exists no statutory or charter provision limiting the method in which the company may bind itself to written contracts, it is held that the great weight of authority is now to the effect that the right to make contracts of insurance, like any other right of contracting, exists as at common law, and that an oral or parol contract of insurance, or executory agreement to insure, which leaves nothing to be done but to issue and deliver the policy, are valid and enforceable, and that this rule applies to such mutual companies.[14]

§ 35. Parol contracts: corporations: statutory or charter provisions.—Some distinction was formerly made between corporations and individuals or partnerships, as to the validity of parol contracts, since under the common law corporations could only contract under their corporate seal. But this doctrine does not now obtain.[15]

see 4 Thompson on Corp. (ed. 1894) sec. 5015 et seq. 5825 et seq.; vol. 5 Id. secs. 5849, 6042.

[13] Knights of Maccabees of the World v. Gordon, 83 Ark. 17, 102 S. W. 711, 36 Ins. L. J. 628. See Brown v. Franklin Mutual Fire Ins. Co. 165 Mass. 565, 52 Am. St. Rep. 534, 43 N. E. 512.

[14] State Mutual Fire Ins. Co. v. Taylor (1913) — Tex. Civ. App. —, 157 S. W. 950.

[15] *United States.* — Fleckner v. United States Bank, 8 Wheat. (21 U. S.) 338, 357, 358, 5 L. ed. 631, 636, per Story, J.; Bank of Columbia v. Patterson, 7 Cranch (11 U. S.) 299, 3 L. ed. 351.

Delaware.—Deringer v. Deringer 5 Houst. (Del.) 416, 1 Am. St. Rep. 150.

Illinois.—B. S. Green Co. v. Blodgett, 159 Ill. 169, 50 Am. St. Rep. 146, 42 N. E. 176; New England Fire & Marine Ins. Co. v. Schettler, 38 Ill. 171.

Indiana.—Ross v. City of Madison, 1 Ind. 281, 48 Am. Dec. 361.

Iowa.—Muscatine Water Co. v. Muscatine Lumber Co. 85 Iowa, 112, 39 Am. St. Rep. 284, 52 N. W. 108.

Massachusetts.—Thayer v. Middlesex Ins. Co. 10 Pick. (27 Mass.) 326, 329.

Michigan. — Sarmiento v. Davis Boat & Oar Co. 105 Mich. 300, 55 Am. St. Rep. 446, 63 N. W. 205.

New York.—Perkins v. Washington Ins. Co. 4 Cow. 645; Mott v. Hicks, 1 Cow. 513, 13 Am. Dec. 550.

Pennsylvania.—Hamilton v. Lycoming Mutual Ins. Co. 5 Pa. St. 339

Virginia.—See Banks v. Poitiaux, 3 Rand. 136, 15 Am. Dec. 706.

Wisconsin.—St. Clair v. Rutledge, 115 Wis. 583, 95 Am. St. Rep. 964, 92 N. W. 234; Ford v. Hill, 92 Wis. 188, 53 Am. St. Rep. 902, 66 N. W. 115.

See also Angell & Ames on Corp. (9th ed.) sec. 228 et seq; 1 May on Ins. (Parson's ed.) sec. 16; Morawetz on Private Corp. (ed. 1882) secs. 167 et seq.; Thompson on Corp. (2d. ed.) secs 1915, 1920, 1923, 1940, and see Id. secs. 1921 et seq. as

There are cases, however, which go so far as to hold that where the act of incorporation or charter of the insurer requires the contract to be in writing, such corporate provision should govern, and necessitates a writing. Such decisions would seem to rest upon the principle that a corporation can only act in the manner and mode prescribed by the law creating it. Thus, in 1804, Mr. Chief Justice Marshall, although not holding that a parol contract of insurance was invalid, determines that where the act incorporating an insurance company provides that its policies shall be in writing, a contract to cancel is as solemn an act as the contract for insurance, and must likewise be in writing and not rest in parol.[16] So in Spitzer v. St. Mark's Insurance Company [17] it is held that since under the company's act of incorporation it was empowered only to make policies in writing, a contract to renew a policy was the same as to make one, and it could only be done by a written instrument, and where the company's charter provided that policies issued by the company should be under seal, it was decided that an unsealed policy could not be given in evidence.[18] And under a Pennsylvania decision, where the company's charter, after granting the right to make contracts of insurance, provides that "every such contract, bargain, agreement, and policy to be made by the said corporation shall be in writing or in print," any attempted oral contract of insurance by an agent is, in the absence of an estoppel, not binding on the company.[19] Again, it has been declared

to use of corporate seal. As to necessity for sealing see Brice's Ultra Vires (ed. 1893) pp. 538 et seq.

Sealed and unsealed instruments; statutes abolishing distinctions, see notes 71 Am. St. Rep. 205, 206, 50 Id. 151 et seq., as to affixing seal to policy, see § 180 herein.

See as to parol contracts by corporations. 4 Thompson on Corp. (ed. 1894) secs. 5015 et seq., 5174–5177, 5825 et seq.; Id. (2d ed.) secs. 1920, 2138.

To bind a corporation by a contract made by one who has authority to act for it, it is not necessary that his authority should be recited in the contract, or the corporate name be signed to it, or his official designation be added to his signature. Jones v. Williams, 139 Mo. 1, 37 L.R.A. 682, 61 Am. St. Rep. 436, 39 S. W. 486, 40 S. W. 353.

[16] Head v. Providence Ins. Co. 2 Cranch (6 U. S.) 127, 150, 2 L. ed. 229, 237.

[17] 6 Duer (N. Y.) 6 (1856).

[18] Lindauer v. Delaware Mutual S. Ins. Co. 13 Ark. 461. See Montreal Assur. Co. v. McGillivray, 9 L. C. 488; National Banking & Ins. Co. v. Knaup, 55 Mo. 154; Cockerill v. Cincinnati Ins. Co. 16 Ohio, 148. But see the last section herein.

[19] Benner v. Fire Association of Phila. 229 Pa. 75, 78 Atl. 44, 140 Am. St. Rep. 706, 40 Ins. L. J. 84. The court, per Moschzisker, J., said: "But no matter what the view may be elsewhere, in Pennsylvania we have an authority which settles the question here." See also Ripka v. Mutual Fire Ins. Co. 36 Pa. Super. Ct. 517.

in Illinois that the rights of the parties were governed by the law of that state where the application was made to a local agent in the state, and the policy issued in New York did not become operative until countersigned by the local agent there.[20] But corporations in that state are not precluded from making oral contracts to effect insurance, where their charters authorize them to make such contracts by issuing written policies.[1] There is a distinction, however, between mere agreements to issue a policy and completed parol contract of insurance. There are numerous cases which hold that preliminary parol contracts to issue a policy are valid, even though a loss occur before the issuance, and even though the charter or act of incorporation provide that the contract be executed only in a certain manner.[2] But where the question is whether a parol executed contract of insurance can be enforced in view of such charter provisions as the above, many serious considerations are involved, such as the right of a corporation to incur a liability which is not necessarily an enlargement of its powers.

So again, it cannot be assumed that every person is familiar with the charters of all corporations,[3] or with by-laws limiting the powers of agents to make the customary contracts appertaining to the business he is authorized to transact.[4] And while those dealing with a private corporation are charged with some degree of care to ascertain the corporation's powers with reference to a transaction, yet if the transaction has some fair relation to matters within the corporate authority, the defense of ultra vires will not in general be available to afford injustice or imposition.[5] And under an Ohio decision a parol contract of insurance is valid when not forbidden by statute or a provision of the company's charter which has been brought to the knowledge of the other contracting party.[6] And where a person without such knowledge has acted in the highest good faith in pursuance of a parol contract and induced by it, it is undoubtedly true that the corporation could not

[20] Pomeroy v. Manhattan Life Ins. Co. 40 Ill. 398.

[1] Firemen's Ins. Co. v. Kuessner, 164 Ill. 275, 45 N. E. 540.

Corporation authorized by charter to make insurance and issue policy may enter into parol contract of insurance. Continental Ins. Co. v. Roller, 101 Ill. App. 77.

[2] See Constant v. Alleghany Ins. Co. 3 Wall. Jr. (U. S. C. C.) 313, Fed. Cas. No. 3136; Collett v. Morrison, 9 Hare, 162; Perry v. Mercantile Ins. Co. 8 U. C. 363.

[3] Lloyd v. West Branch Bank, 15 Pa. St. 172.

[4] Barber v. Stromberg-Carlson Tel. Mfg. Co. 81 Neb. 517, 129 Am. St. Rep. 703, 18 L.R.A.(N.S.) 680, and note, 116 N. W. 157.

[5] McQuaig v. Gulf Naval Stores Stores Co. 56 Fla. 505, 131 Am. St. Rep. 160, 47 So. 2.

[6] Newark Machine Co. v. Kenton Ins. Co. 50 Ohio St. 549, 22 L.R.A. 768, 35 N. E. 1060.

plead ultra vires to avoid the obligation.[7] So where a contract has been fully performed by the party contracting with a corporation, and the *corporation has received the benefits from such contract,* it cannot afterward invoke the doctrine of ultra vires to defeat an action brought against it on such contract. And where an insurance company issues a policy to one upon his own life, payable at his death to a third person, and the insured pays the premiums which are accepted by the company, it is held that it cannot, after the death of the assured, resist payment of the policy to the beneficiary, upon the ground that he is neither a relative, heir, nor devisee of the insured, and that its charter authorizes it to pay to such persons only.[8] So where a fire insurance company has insured

[7] See the following cases:

United States.—National Bank v. Whitney, 103 U. S. 99, 26 L. ed. 443; Union National Bank v. Matthews, 98 U. S. 621, 25 L. ed. 188.

Connecticut.—Palmer v. Hartford Fire Ins. Co. 54 Conn. 488, 9 Atl. 248; Credit Co. v. Howe Machine Co. 54 Conn. 387, 8 Atl. 472.

Indiana.—Louisville N. A. & C. Ry. Co. v. Flanagan, 113 Ind. 488, 14 N. E. 370.

New Hampshire.—Norton v. Bank, 61 N. H. 593.

New York.—Parish v. Wheeler, 22 N. Y. 494; Samuels v. Fidelity & Casualty Co. 1 N. Y. Supp. 850, aff'd 121 N. Y. 660.

Ohio.—Newark Machine Co. v. Kenton Ins. Co. 50 Ohio St. 549, 22 L.R.A. 768, 35 N. E. 1060.

Pennsylvania.—Lloyd v. West Branch Bank, 15 Pa. St. 172.

Tennessee.—Mallory v. Hananer Oil Works, 86 Tenn. 598, 8 S. W. 396.

See also 2 Morawetz on Corp. (2d ed.) c. VIII. secs. 577–725; 5 Thompson on Corp. (ed. 1894) sec. 6021, "The other party estopped when he has received the benefit:" sec. 6022, "Or where the corporation has acted to its disadvantage:" sec. 6023, "Rule where the contract is fully executed on both sides," sec. 6024, "Rule where the contract has been fully executed on either side;" sec. 6025, "Rule where the contract has been executed by the party contracting with the corporation;" sec. 6026, "Rule where the contract has been executed by the corporation;" sec. 6028, "Doctrine that violation of charter or want of power cannot be set up collaterally;" sec. 6029, "Cases where this doctrine has been applied;" sec. 6030, "Who may not set up such violations or want of power;" sec. 6031, "Illustrations of the foregoing."

As to charter: corporate power: ultra vires, see § 334 herein.

[8] Bloomington Mutual Ben. Assoc. v. Blue, 120 Ill. 121, 11 N. E. 331; 60 Am. Rep. 558. See last section herein.

If a corporation has entered into a contract in violation of a directory provision of its charter, and has enjoyed the full benefit of such contract, it cannot plead ultra vires in defense, in the absence of proof that fraud was intended or has been consummated. Sherman Center Town Co. v. Morris, 43 Kan. 282, 19 Am. St. Rep. 134, 23 Pac. 569.

See also the following cases:

Illinois.—Kadish v. Garden City Equitable Loan & Building Assoc. 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. 236.

Iowa.—Twiss v. Guaranty Life Assoc. 87 Iowa, 733, 43 Am. St. Rep. 418, 55 N. W. 8.

New Hampshire.—Manchester & L. R. Co. v. Concord R. Co. 66 N. H. 100, 9 L.R.A. 689, 20 Atl. 383.

New York.—Vought v. Eastern

against hail, without authority so to do, and the insured performs his part of the contract and the insurer accepts the benefit, it is estopped to set up its want of power to issue such a policy.[9] So if a company by its charter is prohibited from insuring more than two-thirds of the value of any property, yet voluntarily and without fraud or misrepresentation insures more, the policy is not thereby made void.[10] Again, when the act of incorporation provides that all powers relating to contracts of insurance are vested in directors, and they are to divide the property insured into four classes and to direct the making and issuing of all policies of insurance, if after making a by-law establishing a rule for the division of risks, and with a knowledge of the facts, they insure property in one class properly falling in another, thereby violating the by-law, still the policy issued will be valid and the company bound.[11] But it has also been held that an insurance company is not estopped from setting up the fact that a contract of insurance made through its agent is ultra vires, though its agent had led the other contracting party to believe that the company had power to make it, and though no pretense was set up by the company or its agent that the contract was ultra vires until a loss thereunder was known by all parties to have occurred.[12] Therefore, charter provisions relating to executing a policy ought not, in the absence of words of restriction or a plain denial of such power, to be construed to limit the powers of the corporation or to prevent them from making parol contracts within the ordinary scope of their chartered powers.[13]

Bldg & Loan Assoc. 172 N. Y. 508, 92 Am. St. Rep. 761, 65 N. E. 496.

Wisconsin.—Wuerfler v. Trustees Grand Grove, Wis. Order Druids, 116 Wis. 19, 96 Am. St. Rep. 940, 92 N. W. 433.

But *compare* Chewacia Lime Works v. Dismukes, 87 Ala. 344, 5 L.R.A. 100n, 6 So. 122; Miller v. American Mutual Accident Ins. Co. 92 Tenn. 167, 20 L.R.A. 765, 21 S. W. 39.

[9] Denver Fire Ins. Co. v. McClellan, 9 Colo. 11, 59 Am. Rep. 134, 9 Pac. 771.

[10] Williams v. New England Mut. F. Ins. Co. 31 Me. 219.

[11] Union Mutual Fire Ins. Co. v. Keyser, 32 N. H. 313, 64 Am. Dec. 375.

[12] Webster v. Buffalo Ins. Co. 7 Fed. 399. See United States Insurance Co. v. Colt, 20 Wall. (87 U. S.) 560, 22 L. ed. 423.

Illinois.—Hartford Ins. Co. v. Wilcox, 57 Ill. 180.

Maine.—Walker v. Metropolitan Ins. Co. 56 Me. 371.

Massachusetts.—Putman v. Home Ins. Co. 123 Mass. 324, 328, 25 Am. Rep. 93.

New York.—Post v. Ætna Ins. Co. 43 Barb. (N. Y.) 351.

[13] New England Fire & Marine Ins. Co. v. Robinson, 25 Ind. 536; Sanborn v. Firemen's Ins. Co. 16 Gray (82 Mass.) 448, 77 Am. Dec. 419; Baile v. St. Joseph Fire Ins. Co. 73 Mo. 371. See Posey County Fire Assoc. v. Hogan, 37 Ind. App. 573, 77 N. E. 670; Brown v. Franklin Mutual Fire Ins. Co. 165 Mass. 565, 52 Am. St. Rep. 534, 43 N. E. 512; Sanford v. Orient Ins. Co. 174 Mass.

§ 36. Parol contracts: corporations: statutory or charter provisions: continued.—It is even declared in a Massachusetts case [14] that the phraseology of statutes chartering insurance companies respecting the execution of policies should be regarded as consisting simply of enabling words not restraining the power which they confer to make contracts of which the policies are the evidence, and it was directly determined that the company had power to make an oral contract, although the charter gave authority to make contracts of insurance "in their name and by the signature of their president for the time being, or by the signature of such other person and in such form and with such ceremonies of authentication as they may by their rules and by-laws direct." In a later case in that state it is held that an insurance company having power generally to "make insurance against loss by fire" may make a preliminary contract to insure property, to be consummated by a subsequent execution and delivery of a policy; and the language in its charter describing the manner in which a policy should be executed does not restrain this general power.[15] It is also decided in the same state that the power of an insurance corporation to make an oral contract of insurance is not impaired by a provision in its by-laws that its "directors may authorize the president and secretary to make insurance, and will issue policies at such rates of insurance and under such limitations and restrictions as they shall prescribe." These are enabling, not restraining, words.[16] It is also determined that while under a statute in Massachusetts insur-

416, 75 Am. St. Rep. 358, 54 N. E. 883 (note more fully under § 36 herein).

Validity of oral contract of insurance; contract to insure; charter or statutory provisions, see note 22 L.R.A. 770.

[14] Sanborn v. Firemen's Ins. Co. 16 Gray (82 Mass. 448) 77 Am. Dec. 419; see also Franklin Fire Ins. Co. v. Colt, 20 Wall. (87 U. S.) 560, 22 L. ed. 423.

[15] Sanford v. Orient Ins. Co. 174 Mass. 416, 75 Am. St. Rep. 358, 54 N. E. 883.

[16] Brown v. Franklin Mut. Fire Ins. Co. 165 Mass. 565, 52 Am. St. Rep. 534, 43 N. E. 512. *Compare* Jennings v. Metropolitan Life Ins. Co. 148 Mass. 61, 18 N. E. 601. Waiver of proofs of death. *Cited* in Paul v. Fidelity & Casualty Co. 186 Mass. 413, 416, 104 Am. St. Rep. 594, 71 N. E. 801 (a case of nonwaiver as to time limitation for suing. *Cited* in Hatch v. United States Casualty Co. 197 Mass. 101, 14 L.R.A.(N.S.) 507, 83 N. E. 398); Lewis v. Metropolitan Life Ins. Co. 180 Mass. 317, 318, 62 N. E. 369 (defense of estoppel not sustained. *Cited* in Thomson v. American Fidelity Co. 215 Mass. 460, 461, 102 N. E. 699, agent held to have no authority to waive time limitation for suing; Caywood v. Supreme Lodge Knights & Ladies of Honor, 171 Ind. 410, 23 L.R.A.(N.S.) 304, 308, 86 N. E. 482). *Distinguished* in Carlson v. Metropolitan Life Ins. Co. 172 Mass. 142, 145, 51 N. E. 525 (no waiver: time limitation for suing. *Cited* also in Thomson case above noted).

ance companies can make valid policies only when attested by the signatures of the president and secretary, still this provision has no application to oral agreements to make insurance.[17] So it is declared in a New York case [18] that "whatever doubts may formerly have existed as to the validity of parol contracts of insurance made by insurance companies authorized by their charters to make insurance by issuing policies, it is now settled that they are valid. It is equally well settled that parol contracts of such companies to effect an insurance by issuing policies are valid," [19] and it was also held in an Indiana case [20] that the company, unless expressly restrained by charter, might make a valid insurance by parol.[1] And the facts that an insurance company is bound by its charter to print on the face of its policies all conditions, and that certain officers shall sign all the policies or contracts made, etc., do not prohibit the company from making oral contracts of insurance,[2] although under a similar state of facts a case was decided contra in the Missouri state court.[3] But a different rule is applied in a later case in that state and it is held that where the charter of a corporation is that furnished by the general laws of the state, which require that the conditions of all policies issued by companies so organized shall be written or printed on the face thereof, and that all policies and contracts of insurance and instruments of guaranty made by such companies shall be subscribed by the president, or president pro tempore, and attested by the secretary, nevertheless a verbal agreement to insure is binding.[4] This rule is again asserted there under a decision in 1906, and it is further decided that a statute declaring that parol contracts may be binding on aggregate corporations if made by an agent duly authorized by the corporate vote or under

[17] Commercial Mutual Ins. Co. v. Union Mutual Ins. Co. 19 How. (60 U. S.) 318, 15 L. ed. 636.

[18] Ellis v. Albany City Fire Ins. Co. 50 N. Y. 402, 10 Am. Rep. 495. See also Commercial Mutual Ins. Co. v. Union Mut. Ins. Co. 19 How. (60 U. S.) 319, 15 L. ed. 636; Walker v. Metropolitan Ins. Co. 56 Me. 371; Trustees First Baptist Church v. Brooklyn Fire Ins. Co. 19 N. Y. 305. See §§ 33a, 38a herein.

[19] See also Loomis v. Jefferson County Patrons' Fire Relief Assoc. 87 N. Y. Supp. 5, 92 App. Div. 601.

As to standard policy rule in New York, see §§ 33a, 38a herein.

[20] New England Fire & Marine Ins. Co. v. Robinson, 25 Ind. 536.

[1] See also State Mutual Fire Ins. Co. v. Taylor, — Tex. Civ. App. —, 157 S. W. 950.

[2] Henning v. United States Ins. Co. 2 Dill. (U. S. C. C.) 26, Fed. Cas. 6366.

[3] Henning v. United States Ins. Co. 47 Mo. 425, 4 Am. Rep. 332.

[4] Baile v. St. Joseph Fire & Marine Ins. Co. 73 Mo. 383, *distinguishing* Henning v. United States Ins. Co. 47 Mo. 425, 4 Am. Rep. 332. An earlier statute also provided that parol contracts could be made by duly authorized agents of aggregate corporations and that such contracts could be implied from corporate acts or those of an agent with general powers.

the general regulations of the corporation, and that contracts may be implied on the part of such corporation from their acts or those of an agent whose powers are of a general character, must be construed as authorizing insurance corporations to make parol contracts of insurance.[5] It is held in Constant v. Allegheny Insurance Company [6] that although by its act of incorporation an insurance company can make a valid insurance only by a policy attested by the president, secretary, and the seal of the corporation, yet before such instruments are attested in due form the president or secretary, or whoever else may act as a general agent of the company, may make agreements and even parol promises as to the terms on which a policy shall be issued, so that a court of equity will compel the company to execute the contract specifically.[7] And under the charter of an insurance company which provides that every contract, bargain, agreement, and policy for insurance shall be in writing or in print, and be under the seal of the corporation, a contract to issue a policy as an executory agreement to insure is binding without a written memorial of it.[8] It is also decided that the rule that corporate contracts are unenforceable when not signed by certain persons is so harsh and inconvenient that it has been widely departed from and practically abandoned,[9] and it is generally held in like cases that a parol agreement for insurance is valid.[10] But a mere collateral promise or representation which does not involve the execution of a policy of insurance is not within the scope of the general authority of an officer or agent of such a cor-

[5] King v. Phœnix Ins. Co. 195 Mo. 290, 113 Am. St. Rep. 678, 6 Amer. & Eng. Annot. Cas. 618, 92 S. W. 892.

[6] 3 Wall. Jr. (U. S. C. C.) 313, Fed. Cas. 3136.

[7] See also Security Fire Ins. Co. v. Kentucky Marine & Fire Ins. Co. 7 Bush (Ky.) 81, 3 Am. Rep. 301.

[8] Insurance Co. (Franklin Ins. Co.) v. Colt, 20 Wall. (87 U. S.) 560, 22 L. ed. 423.

Cited in: *United States.*—Eames v. Home Ins. Co. 94 U. S. 627, 24 L. ed. 300; Laclede Fire-Brick Mfg. Co. v. Hartford Steam-Boiler Inspection & Ins. Co. 9 C. C. A. 8, 19 U. S. App. 510, 60 Fed. 351.

Maryland.—Phœnix Ins. Co. v. Ryland, 69 Md. 447, 1 L.R.A. 550, 16 Atl. 109.

Massachusetts.—Sanford v. Orient Ins. Co. 174 Mass. 420, 75 Am. St. Rep. 358, 54 N. E. 883.

Michigan.—Westchester Fire Ins. Co. v. Earle, 33 Mich. 150.

North Dakota.—McCabe v. Ætna Ins. Co. 9 N. D. 25, 47 L.R.A. 645, 81 N. W. 426.

West Virginia.—Croft v. Hanover F. Ins. Co. 40 W. Va. 512, 52 Am. St. Rep. 902, 21 S. E. 854.

[9] Barber v. Stromberg-Carlson Telephone Mfg. Co. 81 Neb. 517, 129 Am. St. Rep. 703, 18 L.R.A.(N.S.) 680, and note, 116 N. W. 157.

[10] Ide v. Phœnix Ins. Co. 2 Biss. (U. S. C. C.) 333, Fed. Cas. 7001; Angell v. Hartford Fire Ins. Co. 59 N. Y. 171, 17 Am. Rep. 322; Fish v. Cottenett, 44 N. Y. 538; Post v. Ætna Ins. Co. 43 Barb. (N. Y.) 351; Cooke v. Ætna Ins. Co. 7 Daly (N. Y.) 555; Jones v. Provincial Ins. Co. 16 U. C. Q. B. 477.

poration, and cannot be enforced.[11] The following cases further illustrate the rule as to agreements for insurance: Thus, an agreement for insurance was made with an insurance company through its agent, and on the next day the policy, dated as of the preceding day, was executed, delivered, and received in perfect accordance with that agreement, and it was held that the company was liable for a loss occurring after the agreement was entered into and before the policy was executed, although the charter of the company provided that all policies of insurance should be subscribed by the president and signed and sealed by the secretary.[12] Again, where the charter confers upon an insurance company power "generally to do and perform all things relative to the object of the association," and provides in a subsequent section that "all policies or contracts of insurance" shall be subscribed by the president or some other officer designated by the board of directors for that purpose, the latter provision does not disable the company from binding itself by contracts for policies and immediate insurance executed in other modes and by other agents, but merely prescribes the manner in which the final contract or policy shall be executed.[13] So a provision in a company's charter requiring that "all policies and contracts of insurance . . . shall be subscribed by the president" relates only to executed insurances, and does not abridge the common-law right to make an oral executory contract for insurance.[14]

§ 37. Parol contract for insurance subject to usual provisions of policy.—A parol contract for insurance is in effect the contract of the company as expressed in the policies commonly issued by them, unless otherwise agreed upon,[15] and is to be regarded as made upon the terms and subject to the conditions in the ordinary forms of policies used by the company at the time.[16] In other words, if nothing is stipulated in the preliminary agreement concerning the nature or kind of the policy to be issued, the law presumes that it was contemplated by the parties that the ordinary

[11] Constant v. Alleghany Insurance Co. 3 Wall. Jr. (U. S. C. C.) 313, Fed. Cas. 3136.

[12] Davenport v. Peoria Marine & Fire Ins. Co. 17 Iowa, 276.

[13] Dayton Ins. Co. v. Kelly, 24 Ohio St. 345, 15 Am. Rep. 612.

[14] Security Fire Ins. Co. v. Kentucky Marine & Fire Ins. Co. 7 Bush (Ky.) 81, 3 Am. Rep. 301.

[15] Hubbard v. Hartford Fire Ins. Co. 33 Iowa, 325, 11 Am. Rep. 125; Newark Machine Co. v. Kenton Ins. Co. 50 Ohio St. 549, 22 L.R.A. 768, 35 N. E. 1060; Smith v. State Ins. Co. 64 Iowa, 716, 21 N. W. 145.

[16] Salisbury v. Hekla Fire Ins. Co. 32 Minn. 458, 21 N. W. 552; Vining v. Franklin Fire Ins. Co. 89 Mo. App. 311; De Grove v. Metropolitan Ins. Co. 61 N. Y. 594, 19 Am. Rep. 305; Cleveland Oil & Paint Mfg. Co. v. Norwich Union Fire Ins. Co. 34 Oreg. 228, 55 Pac. 435; Eureka Ins. Co. v. Robinson, Rhea & Co. 56 Pa. St. 256, 94 Am. Dec. 65; State Fire Ins. Co. v. Porter, 3 Grant Cas. (Pa.) 123.

and usual policy used by the insurer to cover property of like nature and kind as that designated in the agreement should be issued. The usual intendment of such agreement is that a policy shall issue which shall contain the specific limitations and conditions upon which the loss insured against shall be payable. The issuance of the policy is the ultimate act contemplated by the executory, and completes the executed contract.[17] And where nothing is said in the negotiations about special rates of insurance, or the special conditions of the policy, it will be presumed that those which were usual and customary were intended.[18] The preceding rule has seemingly been qualified to this extent, that a presumption that the parties to an oral preliminary contract of insurance contemplated such a form of policy as has been usual between them, or is usual in such cases may be applied in some instances.[19] So where plaintiff applied to defendant's agent for a policy of marine insurance on certain goods and paid the premium, but the agent said it was not his custom to give a policy, and that it was unnecessary, and gave him a receipt specifying the risk insured, but containing no conditions, it was held that the contract was governed by the limitations and conditions contained in the policies ordinarily used by the company.[20] If the insurer, however, enters into an oral contract of insurance, and at the same times agrees to issue a policy which it subsequently refuses to do, it cannot claim that the insured's right of recovery is defeated by the violation of any provisions which the policy, if issued, would have contained.[1] But if a policy is issued in pursuance of a verbal agreement, and assured receives it, but

[17] Sproul v. Western Assurance Co. 33 Oreg. 98, 54 Pac. 180, 28 Ins. L. J. 118.

[18] Newark Machine Co. v. Kenton Ins. Co. 50 Ohio St. 549, 22 L.R.A. 708 and note, 35 N. E. 1063; Cleveland Oil & Paint Mfg. Co. v. Norwich Union Fire Ins. Co. 34 Oreg. 228, 55 Pac. 435.

[19] Benner v. Fire Association of Phila. 229 Pa. 75, 140 Am. St. Rep. 706, 78 Atl. 44, 40 Ins. L. J. 84. "We can conceive of instances where this rule might well be applied, but this is not one of them." Per Moschzisker, J.

[20] De Grove v. Metropolitan Ins. Co. 61 N. Y. 594, 19 Am. Rep. 305, and note, 309. See also the following cases:

United States.—Eames v. Home Ins. Co. 94 U. S. 621, 24 L. ed. 298; Relief Fire Ins. Co. v. Shaw, 94 U. S. 574, 24 L. ed. 291.

Iowa.—Barre v. Council Bluffs Ins. Co. 76 Iowa, 609, 41 N. W. 373; Smith v. State Ins. Co. 64 Iowa, 716, 21 N. W. 145.

Minnesota.—Salisbury v. Hekla Fire Ins. Co. 32 Minn. 458, 21 N. W. 552.

Nebraska.—McCann v. Ætna Ins. Co. 3 Neb. 198.

New York.—Lipman v. Niagara Fire Ins. Co. 121 N. Y. 454, 8 L.R.A. 719, 24 N. E. 699.

[1] Hardwick v. State Ins. Co. 23 Or. 290, 31 Pac. 656, 22 Ins. L. J. 262. *Compare* Sproul v. Western Assurance Co. 33 Oreg. 98, 54 Pac. 180, 28 Ins. L. J. 118.

it is void because of noncompliance with a statutory form, the presumption is that the terms of the oral contract conform with those of the written policy.[2]

§ 38. Parol agreement for insurance may be specifically enforced, or court may award damages.—An oral contract to issue a policy of insurance is binding and may be specifically enforced, or the court may award damages the same as in an action on an executed policy.[3] In a New Hampshire case[4] an agreement was made with

[2] Green v. Liverpool & London & Globe Ins. Co. 91 Iowa. 615, 60 N. W. 189. See Howard Ins. Co. v. Owens, 94 Ky. 197, 21 S. W. 1037, 14 Ky. L. Rep. 881.

[3] *United States.*—Tayloe v. Merchants Fire Ins. Co. 9 How. (50 U. S.) 390, 13 L. ed. 187; Fitton v. Fire Ins. Assoc. 20 Fed. (U. S. C. C.) 766 (agreement to insure may be considered in equity as insurance, at law there could only be an action for breach of contract to effect the insurance); Humphrey v. Hartford Fire Ins. Co. 15 Blatchf. (U. S. C. C.) 35, Fed. Cas. No. 6874.

Alabama.—Commercial Fire Ins. Co. v. Morris, 105 Ala. 498, 18 So. 34; Home Ins. Co. v. Adler, 77 Ala. 242, 71 Ala. 524.

California.—Gold v. Sun Ins. Co. 73 Cal. 216, 14 Pac. 786.

Connecticut.—See Bishop v. Clay Fire & Marine Ins. Co. 49 Conn. 167.

Georgia.—Simonton, Jones & Hatcher v. Liverpool & London & Globe Ins. Co. 51 Ga. 76 (action lies; equity will grant relief even though contract required to be in writing).

Illinois.—Firemen's Ins. Co. v. Kuessner, 164 Ill. 275, 45 N. E. 540; Dinning v. Phœnix Ins. Co. 68 Ill. 414 (but held that there were only preliminaries to contract, and that no contract was actually made, so bill was dismissed); Fire Ins. Co., Phila. County v. Sinsabaugh, 101 Ill. App. 55; see Concordia Fire Ins. Co. v. Heffron, 84 Ill. App. 610, as to pleading on oral contract to insure.

Indiana.—Standley v. Northwestern Mutual Life Ins. Co. 95 Ind. 254; American Horse Ins. Co. v. Patterson, 28 Ind. 17; Peoria Marine & Fire Ins. Co. v. Walser, 22 Ind. 73; Kentucky Mutual Ins. Co. v. Jenks, 5 Ind. 96; Western Assurance Co. v. McAlpin, 23 Ind. App. 220, 55 N. E. 119.

Kansas.—Preferred Accident Ins. Co. v. Stone, 61 Kan. 48, 58 Pac. 986.

Kentucky.—Security Fire Ins. Co. v. Kentucky Marine & Fire Ins. Co. 7 Bush (Ky.) 81, 3 Am. Rep. 301; see Hartford Fire Ins. Co. v. Trimble, 117 Ky. 583, 25 Ky. L. Rep. 1497, 78 S. W. 462.

Maryland.—Phœnix Ins. Co. v. Ryland, 69 Md. 437, 1 L.R.A. 548, 16 Atl. 109.

Massachusetts.—See Cunningham v. Connecticut Fire Ins. Co. 200 Mass. 333, 86 N. E. 787, 38 Ins. L. J. 315 (a case of action of contract, on parol agreement to issue standard policies; no discussion as to right of action).

Michigan.—Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co. 92 Mich. 482, 20 L.R.A. 277, 52 N. W. 1070.

Minnesota.—Everett v. O'Leary, 90 Minn. 154, 95 N. W. 901.

Mississippi.—Franklin Fire Ins. Co. v. Taylor, 52 Miss. 441.

Missouri.—Baile v. St. Joseph Fire & Marine Ins. Co. 73 Mo. 371.

Nebraska.—Carter v. Bankers Life Ins. Co. 83 Neb. 810, 120 N. W. 455.

Nevada.—Cooper v. Pacific Mutual Life Ins. Co. 7 Nev. 116, 8 Am. Rep. 705.

New Hampshire.—Gerrish v. German Ins. Co. 55 N. H. 355.

the agent of the company for insurance against fire for one year, commencing the risk at noon, September 30, 1873. The premium was paid to the agent and he agreed to procure and deliver the policy. Before this was done, and on October 1, 1873, a loss occurred. The requisite proofs of loss were made and a policy demanded and payment of the amount insured, which demands were refused. Upon a bill in equity therefor it was decided that the court had jurisdiction to compel a delivery of the policy and specific performance, and that it would, to avoid circuity of action, decree payment of the loss. So specific performance of an executory parol contract to insure a marine risk may be compelled in equity after the loss has occurred, when it appears that the voyage was undertaken on the understanding that the risk had been accepted, and that the writing to effect the insurance would be duly made, and that the premium would be paid when required accord-

New Jersey.—Hallock v. Commercial Ins. Co. 26 N. J. L. 268.

New York.—Ellis v. Albany City Ins. Co. 50 N. Y. 402, 10 Am. Rep. 495; Rhodes v. Railway Passenger Ins. Co. 5 Lans. 71; Kelly v. Commonwealth Ins. Co. 10 Bosw. 82. But *compare* § 38a herein.

North Dakota.—Boos v. Ætna Ins. Co. 22 N. Dak. 11, 132 N. W. 222, 40 Ins. L. J. 1787.

Oregon.—Sproul v. Western Assur. Co. 33 Oreg. 98, 54 Pac. 180, 28 Ins. L. J. 118.

Utah.—Idaho Forwarding Co. v. Firemen's Fund Ins. Co. 8 Utah, 41, 17 L.R.A. 586, 29 Pac. 826.

Virginia.—Interstate Fire Ins. Co. v. McFall, 114 Va. 207, 76 S. E. 293; Haden v. Farmers & Mechanics Fire Assoc. 80 Va. 683; Haskin v. Agricultural Fire Ins. Co. 78 Va. 700; Wooddy v. Old Dominion Ins. Co. 31 Gratt. 362, 31 Am. Rep. 732.

Wisconsin.—Northwestern Iron Co. v. Ætna Ins. Co. 23 Wis. 160, 99 Am. Dec. 145.

Wyoming.—Summers v. Mutual Life Ins. Co. 12 Wyo. 369, 66 L.R.A. 812, 109 Am. St. Rep. 992, 75 Pac. 937.

Canada.—Jones v. Provincial Ins. Co. 16 U. C. Q. B. 477.

An executory contract for insurance, being valid, can be enforced in a court of equity, and having been enforced by the procurement of the policy, an action can be maintained upon the instrument; or the court, in enforcing the execution of the contract, may enter a decree for the amount of the insurance. Franklin Fire Ins. Co. v. Colt, 20 Wall. (87 U. S.) 560, 22 L. ed. 423. *Cited* in:

United States.—Tennant v. Travellers' Ins. Co. 31 Fed. 324; Frankle v. Pennsylvania F. Ins. Co. 12 Ins. L. J. 619, Fed. Cas. No. 5,052a; Magic Ruffle Co. v. Elm City Co. 13 Blatchf. 151, 2 Bann. & Ard. 159, Fed. Cas. No. 8,949; Weeks v. Lycoming F. Ins. Co. 7 Ins. L. J. 553, Fed. Cas. No. 17,353.

Alabama.—Home Ins. Co. v. Adler, 71 Ala. 524.

California.—Crawford v. Transatlantic F. Ins. Co. 125 Cal. 611, 58 Pac. 177.

Indiana.—Prudential Ins. Co. v. Sullivan, 27 Ind. App. 37, 59 N. E. 873.

Kansas.—Preferred Acci. Ins. Co. v. Stone, 61 Kan. 53, 58 Pac. 986.

Massachusetts.—Emery v. Boston Marine Ins. Co. 138 Mass. 412.

Michigan.—Michigan Pipe Co. v. Michigan F. & M. Ins. Co. 92 Mich. 491, 20 L.R.A. 289, 52 N. W. 1070.

New York.—Hicks v. British American Assur. Co. 162 N. Y. 299,

ing to usage;[5] and an oral promise by the president of an insurance company to make a policy of insurance is a contract binding on the company, and a court of equity will compel its specific performance.[6] Again, if the agents of the A, B, C, D, and E insurance companies agree with a party to insure her premises in the A, B, C, and D companies, she has against these four, after destruction thereof by fire, a claim for the loss, even though the policies have not been delivered to her, but none against the E, although the E had also written out a policy for her. Equity will only consider that to be done which was agreed to be done.[7] So equity may compel the issuance and delivery of an insurance policy after the loss, and enforce the payment of it, as if made in advance, where there has been a valid agreement for one before the loss, even where the contract was by parol and the charter of the company requires all policies to be in writing.[8] And full relief will be administered in a suit for specific performance of a contract to insure, by compelling the payment of the loss when the evidence of its extent is satisfactory.[9] But equity will not compel the issuance of a policy in accordance with the provisions of a contract to insure, where the property intended to be covered has been destroyed and its owner has received from other insurers more than its value. Nor will specific performance of a contract to issue a policy be granted where it was effected by agents of the property owner, and was not binding on him without ratification, and he did not ratify it until after loss, when it was to his interest to do so.[10]

In a Kentucky case, in an action upon a "workman's collective policy" agreed to be issued to an employer for the benefit of his operatives, in case of injury, or resulting death to an employee.

48 L.R.A. 430, 56 N. E. 743; rev'g 13 App. Div. 445, 43 N. Y. Supp. 623; Van Tassel v. Greenwich Ins. Co. 72 Hun, 145, 25 N. Y. Supp. 301; Clarkson v. Western Assur. Co. 92 Hun, 535, 37 N. Y. Supp. 53.

Oregon.—Sproul v. Western Assur. Co. 33 Or. 101, 54 Pac. 155.

Pennsylvania.—Smith v. Sugar Valley Mut. F. Ins. Co. 5 Pa. Dist. R. 340.

[4] Gerrish v. German Ins. Co. 55 N. H. 355.

[5] Phœnix Ins. Co. v. Ryland, 69 Md. 437, 16 Atl. 109, 1 L.R.A. 548.

[6] Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co. 19 How. (60 U. S.) 318, 15 L. ed. 636, See Union Mutual Ins. Co. v. Commercial Mutual Marine Ins. Co. 2 Curt. (U. S. C. C.) 524, Fed. Cas. 14,372; New England Fire & Marine Ins. Co. v. Robinson, 25 Ind. 536; Trustees of First Baptist Church v. Brooklyn Ins. Co. 18 Barb. (N. Y.) 69; Kelly v. Commonwealth Ins. Co. 10 Bosw. (N. Y.) 82.

[7] Fitton v. Fire Ins. Assoc. 20 Fed. 766.

[8] Franklin Fire Ins. Co. v. Taylor, 52 Miss. 441. See Ellis v. Albany Ins. Co. 50 N. Y. 495, and note.

[9] Phenix Ins. Co. v. Ryland, 69 Md. 437, 1 L.R.A. 548, 16 Atl. 109.

[10] Insurance Co. of North America v. Schall, 96 Md. 225, 61 L.R.A. 300, 53 Atl. 925.

and which insurance was to be in force until an unsigned application was disapproved and notice thereof given to the employer, and between the date of said application and notification of its rejection an employee lost his life, it was held that *as there existed no right to have a policy issued the remedy was not in equity but by an action at law to recover on the parol contract.*[11]

§ 38a. Same subject: standard policy: rule in New York.—It is held in New York that, since 1886, when the legislature enacted the standard fire insurance policy law,[12] an oral contract to insure has been treated as a contract of insurance, and not, as formerly, a contract to issue a policy, and that assured's assignee had a cause of action on a contract for present insurance since it included within it the standard form of policy, and the contract was a completed one, but that the failure to deliver the policy to the assignor gave said assignee no cause of action therefor, as he had sustained no damage by reason thereof. We may, however, state the conclusion arrived at in this decision in another form, as follows: The value of property destroyed by fire after an oral contract to insure it, but before the issuance of a policy thereon, cannot be recovered as damages for breach of agreement to issue the policy, where the failure to deliver the policy did not cause any damage to the insured, since the oral agreement constituted a binding contract of insurance which could be enforced against the insurer except for the failure of the insured to comply with the conditions contained in the standard policy of insurance, which were by law made a part of the contract.[13]

[11] Fidelity & Casualty Co. v. Ballard & Ballard Co. 105 Ky. 253, 20 Ky. L. Rep. 1169, 48 S. W. 1074, 28 Ins. L. J. 227. The court, per Payntor, J., said: "If parties have agreed to the terms of insurance, but the policy has not been issued, the insured could proceed in a court of equity, and compel the company to issue the policy. When a loss intervenes between the time the terms of insurance are agreed upon and the delivery of the policy, which is but an evidence of contract, then the insured can, by an action at law, recover the amount authorized by the terms of the contract. In the event of loss before delivery of the policy, if the insured desired by circuitous route to bring an action, and have adjudged to him the policy, he might do so, and then maintain an action at law to recover the loss which he sustained by the company's violation of the contract as evidenced by the policy, or the court, in equity, could render judgment for the amount of the loss. In the case at bar the plaintiff does not seek to have the court compel the company to issue a policy. It is confessed that the company had the right to disapprove the application and refuse to issue it. Therefore the plaintiff had no right to maintain an action in equity to compel the company to issue it. This action is at law to recover on the contract of insurance which was made to be in force until the company approved the application or rejected it, and notified the appellee of such action."

[12] Laws 1886, c. 488.

[13] Hicks v. British-American As-

§ 38b. Same subject: life insurance: industrial life insurance.—Parol agreements for life insurance may be specifically enforced by requiring the issuance of the policy as agreed, either before or after the loss.[14]

But an action which is in form one to establish and enforce an oral contract of industrial life insurance cannot be sustained where it is, in fact, an attempt to alter the terms of a written contract which consisted of an application and a receipt for one week's premium paid on account thereof, and subject to acceptance or rejection by the company, but no policy was issued, and the evidence did not tend to show any consideration for a separate oral contract, even though the agent represented that the insurance began at once.[15]

surance Co. 162 N. Y. 284, 48 L.R.A. 424, 56 N. E. 743, 30 Ins. L. J. 14, rev'g 32 N. Y. Supp. 623, 13 App. Div. 444. The court *cites* Van Loan v. Farmers Mut. Fire Ins. Assoc. 90 N. Y. 280; Angell v. Hartford Fire Ins. Co. 59 N. Y. 171, 17 Am. Rep. 322; Ellis v. Albany City Ins. Co. 50 N. Y. 402, 10 Am. Rep. 495—and declares that "the situation which those cases were designed to meet no longer exists. During the period of time in which they and others were decided, and down to the year 1886, each insurance company was at liberty to insert such provisions in the policy of insurance issued by it as it deemed best. The result was that there was no uniformity in policies of insurance, and when loss by fire occurred prior to a delivery of the policy, it became necessary for the assured to secure possession of the policy, either by its voluntary delivery to him by the officers of the company, or in pursuance of a decree in a suit in equity for specific performance. Thereon he could found a judgment for the damages sustained by the fire, or he was allowed to recover the damages sustained for a breach of the contract, which was treated as a contract for the delivery of a policy. The last one of the cases cited was decided in 1882." The court then notes the enactment of the standard fire insurance policy law and says that "thereafter the contract to insure was, by common consent of the profession and the courts, scientifically treated as a contract of insurance, and not, as formerly, a contract to issue a policy, as an examination of the authorities in this court from" Ruggles v. American Central Ins. Co. 114 N. Y. 415, 11 Am. St. Rep. 674, 21 N. E. 1000, "will show." Per Parker, Ch. J.; Landon, J., Werner, J., and Haight, J., dissented. See Queen Ins. Co. v. Hartwell Ice & Laundry Co. 7 Ga. App. 787, 68 S. E. 310, 39 Ins. L. J. 1125.

Marine vessel liability insurance: parol agreement to issue a valid policy binding, and suit lies thereon. International Ferry Co. v. American Fidelity Co. 207 N. Y. 350, 101 N. E. 160.

Parol contract of insurance—executory contract to renew: specific performance. See §§ 33a, 41a, 41c herein.

[14] Summers v. Mutual Life Ins. Co. 12 Wyo. 369, 66 L.R.A. 812, 75 Pac. 937. See also Carter v. Bankers Life Ins. Co. 83 Neb. 810, 120 N. W. 455 (ten-payment policy).

[15] Chamberlain v. Prudential Ins. Co. of America, 109 Wis. 4, 83 Am. St. Rep. 851, 85 N. W. 128, 30 Ins. L. J. 427.

§ 38c. Evidence: oral contract must be clearly established.—Such parol contracts must be clearly established, or the court will refuse relief either at law or in equity.[16] And in order to sustain an action on a contract of insurance, where no policy has been issued, the elements must have been agreed upon, and nothing been left open and undetermined, and all conditions precedent complied with.[17] And where a complaint alleges the subject of insurance, the limit of the risk, the peril insured against, the amount, and the premium, it is sufficiently specific to support an action based on a parol contract of insurance.[18]

Again, since a contract of insurance may rest in parol if all the elements essential to a valid contract are agreed upon, a contract of insurance is established where an agent, with authority to receive

[16] *California.*—American Can Co. v. Agricultural Ins. Co. 12 Cal. App. 133, 106 Pac. 720, 39 Ins. L. J. 518. See Crawford v. Trans-Atlantic Fire Ins. Co. 125 Cal. 609, 58 Pac. 177, 28 Ins. L. J. 938 (covering also points of what declarations are and are not part of the res gestæ).

Connecticut.—See Bishop v. Clay Fire & Marine Ins. Co. 49 Conn. 167.

Illinois.—Dinning v. Phœnix Ins. Co. 68 Ill. 414.

Indiana.—New England Fire & Marine Ins. Co. v. Robinson, 25 Ind. 536.

Kentucky.—Hartford Fire Ins. Co. v. Trimble, 117 Ky. 583, 25 Ky. L. Rep. 1497, 78 S. W. 462.

Maryland.—See Mallette v. British-American Assur. Co. 91 Md. 471, 46 Atl. 1005.

Michigan.—Kleis v. Niagara Fire Ins. Co. 117 Mich. 469, 5 Det. L. News, 337, 76 N. W. 155, 27 Ins. L. J. 912.

Minnesota.—See Ames-Brooks Co. v. Ætna Ins. Co. 83 Minn. 346, 86 N. W. 344, 30 Ins. L. J. 802.

Nebraska.—McCann v. Ætna Ins. Co. 3 Neb. 198.

Ohio.—Hartford Fire Ins. Co. v. Whitman, 75 Ohio St. 312, 79 N. E. 450; Snydam v. Columbus Ins. Co. 18 Ohio St. 459.

Pennsylvania.—Benner v. Fire Assoc. of Phila. 229 Pa. 75, 78 Atl. 44, 40 Ins. L. J. 84, 140 Am. St. Rep. 706; Patterson v. Benjamin Franklin Ins. Co. 81* Pa. St. 454; Ripka v. Mutual Fire Ins. Co. 36 Pa. Super. Ct. 517.

Virginia.—Haden v. Farmers & Mechanics' Fire Assoc. 80 Va. 683; Haskin v. Agricultural Fire Ins. Co. 78 Va. 700.

Wisconsin.—Strohn v. Hartford Ins. Co. 37 Wis. 625.

Oral contracts of insurance must be clearly established in every particular. The testimony must make clear the subject-matter, the amount, and elements of the risk, including its duration in point of time and extent of hazard assumed, the rate of premium, and, generally, all the circumstances peculiar to the contract of insurance. Benner v. Fire Assoc. of Phila. 229 Penn. 75, 140 Am. St. Rep. 706, 78 Atl. 44, 40 Ins. L. J. 84. See also Mooney v. Merriam, 77 Kan. 305, 94 Pac. 263; Hartford Fire Ins. Co. v. Trimble, 117 Ky. 583, 25 Ky. L. Rep. 1497, 78 S. W. 462, 33 Ins. L. J. 348; Keystone Mattress & Spring Bed Co. v. Pittsburg Underwriters, 21 Pa. Super. Ct. 38. *Examine* §§ 38–38c, 46–49, 72 herein.

[17] Croft v. Hanover Fire Ins. Co. 40 W. Va. 508, 52 Am. St. Rep. 902, 21 S. E. 854. *Compare* § 45a herein.

[18] Ohio Farmers Ins. Co. v. Bell (1912) 51 Ind. App. 377, 99 N. E. 812.

applications for insurance and accept risks, agrees to insure certain property, and the time when the risk should begin, the amount of the risk, its duration, the premium, and the kind of policy to be issued were all fixed, and nothing remained to be determined afterward, though the premium was not paid, the agent being indebted to the insured, and having on previous occasions issued policies to the insured, crediting the premium on account.[19] But, as in other cases of parol contracts, the assent of the parties to the terms of the agreement may be shown by their acts and the attendant circumstances, as well as by the words they have employed,[20] although evidence of usage to make written applications is immaterial.[1] Again, acceptance of a policy does not constitute conclusive evidence of a contract or parol agreement to effect a stipulated insurance by the issue of a valid policy, where there is no negligence on insured's part.[2] It may, however, be a question for the jury whether or not there exists a parol contract to insure.[3]

[19] Western Assur. Co. v. McAlpin, 23 Ind. App. 220, 77 Am. St. Rep. 423, 55 N. E. 119. See also Posey County Fire Assoc. v. Hogan, 37 Ind. App. 573, 77 N. E. 670. *Examine* §§ 72 et seq. herein.

[20] Newark Machine Co. v. Kenton Ins. Co. 50 Ohio St. 549, 22 L.R.A. 768, 35 N. E. 1060. See § 3760 herein.

[1] Emery v. Boston Marine Ins. Co. 138 Mass. 398. In this case the court, per Allen, J., said: "But it is also well settled, and it is now too late to question the doctrine, that an oral contract of insurance may be valid: Sanborn v. Fireman's Ins. Co. 16 Gray (82 Mass.) 448. As was said in that case: 'It is not easy to see the force of the reasoning which would infer that because parties usually make their contract in one way it would be void when they choose to make it in another, equally good at common law and not prohibited by any statute.' See also Relief Fire Ins. Co. v. Shaw, 94 U. S. 574, 24 L. ed. 291. A usage that an oral contract if made is considered invalid would be plainly repugnant to law and void. In the present case the evidence of usage was offered, not in aid of the construction of a contract, but to support the position that no contract whatever had been made. If a contract had in point of fact been made as alleged, it was of no consequence whether it was according to general usage or not. . . . It is no legitimate confirmation of the defendant's position under such circumstances to show that other insurance companies usually require applications for marine insurance to be in writing as a condition of making the contract. . . . An oral contract was lawful, and the evidence was properly confined to the question whether this particular oral contract had been made, as testified by the plaintiff, without going into the general inquiry whether other parties were accustomed to make such contracts.'" *Compare* Ætna Ins. Co. v. Northwestern Iron Co. 21 Wis. 464, 471.

[2] International Ferry Co. v. American Fidelity Co. 207 N. Y. 350, 101 N. E. 160, revg. 129 N. Y. Supp. 1129, 145 App. Div. 906.

[3] *Illinois.*—Insurance Co. of North America v. Bird, 175 Ill. 42, 51 N. E. 686, affg. 74 Ill. App. 396.

Kentucky.—Natural Fire Ins. Co. v. Rowe, 20 Ky. L. Rep. 1473, 49 S. W. 422.

§ 39. Parol contracts: statute of frauds.—In the United States Supreme Court it is held that the statute of frauds does not require that a promise to make a policy of insurance should be in writing,[4] nor does the statute make a writing necessary in Alabama,[5] nor in Kentucky.[6] So an oral contract of insurance for one year, including its date, is a contract to be performed within a year, and is not within the statute of frauds,[7] and an agreement to insure for even three or more years, where the contingency may happen within a year, is not within the statute.[8]

A verbal agreement of renewal which is not by its terms to endure for a longer period than one year, though it may continue for an indefinite period, is not within the statute.[9] But a contract to issue a policy and to renew the same yearly thereafter until the insured shall otherwise direct, inasmuch as it is not to be performed within one year, is within the statute, and is not taken out of it by part performance by issuing a policy each of two preceding years.[10]

Minnesota.—Ames-Brooks Co. v. Ætna Ins. Co. 83 Minn. 346, 86 N. W. 344, 30 Ins. L. J. 802.

Pennsylvania.—Grossbaum Keramic Art Syndicate v. German Ins. Co. 213 Pa. 506, 62 Atl. 1107, 35 Ins. L. J. 214.

South Dakota. — Minneapolis Threshing-Machine Co. v. Darnall, 13 S. Dak. 279, 83 N. W. 266, 29 Ins. L. J. 687.

[4] Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co. 19 How. (60 U. S.) 318, 15 L. ed. 636; Union Mutual Ins. Co. v. Commercial Mutual Marine Ins. Co. 2 Curt. (U. S. C. C.) 524, Fed. Cas. 14,372.

[5] *Alabama.*—Commercial Fire Ins. Co. v. Morris, 105 Ala. 498, 18 So. 34; Gold Life Ins. Co. v. Mayes, 61 Ala. 163. See also:

Arkansas.—King v. Cox, 63 Ark. 204, 37 S. W. 877.

Kansas.—Phœnix Ins. Co. v. Ireland, 9 Kan. App. 644, 58 Pac. 1024.

Missouri.—McIntyre v. Federal Life Ins. Co. 142 Mo. App. 256, 126 S. W. 227.

New York.—International Ferry Co. v. American Fidelity Co. 207 N. Y. 350, 101 N. E. 160.

West Virginia.—Croft v. Hanover Fire Ins. Co. 40 W. Va. 508, 52 Am. St. Rep. 902, 21 S. E. 854.

[6] American Central Ins. Co. v. Leake, 31 Ky. L. Rep. 1016, 37 Ins. L. J. 147, 104 S. W. 373; Howard Ins. Co. v. Owens, 94 Ky. 197, 14 Ky. L. Rep. 881, 21 S. W. 1037; Phœnix Ins. Co. v. Spiers, 87 Ky. 286, 10 Ky. L. Rep. 254, 8 S. W. 453. See also Wiebeler v. Milwaukee, Mechanics Mutual Ins. Co. 30 Minn. 464, 16 N. W. 363.

Reinsurance: statute of frauds, see § 116 herein.

[7] Sanford v. Orient Ins. Co. 174 Mass. 416, 75 Am. St. Rep. 358, 54 N. E. 883; Sanborn v. Fireman's Ins. Co. 16 Gray (82 Mass.) 448, 77 Am. Dec. 419; Howard Ins. Co. v. Owen, 94 Ky. 197, 14 Ky. L. Rep. 881, 21 S. W. 1037. See also Walker v. Metropolitan Ins. Co. 56 Me. 371; Croft v. Hanover Fire Ins. Co. 40 W. Va. 508, 52 Am. St. Rep. 902, 21 S. E. 854.

[8] Morse v. Minnesota & St. Louis Ry. Co. 30 Minn. 464, 16 N. W. 358. See Van Loan v. Farmers' Mutual Fire Ins. Assoc. 24 Hun (N. Y.) 132.

[9] Trustees of First Baptist Church v. Brooklyn Fire Ins. Co. 19 N. Y. 305; s. c. 18 Barb. (N. Y.) 69. See § 1468 herein.

[10] Klein v. Liverpool & London & Globe Ins. Co. 22 Ky. L. Rep. 301, 57 S. W. 250.

A contract may however, be divisible and partly within the statute, and void as to that part and valid as to the other part, as in case of a parol agreement to answer for loss by fire, and for the default and miscarriage of another.[11]

§ 40. How far parol contract merged in written agreement.—A parol contract to issue a policy is not merged in a written policy which does not cover all the branches and elements of the parol contract, and which the company does not admit as binding upon it.[12] So the issuing in consequence of a parol agreement of a policy containing material errors resulting from a mistake of the agent of the insurers in communicating the facts to them, and the agent's error in requiring the insured to pay a premium which is less than the rate agreed upon and less than the agent was authorized to insure at, does not impair the liability of the insurers upon the original agreement,[13] and where the insurers on receiving a premium agreed to deliver a policy covering specific property, and afterward sent a policy varying from the terms of the contract and a loss occurred, it was decided that a recovery might be had in accordance with the terms of the insurance contracted for, it appearing that the policy was received by a clerk and its provisions not known to the insured till after the fire.[14] So where the terms of an order to insure have been materially departed from in the policy by fraud or mistake, the order will be considered as containing the contract between the parties. But the order can be resorted to only in so far as it varies from the policy; in all other respects the policy should be considered as the contract.[15] And if an insurance company receives the premium paid to its agent who made the contract and forwarded the policy, it is bound by the contract made by him, although by mistake it is not correctly stated in the policy.[16]

It may be stated that, as a general rule, the written contract will be presumed to embody therein all previous verbal agreements of the parties and will in the absence of fraud or mistake be conclusive upon them.[17] And in New York an insurance policy presump-

[11] Mobile Marine Dock & Mutual Ins. Co. v. McMillan, 31 Ala. 711.

[12] Nebraska & Iowa Ins. Co. v. Seivers, 27 Neb. 541, 43 N. W. 351.

[13] Bunten v. Orient Mutual Ins. Co. 8 Bosw. (N. Y.) 448.

[14] Franklin Ins. Co. v. Hewitt, 3 B. Mon. (Ky.) 231.

[15] Delaware Ins. Co. v. Hogan, 2 Wash. (U. S. C. C.) 4, Fed. Cas. 3765.

[16] Abraham v. North German Ins. Co. (U. S. C. C.) 40 Fed. 717.

[17] McLaughlin v. Equitable Life Assur. Co. 38 Neb. 725, 57 N. W. 557. *Examine* §§ 185, 3806–3809 herein.

See also the following cases:

United States.—Northern Assurance Co. v. Grand View Building Assoc. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. 133, 31 Ins. L. J. 97 ("It

tively merges all previous stipulations and expresses the final understanding of the parties. If, however, by inadvertence or mutual

is a fundamental rule, in courts both of law and equity, that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument. . . . This rule has always been followed and applied by the English courts in the case of policies of insurance in writing. . . . Coming to the decisions in our state courts, we find that, while there is some contrariety of decisions, the decided weight of authority is to the effect that a policy of insurance in writing cannot be changed or altered by parol evidence of what was said prior or at the time the insurance was effected. . . . As to the fundamental rule that written contracts cannot be modified or changed by parol evidence, unless in cases where the contracts are vitiated by fraud or mutual mistake, we deem it sufficient to say that it has been treated by this court as invariable and salutary. . . . Policies of fire insurance in writing have always been held by this court to be within the protection of this rule." Id. per Mr. Justice Shiras); Kentucky Vermillion Mining & Concentrating Co. v. Norwich Union Fire Ins. Soc. 146 Fed. 695, 77 C. C. A. 121; Lefler v. New York Life Ins. Co. 143 Fed. 814, 74 C. C. A. 488 (parol evidence of prior negotiations inadmissible to contradict certain and unambiguous terms of written contract, even to raise an estoppel in pais); New York Life Ins. Co. v. McMaster. 87 Fed. 63, 57 U. S. App. 638, 30 C. C. A. 532, 28 Ins. L. J. 698 (holding that no representation, promise, or agreement made, or opinion expressed, in the previous parol negotiations as to the terms or legal effect of the resulting written agreement, can be permitted to prevail either at law or in equity, over the plain provisions and just interpretation of the contract, in the absence of some artifice or fraud which concealed its terms, and prevented complainant from reading it. See McMaster v. New York Life Ins. Co. [U. S. C. C.] 90 Fed. 40, 28 Ins. L. J. 960. Both the above cases are reversed in McMaster v. New York Life Ins. Co. 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. 10, 31 Ins. L. J. 555. The court per Sanborn, C. J., in the C. C. A. case *quotes* from Union Mutual Life Ins. Co. v. Mowry, 96 U. S. 544, 547, 24 L. ed. 674, as follows: "All previous verbal arrangements were merged in the written agreement. The understanding of the parties as to the amount of the insurance, the conditions upon which it should be payable, and the premiums to be paid were there expressed for the very purpose of avoiding any controversy or question concerning them. . . . For compliance with arrangements respecting future transactions, parties must provide by stipulations in their agreements when reduced to writing. The doctrine, carried to the extent for which the assured contends in this case, would subvert the salutary rule that the written contract must prevail over previous verbal arrangements and open the door to all the evils which that rule was intended to prevent").

Georgia.— Fowler v. Preferred Accident Ins. Co. 100 Ga. 330, 28 S. E. 398, 27 Ins. L. J. 168 ("all the oral conversations and negotiations between the plaintiff and the defendant's agent in reference to accident insurance which the plaintiff desired to procure in the defendant company resulted in the plaintiff filling out and signing an application for a policy for such insurance in the defendant company, and the agents of the defendant giving the plaintiff a receipt for a certain sum on the first quarterly premium of the policy to be issued by the defendant and were therefore merged in the said written instruments by virtue of the plain

mistake, or fraud of one party and mistake of the other an accepted policy fails to conform to a prior oral agreement to insure a court will correct it.[18] Again, it is decided in an Oklahoma case, where the court reviews at length numerous authorities, that: (1) It is a fundamental rule of law that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument. (2) When parties have deliberately entered into a written contract in such terms as import a legal obligation, without any uncertainty as to the object or intent of such transaction, it is conclusively presumed that the whole transaction of the parties and the extent and manner of their undertaking was reduced to writing; and all oral testimony of previous negotiations or statements between the parties, or contemporaneous therewith, are merged in the written instrument, in the absence of fraud or mutual mistake of the parties. (3) A contract in writing, if its terms are free from doubt or ambiguity, must be permitted to speak for itself, and

and familiar rule that all oral negotiations, conversations, and agreements between parties to a written contract which either precedes or accompanies the execution of the instrument are to be regarded as merged in or extinguished by it, and the writing is to be treated as the exclusive agreement by which the contracting parties are bound." Id. per Fish, J.).

Kentucky. — Provident Savings Life Assurance Soc. of N. Y. v. Withers, 132 Ky. 541, 21 L.R.A.(N.S.) 30 note, 116 S. W. 350 (renewable term policy; special preliminary contract became merged in policy when issued, and said policy constituted the sole measure of the company's liability).

Massachusetts.—Bowditch v. Norwich Union Fire Ins. Soc. 193 Mass. 565, 79 N. E. 788, 36 Ins. L. J. 276.

Michigan.—Kleis v. Niagara Fire Ins. Co. 117 Mich. 469, 5 Det. L. N. 337, 76 N. W. 155 ("this was the completion of a contract evidence of which was contained in the two writings, viz., the application and policy, which merged all negotiations and agreements in the writing; and under innumerable authorities it is not subject to contradiction or variation by parol in an action brought upon it. If the action is brought on the oral contract underlying it, a complete answer is that the negotiations were reduced to writing, and executed and accepted by the parties." Id. per Hooker, J.).

Washington.—Ferguson v. Lumbermen's Ins. Co. 45 Wash. 209, 88 Pac. 128, 36 Ins. L. J. 318 (oral evidence inadmissible which tends directly to contradict terms of policy and application by showing that more property was covered than the written contract specified).

West Virginia.—Providence-Washington Ins. Co. v. Board of Education, 49 W. Va. 360, 38 S. E. 679, 30 Ins. L. J. 577 (where parties have made a written agreement, the writing is regarded as the exclusive evidence of the contract, and all oral negotiations preceding or accompanying the execution of the written agreement are merged in it and are not admissible in evidence).

Wisconsin.—Rief v. Continental Casualty Co. 131 Wis. 368, 111 N. W. 502 (where no fraud or mistake evidence to contradict or vary policy inadmissible).

[18] International Ferry Co. v. American Fidelity Co. 207 N. Y. 350, 101 N. E. 160 (marine vessel liability insurance), see § 38a herein.

cannot by the courts, at the instance of one of the parties be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts, and this principle is applicable to contracts of insurance.[19] The rule, however, that parol agreements are merged in a written contract has no application where, in an action to recover premiums with interest, paid on a life insurance policy, it is alleged that the written contract was by fraud or mistake executed differently from the terms of the agreement.[20]

§ 41. Parol contract: renewal.—The term "renewal" means that the old policy shall be repeated in substance. It is the same in this connection as "extended." [1] And where there is an agreement for the renewal of a policy, the insured is justified in assuming that the premium, and all the terms and conditions of the renewal will be the same as those of the original unless he has notice of some proposed change. In other words unless otherwise expressed, a renewal of an existing insurance policy is on the same terms and conditions as were originally contained in the pre-existing policy. This is especially so where the terms of the original policy expressly so provide and the verbal agreement to insure is made shortly before the expiration of said policy and a part of the renewal premium is paid with a promise to pay the remainder in a few days, said payment and promise being accepted by the agent of insurer.[2] A parol contract to renew an existing policy or contract of insurance is valid. It may be based upon the payment of the consideration or premium at the time the contract is made, or upon an express agreement postponing said payment, or upon a course of dealing between the parties showing that they contemplated that credit should be given for the premium, and that it need not be paid

[19] Liverpool & London & Globe Ins. Co. v. T. M. Richardson Lumber Co. 11 Okla. 585, 69 Pac. 938, 31 Ins. L. J. 997. See also Gish v. Ins. Co. of North America, 16 Okla. 59, 13 L.R.A.(N.S.) 826, 87 Pac. 869, 36 Ins. L. J. 227.

[20] Gwaltney v. Provident Saving Life Assurance Soc. 132 N. Car. 925, 44 S. E. 659, 33 Ins. L. J. 72. See Mutual Life Ins. Co. v. Hargus, — Tex. Civ. App. —, 99 S. W. 580.

[1] Phoenix Ins. Co. v. Hale, 67 Ark. 433, 55 S. W. 486, 29 Ins. L. J. 550, 554, per Hughes, J.: "Binding receipt" construed in this connection, and contract to renew held valid even though said receipt was to be invalid on the issue of the renewal, and although the insurer declined to renew but failed to notify insured or return the premium paid. The loss occurred after the expiration of the time specified in the receipt.

As to renewal policy being on same terms and conditions as original, see §§ 1460, 1463 herein. *Examine* § 37 herein.

Reinsurance sometimes means "renewal." See § 112 herein.

[2] Mallette v. British American Assurance Co. 91 Md. 471, 46 Atl. 1005, 29 Ins. L. J. 966. *Compare* O'Reilly v. Corporation of London Assurance Co. 101 N. Y. 575, 5 N. E. 568, distinguished in McCabe v. Aetna Ins. Co. 9 N. Dak. 19, 47 L.R.A. 641, 81 N. W. 426, 29 Ins. L. J. 138.

when the renewal policy is issued but upon demand by the agent.[3] And where insurance agents authorized to countersign, issue and renew policies of insurance agree orally to continue an existing contract of insurance and issue a renewal or policy therefor, the insurer is obligated, although credit is given for the premium.[4] And where an insurance agent had charge of all the insured's insurance business for several years, under directions not to let a policy expire unless told to do so, and under an arrangement whereby the insured paid the premiums only on presentation of bills therefor, and the agent had a pigeonhole in his safe devoted to the exclusive custody of insured's papers, it was decided that there was a valid renewal of an accident policy by the agent attaching a renewal receipt to the original policy, charging the renewal premium to insured and crediting the insurance company with the amount.[5] And a company through its authorized agent,

[3] Baldwin v. Phoenix Ins. Co. 107 Ky. 356, 21 Ky. L. Rep. 1090, 54 S. W. 13, 29 Ins. L. J. 78. In this case insurer's agent had been issuing policies for years to insured without premiums being paid when policies were issued or renewals made, but said premiums had been charged to insured, and when the account was presented it was paid. See quotation from this case in note to § 31 herein. Compare Klein v. Liverpool & London & Globe Ins. Co. 22 Ky. L. Rep. 301, 57 S. W. 250, noted under § 39 herein.

That parol contract to renew valid, see:

Arkansas.—King v. Cox, 63 Ark. 204, 37 S. W. 877.

California.—American Can Co. v. Agricultural Ins. Co. 12 Cal. App. 133, 106 Pac. 720, 39 Ins. L. J. 518 (but the evidence here did not establish a parol contract).

Illinois.—Insurance Co. of North America v. Bird, 175 Ill. 42, 51 N. E. 686.

Indiana.—Western Assurance Co. v. McAlpin, 23 Ind. App. 220, 55 N. E. 119.

Kentucky.—Hartford Fire Ins. Co. v. Trimble, 117 Ky. 583, 25 Ky. L. Rep. 1497, 78 S. W. 462, 33 Ins. L. J. 348 (but evidence showed no enforcible contract)

Missouri.—Shepard v. Boone County Mutual Fire Ins. Co. 138 Mo. App. 20, 119 S. W. 984, 38 Ins. L. J. 904 (oral contract for renewal valid, but facts here showed no oral contract was made).

North Dakota.—Boos v. Aetna Ins. Co. 22 N. Dak. 11, 132 N. W. 222, 40 Ins. L. J. 1787 (*following* McCabe v. Aetna Ins. Co. 9 N. Dak. 19, 47 L.R.A. 641, 81 N. W. 426, 29 Ins. L. J. 138).

[4] Squier v. Hanover Fire Ins. Co. 162 N. Y. 552, 76 Am. St. Rep. 349, 37 N. E. 93. *Compare* Brown v. Dutchess County Mutual Ins. Co. 71 N. Y. Supp. 670, 64 App. Div. 9.

As to agent's power to renew, see § 538 herein.

[5] Washburn v. United States Casualty Co. 106 Me. 411, 76 Atl. 902, 108 Me. 429, 81 Atl. 575.

As to prepayment of premium as prerequisite: credit for premium, and custom as to same, see §§ 72, 78, 84, 1122, 1141 herein. See also:

United States.—Ins. Co. (Franklin Fire Ins. Co.) v. Colt, 20 Wall. (87 U. S.) 560, 22 L. ed. 423; Brooklyn Life Ins. Co. v. Miller (Miller v. Life Ins. Co.) 12 Wall. (79 U. S.) 285, 20 L. ed. 398.

Arkansas.—King v. Cox, 63 Ark. 204, 37 S. W. 877.

Indiana.—Western Assurance Co.

may contract by parol for the renewal of a policy, although it be stipulated on the face of the existing policy that it shall not be renewed in that manner.[6] Again, although the written appointment of an agent of a fire insurance company does not authorize him to make oral contracts, still he may bind the insurer by a parol contract to insure where such contract is a renewal of an existing policy about to expire, if he has authority to negotiate, fill up and issue blank policies with which he is entrusted and which are signed by the president and secretary of the company. So where a contract of insurance is about to expire and insured applies for ten days further insurance and agrees therefor with the agent, this may constitute a mere renewal of the pre-existing insurance contract, and as written the agent's authority, when his power to renew a policy by oral agreement is not limited.[7] And a parol agreement by an agent of a foreign insurance company for renewal of a policy which had been originally issued by him will be deemed to have been made by him in his representative capacity,

v. McAlpin, 23 Ind. App. 220, 55 N. E. 119.

Maryland.—Union Fire Ins. Co. v. Baltimore Asbestos Co. (Md.) 89 Atl. 408; Mallette v. British American Assurance Co. 91 Md. 471, 46 Atl. 1005, 29 Ins. L. J. 966.

Michigan.—Bailey v. Preferred Masonic Mutual Accident Assoc. 102 Mich. 289, 26 L.R.A. 171, 57 N. W. 184.

North Dakota.—McCabe v. Aetna Ins. Co. 9 N. Dak. 19, 47 L.R.A. 641, 81 N. W. 426, 29 Ins. L. J. 138 ("it is also urged that prepayment of the premium for the renewal term was necessary to effect a valid renewal but we are of opinion that this was not essential. By the terms of the policy prepayment of the premium is not required. By the language of the policy, it may be renewed 'in consideration of premium for the renewal term.' This language cannot be construed so as to require prepayment of such premium. Moreover, this language in the policy has reference only to the completed contract of renewal, and not to a preliminary contract to renew." Id. per Fisk, J.).

Ohio.—Newark Machine Co. v. Kenton Ins. Co. 50 Ohio St. 549, 22 L.R.A. 768, 35 N. E. 1060.

Pennsylvania.—Benner v. Fire Association of Phila. 229 Pa. 75, 140 Am. St. Rep. 706, 40 Ins. L. J. 84, 78 Atl. 44.

Texas.—Supreme Lodge United Benevolent Assoc. v. Lawson, — Tex. Civ. App. —, 133 S. W. 907.

Wyoming.—Summers v. Mutual Life Ins. Co. 12 Wyo. 369, 109 Am. St. Rep. 952, 66 L.R.A. 812, 75 Pac. 937.

Prior parol agreement as to payment of premiums—waiver and estoppel, see § 1354 herein.

[6] Cohen v. Continental Fire Ins. Co. 67 Tex. 325, 3 S. W. 296, 60 Am. Rep. 24. See Giddings v. Phœnix Ins. Co. 90 Mo. 272, 277, 2 S. W. 139; Royal Ins. Co. v. Beatty, 119 Pa. St. 6, 12 Atl. 607.

Examine as to specialties. Firemen's Ins. Co. v. Floss, 67 Md. 403, 10 Atl. 139.

[7] King v. Phoenix Ins. Co. 195 Mo. 290, 113 Am. St. Rep. 678, 6 Amer. & Eng. Annot. Cas. 618, 92 S. W. 892. Compare Brown v. Dutchess County Mutual Ins. Co. 71 N. Y. Supp. 670, 64 App. Div. 9.

when he is authorized to issue renewals.[8] But it is held in Pennsylvania, that an agent appointed to the territory in question with full power to receive proposals for insurance; with authority to issue and countersign policies and renewal receipts "furnished by said associations;" to assent to assignments and transfers, to collect premiums, and to transact "such other business as may be entrusted to his care" is not thereby empowered to obligate and

[8] McCabe v. Aetna Ins. Co. 9 N. Dak. 19, 47 L.R.A. 641, 81 N. W. 426, 29 Ins. L. J. 138 (in this case there was nothing in the commission or in the policy authorizing the agent to make a preliminary oral agreement to issue or renew policies, neither was there anything restricting the agent's authority in this regard, "and if such authority was conferred upon him, it must have been so conferred by operation of law, from the express authority given him." The agent had express authority to receive proposals for insurance; to act as surveyor, and to appoint surveyors, for buildings to be insured, to make insurance thereon by policies signed by the president and attested by the secretary, countersigned by said agent as agent, and by the terms of the policy said agent might renew the same in the manner therein provided. It was declared that such an agent was a general agent. The court, per Fisk, J., *cites* and *considers: On the point of general agency*, King v. Cox, 63 Ark. 204, 37 S. W. 877; Post v. Aetna Ins. Co. 43 Barb. (N. Y.) 361; Lightbody v. North American Ins. Co. 23 Wend. (N. Y.) 22; McEwen v. Montgomery County Mutual Ins. Co. 5 Hill (N. Y.) 105. *And on the point that a general agent with similar authority may enter into a binding executory contract by parol to issue or renew a policy in the future* the following cases:

United States.—Insurance Co. (Franklin Fire Ins. Co.) v. Colt, 20 Wall. (87 U. S.) 560, 22 L. ed. 423; Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co. 19 How. (60 U. S.) 318, 321, 15 L. ed. 636; Taylor v. Germania Insurance Co. 2 Dill. (C. C.) 282, Fed. Cas. No. 13,793; Baubile v. Ætna Ins. Co. 2 Dill. (C. C.) 156, Fed. Cas. No. 1,111; Scranton Steel Co. v. Ward's Detroit & Lake Superior Line (C. C.) 40 Fed. 866.

Arkansas.—King v. Cox, 63 Ark. 204, 37 S. W. 877.

California.—Stewart v. Helvetia Swiss Fire Ins. Co. 102 Cal. 218, 36 Pac. 410.

Iowa.—City of Davenport v. Peoria Marine & Fire Ins. Co. 17 Iowa, 276.

Kentucky.—Security Fire Ins. Co. v. Kentucky Marine & Fire Ins. Co. 7 Bush, 81, 3 Am. Rep. 301.

Maryland.—Phœnix Insurance Co. v. Ryland, 69 Md. 437, 1 L.R.A. 548, 16 Atl. 109.

Massachusetts.—Emery v. Boston Marine Ins. Co. 138 Mass. 398, 412; Sanborn v. Firemen's Ins. Co. 16 Gray (82 Mass.) 448, 77 Am. Dec. 419.

Missouri.—Baile v. St. Joseph Fire & Marine Ins. Co. 73 Mo. 371.

New York.—Manchester v. Guardian Assurance Co. 151 N. Y. 88, 56 Am. St. Rep. 600, 45 N. E. 381; More v. New York Bowery Fire Ins. Co. 130 N. Y. 537, 29 N. E. 757; O'Reilly v. Corporation of London Assurance Co. 101 N. Y. 575, 5 N. E. 568; Van Loan v. Farmers Mutual Fire Ins. Assoc. 90 N. Y. 280; Angell v. Hartford Fire Ins. Co. 59 N. Y. 171, 17 Am. Rep. 322; Ellis v. Albany City Ins. Co. 50 N. Y. 402, 10 Am. Rep. 495; Trustees of First Baptist Church v. Brooklyn Fire Ins. Co. 19 N. Y. 305; Post v. Aetna Ins. Co. 43 Barb. 351; Shank v. Glens Falls Ins. Co. 40 N. Y. Supp. 14, 4 App. Div. 516.

bind the company by an oral agreement to renew in the future an existing contract. There was, however, a law under which the insurance company was organized which required every contract or policy made by it to be in writing or print, and under such charter provision it was determined that in the absence of elements of estoppel the company was precluded from making a binding parol contract to renew a policy in the future.[9] In Benjamin v. Saratoga Mutual Fire Insurance Company[10] a policy of insurance was issued to plaintiff as agent of the owners. Plaintiff had an interest in the property as mortgagee, of which he informed the insurers. Afterward he obtained title by foreclosure. He notified the insurers of this and of the fact that he had agreed to convey to a third person. They consented that the policy should remain valid till the vendee's title was perfected and it was held that this agreement was equivalent to issuing a new policy to the plaintiff. A preliminary contract to insure or renew insurance is not within the provisions of the policies of the insurer respecting renewals, waiver, etc.[11]

§ 41a. Same subject: standard policy: agent's authority.—Where a local agent's commission empowered him to issue and countersign policies on risks accepted by him; to renew or cancel such policies; and to assent to assignments thereof before loss; but such authority was subject to the terms and conditions of the company's printed policy, and the agent's acts were not to be in contravention thereof, or to operate as a waiver of them, the agent's authority depended upon two writings, the agent's commission and the printed policy, which was the standard policy, and it provided for renewal under the original stipulations in consideration of a premium for the renewed term; it also stipulated that whatever was done by the agent must be done by writing indorsed upon the policy; it was also held, in the absence of proof that the agent's powers had been broadened, or that the insurer had ratified

Ohio.—Dayton Ins. Co. v. Kelly, 24 Ohio St. 345, 365.

Oregon.—Hardwick v. State Ins. Co. 20 Oreg. 547, 26 Pac. 840.

South Carolina.—Stickley v. Mobile Ins. Co. 37 S. Car. 56, 16 S. E. 280.

Texas.—Cohen v. Continental Fire Ins. Co. 67 Tex. 325, 60 Am. Rep. 24, 3 S. W. 296.

Utah.—Idaho Forwarding Co. v. Firemens Fund Ins. Co. 8 Utah, 41, 17 L.R.A. 586, 29 Pac. 826.

Wisconsin.—Campbell v. American Fire Ins. Co. 73 Wis. 100, 40 N. W. 661; King v. Hekla Fire Ins. Co. 58 Wis. 508, 17 N. W. 297; Taylor v. Phoenix Ins. Co. 47 Wis. 365.

As to agent's power to renew policy, see § 538 herein.

[9] Benner v. Fire Association of Phila. 229 Pa. 75, 140 Am. St. Rep. 706, 78 Atl. 44, 40 Ins. L. J. 84.

[10] 17 N. Y. 415.

[11] McCabe v. Ætna Ins. Co. 9 N. Dak. 19, 47 L.R.A. 641, 81 N. W. 426, 29 Ins. L. J. 138.

his acts, or that he had ever been held out as having power to bind the company by an oral contract, to insure or to renew existing insurance, that said agent had no authority to make an oral contract of insurance or to renew an existing policy except in accordance with the authority vested in him by his commission and the "printed policy." [12]

§ 41b. Parol contract: renewal: contract must be complete: recovery: evidence to establish.—The contract to renew must be complete as in cases of original insurance.[13] And an agreement to continue an insurance being valid, a recovery may be had before the issuance of the policy or the payment of the premium.[14] But mere loose general conversation relating to the renewal of a policy, had between the assured and an agent authorized to renew policies, cannot be deemed equivalent to a renewal.[15] So evidence of a conversation between the owner of property and the agent of defendant company about renewing another insurance, during which the former said to the latter: "Don't forget the barn; Renew the barn as quick as that comes due," and received the reply, "I will attend to it; you don't need to worry,"—is too vague and uncertain to show clearly an oral contract to insure in the future. The conversation consisted of a few words on the street, no money passed, no memorandum was made, and there was no definite promise, and thereafter the owner instructed the agent to watch the insurance.[16] And where the insured testified that he called the local agent up to his office and told him that certain policies were about to expire and asked him to renew them in the same companies for the same amounts for another year, and there was some conversation about higher rates and the agent agreed to renew the policies and said he would not lose any time on the same, and

[12] Caldwell v. Virginia Fire & Marine Ins. Co. 124 Tenn. 593, 139 S. W. 698, 40 Ins. L. J. 1899.

[13] American Can Co. v. Agricultural Ins. Co. 12 Cal. App. 133, 106 Pac. 720, 39 Ins. L. J. 518; Johnson v. Connecticut Fire Ins. Co. 84 Ky. 470, 2 S. W. 151, 8 Ky. L. Rep. 460; King v. Hekla Fire Ins. Co. 58 Wis. 508, 17 N. W. 297; Dinning v. Phœnix Ins. Co. 68 Ill. 414, 418. See §§ 43–49, 181 herein.

[14] Springer v. Anglo-Nevada Assur. Corp. 33 N. Y. 543, 11 N. Y. Supp. 533. See Wainer v. Milford Mutual Fire Ins. Co. 153 Mass. 335, 11 L.R.A. 598, 26 N. E. 877; Boos v. Aetna Ins. Co. 22 N. Dak. 11, 132 N. W. 222, 40 Ins. L. J. 1787 (a recovery can be had for breach of parol contract to insure made with defendant's authorized agent prior to expiration of the policy).

[15] O'Reilly v. Corporation of London Assur. Co. 101 N. Y. 575, 5 N. E. 568. See also Croghan v. New York Underwriters' Agency, 53 Ga. 109, 111; American Can Co. v. Agricultural Ins. Co. 12 Cal. App. 133, 106 Pac. 720, 29 Ins. L. J. 518.

[16] Benner v. Fire Association of Phila. 229 Pa. 75, 140 Am. St. Rep. 706, 78 Atl. 44, 40 Ins. L. J. 84.

they were to be renewed at their expiration, and the insured never had any communication with the company relative to said oral contract, and on cross-examination testified that he did not depend upon the agent to renew but upon the company, but on redirect examination stated that he depended upon the agent for said renewals, such evidence does not establish an executed contract of insurance. It amounts to nothing more in law than an executory agreement to renew an existing policy of insurance upon its expiration at a future date.[17] Again, where it is sought to establish renewal of an insurance policy in an action thereon, and the plaintiff merely proves an application to the defendant's agent to "bind" or renew the policy, and, receiving no answer, supposed that the policy was continued, no contractual obligation on the part of the defendant is thereby established. In such case it is incumbent upon the party to repeat his question and take further action if he wishes to obtain assent of the company.[18] And no present contract of insurance which will support an action to recover for a loss is shown by evidence that, shortly before the expiration of the former policy, plaintiff instructed his cashier, who was also the insurer's agent, to renew the policy when it expired, which the agent promised but neglected to do.[19] But it is not necessary that insured establish a parol contract to renew "by clear and satisfactory evidence," and an instruction to the jury that plaintiff must establish his case "by a fair preponderance of evidence" is not error.[20] Although the pleading, in an action on a verbal agreement to renew an existing policy, is defective in that it fails to set forth with sufficient fullness and clearness the terms, agreements, covenants, and stipulations contained in the original policy and which were to be inserted in the renewal policy, still, the insured will be entitled to recover upon evidence showing a previous insurance, and a verbal agreement to renew.[1] So evidence of one suing on a preliminary contract to renew a policy that he relied upon it and would have procured other insurance had he not believed that the policy was renewed, is admissible.[2] But an offer to prove that insurance agents are accustomed to agree to renewals in advance

[17] Caldwell v. Virginia Fire & Marine Ins. Co. 124 Tenn. 593, 139 S. W. 698, 40 Ins. L. J. 1899. See § 41a herein.

[18] Royal Ins. Co. v. Beatty, 119 Pa. St. 6, 4 Am. St. Rep. 622, 12 Atl. 607, 5 Pa. (L. ed.) 366.

[19] Idaho Forwarding Co. v. Firemens Fund Ins. Co. 8 Utah, 41, 17 L.R.A. 586, 29 Pac. 826.

[20] McCabe v. Aetna Ins. Co. 9 N. Dak. 19, 47 L.R.A. 641, 81 N. W. 426, 29 Ins. L. J. 138. See § 3760 herein.

[1] Mallette v. British America Assurance Co. 91 Md. 471, 46 Atl. 1005, 29 Ins. L. J. 966. See § 38c herein.

[2] McCabe v. Aetna Ins. Co. 9 N. Dak. 19, 47 L.R.A. 641, 81 N. W. 426, 29 Ins. L. J. 138.

of the expiration of current policies and give credit for premiums is properly refused when offered to establish the authority of the agent to make an oral contract for future insurance or the renewal of insurance.[3]

§ 41c. Parol contract: renewal: standard policy: equitable estoppel.—In Tennessee, as above stated, the standard policy terms and conditions are construed and held to govern the extent of a local agent's authority under his commission to make oral contracts of insurance or renewals of existing policies, and, thus construed and upon the evidence, the agent's want of authority to make such oral contract has been held to preclude a recovery and where at the date of the claimed oral contract sued on the insured held an unexpired policy, issued by the defendant company, containing a stipulation precluding the insured from claiming any privilege or permission affecting the insurance under said policy, unless the same should be written on the policy or attached in writing thereto, an equitable estoppel arises against assured to set up an oral contract to renew said policy as the oral contract would be in fraud of the insurer's rights and said estoppel set up as a matter of defense in the answer is good against the complainant. And even though it might be claimed that the oral contract contemplated the execution of a new printed or written evidence of the contract of insurance beginning at the instant of the expiration of the old policy, and that each of these evidences constitute in and of themselves different contracts, nevertheless the estoppel exists where the parties, the subject matter or property, the amount of indemnity, and the cause of loss contemplated by the oral contract are the same as in the printed policy. And a party cannot in a court of equity expect a decree for damages for the breach of a contract of which that court would refuse to decree specific performance. And where complainant avers his legal right to an executed oral contract but fails to prove it, and avers in the alternative an executory oral contract, and invokes the equitable doctrine of specific performance he must abide by the equitable rules governing that branch of the jurisdiction of the court. And the variance is fatal where the existence of an oral executed contract is averred and the proof shows merely an executory contract to renew a policy.[4]

§ 41d. Parol contract: reinsurance: validity.—The contract of reinsurance involves no legal principles essentially different from those applicable to contracts generally, and although the contract

[3] Benner v. Fire Association of Phila. 229 Pa. 75, 140 Am. St. Rep. 706, 78 Atl. 44, 40 Ins. L. J. 84.

[4] Caldwell v. Virginia Fire & Marine Ins. Co. 124 Tenn. 593, 139 S. W. 698, 40 Ins. L. J. 1899.

differs in many respects from a contract of insurance,[5] still it is held to be a contract of insurance and not required to be in writing, a parol agreement therefor being valid. It may, however, be a question for the jury whether such a contract of reinsurance exists.[6] But under an English decision, in 1911, there was a verbal agreement for reinsurance, or to sign a policy on certain conditions which were complied with, but the defendant, an underwriter at Lloyds, refused to sign, and an action was brought to recover damages for breach of the verbal agreement. It was determined that the action could not be maintained, because the verbal agreement was a contract of sea insurance, and was invalid under the stamp act, 1891,[7] as not being expressed in a policy of sea insurance, and the defendant would, if he paid the loss, be paying money upon a loss relative to sea insurance, which insurance was not expressed in a policy of sea insurance duly stamped, and he would, therefore, be liable to a penalty under the stamp act 1891.[8]

§ 41e. Parol agreement for reinsurance may be specifically enforced.—A suit in equity may be sustained to compel specific performance of an oral contract to reinsure.[9]

[5] See §§ 113, 126, 128, 130 herein. *Examine* Eagle Ins. Co. v. Lafayette Ins. Co. 9 Ind. 446; Consolidated Real Estate Co. v. Cashow, 41 Md. 59; Manufacturers Fire & Marine Ins. Co. v. Western Assur. Co. 145 Mass. 419, 14 N. E. 632; Jackson v. St. Paul Fire & Marine Ins. Co. 99 N. Y. 124, 1 N. E. 539.

[6] McIntyre v. Federal Life Ins. Co. 142 Mo. App. 256, 126 S. W. 227. See Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co. 19 How. (60 U. S.) 318, 15 L. ed. 636, which was an agreement to reinsure.

[7] Sec. 93.

[8] Sec. 97. Genforsikrings Aktieselskabet (Skandinavia Reinsurance Co. of Copenhagen) v. Da Costa (Eng. C. A.): [1911] 1 K. B. (Law. Rep.) 137. Plaintiffs reinsured by means of an "open cover," the risks they had insured as to cargo to be carried in certain steamers for a period of twelve months. The plaintiffs became liable for a loss, but defendant refused to sign the policy put forward by plaintiffs in respect thereto, under the claim that the former had not made all the declarations they should have made under the "open cover." By verbal agreement an independent person was appointed who examined plaintiff's books and certified that all the declarations had been made, but although defendant had agreed to sign the policy upon such certification, it refused to sign or to pay the loss.

[9] Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co. 19 How. (60 U. S.) 318, 15 L. ed. 636.

CHAPTER IV.

REQUISITES OF VALID CONTRACT—COMPLETION OF CONTRACT.

SUBDIV. I. REQUISITES OF VALID CONTRACT.
II. COMPLETION OF CONTRACT—PROPOSAL AND ACCEPTANCE.
III. COMPLETION OF CONTRACT—PREPAYMENT OF PREMIUM.
IV. COMPLETION OF CONTRACT—DELIVERY OF POLICY—KNOWLEDGE OF LOSS.

SUBDIV. I. REQUISITES OF VALID CONTRACT.

§ 43. Requisites of a valid contract of insurance.
§ 44. Requisites of a valid parol contract of insurance.
§ 44a. Same subject: identity of parties: designation of insurer.
§ 44b. Same subject: designation of insured.
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§ 45. Minds of the parties must meet on all essentials of contract.
§ 45a. Same subject: where impossible to obtain definite particulars or important facts.
§ 46. Essentials need not be expressly agreed upon: prior course of dealing, custom, etc.
§ 47. The usual rate of premium will be presumed to have been intended.
§ 48. Both the rate of premium and the duration of the risk may be understood.
§ 49. The rate of premium and amount may be understood.
§ 50. Whether contract exists may be governed by custom or usage of the parties or of the insurance business at a place.

§ 43. Requisites of a valid contract of insurance.—To constitute a valid contract of insurance it is necessary that there should be (1) parties thereto, (2) a premium, (3) a subject-matter, (4) an insurable interest, (5) certain risks or perils, (6) duration of the risk, (7) the amount insured.[10] It is also essential to a valid con-

[10] J. C. Smith & Wallace Co. v. App. 789, 59 S. E. 94; Shawnee Prussian National Ins. Co. 68 N. J. Mutual Fire Ins. Co. v. McClure, 39 L. 674, 54 Atl. 458, 32 Ins. L. J. 559, Okla. 535, 49 L.R.A.(N.S.) 1054, 135 per Garretson, J. See also Todd v. Pac. 1150; Cleveland Oil & Paint German-American Ins. Co. 2 Ga. Manufacturing Co. v. Norwich Union

tract of insurance that the time of the commencement of the risk be agreed upon.[11] And there can be no complete contract of insurance, unless all these essentials exist, either expressly or by implication. But "neither the times and amounts of payments by the assured, nor the modes of estimating or securing the payment of the sum to be paid by the insurers, affect the question whether the agreement between them is a contract of insurance. All that is requisite to constitute such a contract is the payment of the consideration by the one and the promise of the other to pay the amount of the insurance upon the happening of injury to the subject by a contingency contemplated in the contract."[12] And the omission of a statement in the policy of the amount of the premiums which is paid does not invalidate insurance.[13] It is also necessary that the parties be those capable of contracting,[14] and that the

Fire Ins. Soc. 34 Oreg. 228, 55 Pac. 435.

The essentials of a contract of insurance are a subject-matter, the risk insured against, the amount, duration of the risk, and the premium: Tyler v. New Amsterdam Ins. Co. 4 Rob. (N. Y.) 151; Trustees of First Baptist Church v. Brooklyn Ins. Co. 28 N. Y. 153. Essentials are, the premises, the risk, the amount, the time the risk should continue, and the premium: Strohn v. Hartford Fire Ins. Co. 37 Wis. 625; 19 Am. Rep. 277. Rate of premium should be agreed upon. Roberta Manufacturing Co. v. Royal Exchange Assur. Co. 161 N. Car. 88, 76 S. E. 865. See Hartford Fire Ins. Co. v. Whitman, 75 Ohio St. 312, 79 N. E. 450, 36 Ins. L. J. 19. But *compare* §§ 46–49 herein. The substantial elements of a contract of insurance are the payment of a consideration by one party and the promise of the other to pay an agreed amount upon the happening of the specified contingency, it being understood that the former party had an insurable interest in the subject matter: Bolton v. Bolton, 73 Me. 299, 303. To render the contract complete, there should be a matter to form its subject, and this matter should be exposed to the hazards of the sea: Emerigon on Ins. (Meredith's ed.) c. i., secs. 1, 2, pp. 5, 11, "The thing or property insured is called the subject-matter" (marine insurance). 17 Earl of Halsbury's Laws of England, p. 336. See also as to essentials 17 Id. pp. 339 et seq. & notes. Contract or "policy of sea insurance" which does not specify the sum or sums insured is invalid and cannot be stamped or sued on as such policy. Home Marine Ins. Co. Ltd. v. Smith [1898] 2 Q. B. D. L. R. 351, [1898] 1 Q. B. 829, 67 L. J. Q. B. N. S. 777, 554, 78 L. T. Rep. 734, 465. Completed contract: what constitutes: intent of parties, see note 138 Am. St. Rep. 38, 43. Requisites of valid policy, see § 181 herein.

[11] Whitman v. Milwaukee Fire Ins. Co. 128 Wis. 124, 116 Am. St. Rep. 25, 5 L.R.A.(N.S.) 407n, 107 N. W. 291. See §§ 46, 50 herein.

[12] Commonwealth v. Weatherbee, 105 Mass. 149, 160, per Gray, J.; State v. Farmers' & Mechanics' Mutual Benevolent Assoc. 18 Neb. 276, 25 N. W. 81.

Consideration is any benefit conferred upon the promisor to which he is not lawfully entitled. Schadt v. Mutual Life Ins. Co. 2 Cal. App. 715, 84 Pac. 249, Cal. Civ. Code, sec. 1605.

[13] Wheaton v. Liverpool & London & Globe Ins. Co. 20 S. Dak. 62, 104 N. W. 850. *Examine* §§ 45–50 herein.

[14] See §§ 34, 305 et seq. herein.

As to consent of person whose life is insured, see note 56 L.R.A. 585.

risk be a legal one, not repugnant to public policy nor positive prohibition, nor occasioned by the insurer's own fraud or misconduct, nor an infringement of the rights of persons not parties to the contract.[15]

§ 44. Requisites of a valid parol contract of insurance.—A parol contract for insurance must contain all the essentials of a valid agreement so that nothing remains to be done but to fill up and deliver the policy on the one hand, and to pay the premium on the other.[16] The contract must also be fairly entered into for a good consideration between parties competent to contract,[17] and the minds of the insured and insurer must come together in mutual agreement on every material point constituting a contract in order

[15] Bell v. Western Marine & Fire Ins. Co. 5 Rob. (La.) 423, 39 Am. Dec. 542; 1 Phillips on Ins. (3d ed.), 492, sec. 906. See § 34 herein.

On validity of contract of insurance in violation of statute, see note in 12 L.R.A.(N.S.) 612; on validity of insurance on intoxicating liquors as affected by liquor laws, see note in 31 L.R.A.(N.S.) 874.

[16] People's Ins. Co. v. Paddon, 8 Bradw. (Ill.) 447.

See also, the following cases:

United States.—Equitable Life Ins. Co. v. McElroy, 83 Fed. 631, 49 U. S. App. 648, 28 C. C. A. 365, 27 Ins. L. J. 361.

Alabama.—Stephenson v. Allison, 165 Ala. 238, 51 So. 622; Home Ins. Co. v. Adler, 71 Ala. 516.

Illinois.—Insurance Co. of North America v. Bird, 175 Ill. 42, 51 N. E. 686, affg. 74 Ill. App. 306; Barlow v. Farmers' Mutual Fire Ins. Co. 128 Ill. App. 580; Hartford Ins. Co. v. Wilcox, 57 Ill. 180.

Indiana.—Kentucky Mutual Ins. Co. v. Jenks, 5 Ind. 96; Posey County Fire Assoc. v. Hogan, 37 Ind. App. 573, 77 N. E. 670.

Massachusetts.—Cunningham v. Connecticut Fire Ins. Co. 200 Mass. 333, 86 N. E. 787, 38 Ins. L. J. 315 (held, no binding parol contract here); Real Estate Mutual Fire Ins. Co. v. Roessle, 1 Gray (67 Mass.) 336.

Minnesota.—Ames-Brooks Co. v. Ætna Ins. Co. 83 Minn. 346, 30 Ins. L. J. 802 (contract not void because uncertain in its terms. Evidence tended to establish a valid contract to insure).

Mississippi.—Franklin Fire Ins. Co. v. Taylor, 52 Miss. 441.

New Jersey.—Consumers' Match Co. v. German Ins. Co. 70 N. J. L. 226, 57 Atl. 440, 33 Ins. L. J. 525, 32 Ins. L. J. 180.

New York.—Sandford v. Trust Fire Ins. Co. 11 Paige (N. Y.) 547; Tyler v. New Amsterdam Fire Ins. Co. 4 Rob. (N. Y.) 151.

Ohio.—Hartford Fire Ins. Co. v. Whitman, 75 Ohio St. 312, 79 N. E. 450, 36 Ins. L. J. 19 (when oral contract incomplete.)

Pennsylvania.—Benner v. Fire Assoc. of Phila. 229 Penn. 75, 75 Am. St. Rep. 706, 78 Atl. 44, 40 Ins. L. J. 84.

Wisconsin.—Chamberlain v. Prudential Ins. Co. of America, 109 Wis. 4, 83 Am. St. Rep. 850, 85 N. W. 128; John R. Davis Lumber Co. v. Scottish Union & National Ins. Co. 94 Wis. 472, 69 N. W. 156; Stehlick v. Milwaukee Mechanics Ins. Co. 87 Wis. 322, 58 N. W. 350.

On requisites of a present oral contract of insurance, see note in 5 L.R.A.(N.S.) 407; on validity of oral contract of insurance generally, note in 22 L.R.A. 768.

[17] Hartford Fire Ins. Co. v. Farrish, 73 Ill. 166.

Rate of premium not fixed, see Hartford Fire Ins. Co. v. Whitman, 75 Ohio St. 312, 79 N. E. 450, 36 Ins. L. J. 19.

to constitute a complete oral contract for insurance.[18] A parol contract must otherwise conform to the rules given in the last section in regard to legality of the contract. It is declared in the case of life insurance companies whose custom is to contract by written policies, that until such policy is delivered and the premium paid the presumption is that there were negotiations, but no contract, and no intention to contract, before delivery of the policy.[19] But a valid contract of life insurance may exist even though no policy is issued.[20] But an oral contract is incomplete and unenforceable for want of certainty as to the parties, the risk insured against, and the duration of the insurance.[1] And instructions by a general to a local agent, who signifies his desire to write a policy on his own property, to write it in the usual way, do not constitute a binding contract of insurance, even though it is a custom for agents to insure their own property, and such instructions are supplemented by the writing of the policy, where at the time of the conversation between said agents the subject matter of insurance was not in existence, no statement made of the value of the property to be insured, no amount stated, no rate of premium fixed, and the insurance company never accepted or delivered the policy, and no premium was ever paid.[2]

§ 44a. Same subject: identity of parties: designation of insurer.—Where an insurance agent represents several companies, and there is no designation of the company to take the risk, there is no contract, because of failure of parties.[3] So an oral agree-

[18] Bell v. Peabody Ins. Co. 49 W. Va. 437, 38 S. E. 541, 30 Ins. L. J. 627; Ogle Lake Shingle Co. v. National Lumber Ins. Co. 68 Wash. 185, 122 Pac. 990. See Ames-Brooks Co. v. Ætna Ins. Co. 83 Minn. 346, 86 N. W. 344, 30 Ins. L. J. 802. See § 45 herein.

[19] Equitable Life Assurance Soc. v. McElroy, 83 Fed. 631, 49 U. S. App. 648, 28 C. C. A. 365, 27 Ins. L. J. 361. Caldwell, C. J., dissented.

Meaning of "negotiation," see note to § 55 herein.

As to delivery of policy, see International Ferry Co. v. American Fidelity Co. 207 N. Y. 350, 353, 101 N. E. 160. See also §§ 90 et seq. herein.

[20] Carter v. Bankers Life Ins. Co. 83 Neb. 810, 120 N. W. 455. See also §§ 31 et seq. herein.

[1] Ogle Lake Shingle Co. v. National Lumber Ins. Co. 68 Wash. 185, 122 Pac. 990.

[2] Zimmerman v. Dwelling House Ins. Co. 110 Mich. 399, 33 L.R.A. 698, 68 N. W. 215, 26 Ins. L. J. 77.

[3] Ogle Lake Shingle Co. v. National Lumber Ins. Co. 68 Wash. 185, 122 Pac. 990, *citing* New Orleans Ins. Assoc. v. Boniel, 20 Fla. 815; Hartford Fire Ins. Co. v. Trimble, 117 Ky. 583, 25 Ky. L. Rep. 1497, 78 S. W. 462, 33 Ins. L. J. 348; Kleis v. Niagara Fire Ins. Co. 117 Mich. 469, 76 N. W. 155; Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co. 92 Mich. 482, 20 L.R.A. 277, 52 N. W. 1070; John R. Davis Lumber Co. v. Scottish Union & National Ins. Co. 94 Wis. 472, 69 N. W. 156; Sheldon v. Hekla Fire Ins. Co. 65 Wis. 436, 27 N. W. 315.

ment will fail where under the rules of construction there is a want of identity of the parties to the contract. This applies where an agent of several companies is applied to for insurance, and there is no proof or claim that at the date of application for insurance there was any agreement on the part of insurer's agent that it was to be placed with the defendant company.[4] In such cases it is held that there should be a designation of the company or companies to carry the risk as well as the amount to be assumed by each and this agreement should be mutual.[5] But even though if an agent for several insurance companies is directed to place a given amount of insurance, without any expectation on the part of the applicant that it will all be written in any one of the companies, which are not mentioned by name, no contract exists as to any one or all of them, and no liability attaches until further action is taken to determine and define the risk, in doing which the agent acts as agent of insured, still the agent's agreement to place a certain amount of insurance, to select the companies, distribute the risk and give the insurance constitutes a valid contract of insurance with each company as soon as its policy is signed, although the policies are not delivered until after the property is destroyed by fire.[6] And where persons contract for insurance with the agents of several companies without specifying in which the insurance is desired, and subsequently the agents designate a particular corporation as the insurer, they possessing the power to make such designation, this completes the contract, and makes the insurer so designated liable for a subsequent loss.[7] So where the agent represents several companies and with full power in the premises designates a company in which to place the risk and carry the insurance, and the time the policy is to run, the insured's name, the rate, the amount, and the goods to be insured are all agreed upon, approved and placed on file by such agent, there is a complete oral contract of insurance.[8] Again, it is held to be

[4] Hartford Fire Ins. Co. v. Trimble, 117 Ky. 583, 25 Ky. L. Rep. 497, 78 S. W. 462, 33 Ins. L. J. 348; Insurance Co. of North America v. Bird, 175 Ill. 42, 51 N. E. 686, aff'g. 74 Ill. App. 306; John R. Davis Lumber Co. v. Scottish Union & National Ins. Co. 94 Wis. 472, 69 N. W. 156.

[5] John R. Davis Lumber Co. v. Scottish Union & National Ins. Co. 94 Wis. 472, 69 N. W. 156. See Insurance Co. of North America v. Bird, 175 Ill. 42, 51 N. E. 686, aff'g 74 Ill. App. 306; Mooney v. Merriam, 77 Kan. 305, 94 Pac. 263; Costello v. Grant County Mutual Fire & Lightning Ins. Co. 133 Wis. 361, 113 N. W. 639. *Compare* Ames-Brooks Co. v. Ætna Ins. Co. 83 Minn. 346, 86 N. W. 344, 30 Ins. L. J. 802.

As to description of parties, see §§ 310, 1689 herein.

[6] Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co. 92 Mich. 482, 20 L.R.A. 277 (annotated on when insurance agent is agent of insured) 52 N. W. 1070.

[7] Croft v. Hanover Fire Ins. Co. 40 W. Va. 508, 52 Am. St. Rep. 902, 21 S. E. 854.

[8] Thompson v. Germania Fire Ins.

error to non-suit the plaintiff in an action upon a fire insurance policy, on the ground that no completed contract of insurance is shown, where it appears that the plaintiff directed an insurance agency, in which the defendant company, as well as other companies, was represented, to carry for him, on the property subsequently burned, a certain amount of insurance, that policies to the amount specified were written in different companies, chosen by the agency, and that, upon one of these companies becoming bankrupt, the agency replaced the portion of insurance which was carried by that company by writing a policy of similar amount in the defendant company, notwithstanding it further appears that the plaintiff did not know of the substitution of policies until after the fire occurred, and although the new policy was never actually delivered to him.[9]

§ 44b. Same subject: designation of insured.—The fact that the agent's memorandum of insurance designated one person, when the insurance was applied for and intended to be paid to another, does not invalidate an oral contract of insurance.[10]

§ 44c. Oral contract for reinsurance or for renewal must be complete.[11]—And no present contract of insurance which will support an action to recover for a loss is shown by evidence that, shortly before the expiration of a former policy, plaintiff instructed his cashier, who was also the insurer's agent, to renew the policy when it expired, which the agent promised but neglected to do.[12]

§ 45. Minds of the parties must meet on all essentials of contract.—There must be a meeting of minds upon all the essentials of a valid contract of insurance. If any of the material details remain to be determined, the contract is not complete.[13] Concur-

Co. 45 Wash. 482, 88 Pac. 941, 36 Ins. L. J. 400.

[9] Todd v. German-American Ins. Co. 2 Ga. App. 789, 59 S. E. 94.

[10] Croft v. Hanover Fire Ins. Co. 40 W. Va. 508, 52 Am. St. Rep. 902, 21 S. E. 854. *Examine* Phillips v. Union Central Life Ins. Co. (U. S. C. C.) 101 Fed. 33, rev'd Union Central Life Ins. Co. v. Phillips, 102 Fed. 19, 41 C. C. A. 263.

[11] Manchester Fire Ins. Co. v. Insurance Co. of Illinois, 91 Ill. App. 609 (held that essentials not agreed on here); Doherty v. Millers & Manufacturers Ins. Co. 4 Ont. Law Rep. 303 (case of renewal policy held not complete; renewal not accepted; higher rate charged).

[12] Idaho Forwarding Co. v. Fireman's Fund Ins. Co. 8 Utah, 41, 17 L.R.A. 586, 29 Pac. 826.

On validity of oral agreement to renew or extend policy, see note in 22 L.R.A. 772; on terms and conditions of usual written policy as affecting a claim under or damages for breach of an oral contract to renew policy, see notes in 48 L.R.A.(N.S.) 321, 324.

[13] *United States.*—Mutual Life Ins. Co. v. Young, 23 Wall. (90 U. S.) 85, 23 L. ed. 152; Kennedy v. Mutual Benefit Life Ins. Co. (U. S. D. C.) 205 Fed. 677; Travis v. Nederland Life Ins. Co. Ltd. 104 Fed. 486, 43 C. C. A. 653; Kimball v. Lion Ins. Co. 17 Fed. 625, 626.

Alabama.—Home Ins. Co. v. Adler, 71 Ala. 516.

Georgia.—Todd v. German-Ameri-

rence of minds is essential. The impressions of one alone of the parties is insufficient.[14] In brief nothing should be left open for future determination. The assent must be mutual, since this meeting of minds is vital to the life of the contract. This obligation is correlative, and depends upon the acts of the parties themselves, and if one party is not bound it necessarily follows that there is no obligation on the other party.[15] But the terms being specified, the minds of the parties meet when the insurer signifies his acceptance of the application to the applicant.[16] Where, however, one made application for life insurance, gave his note for the premium, and took a receipt from the company's agent, giving the company the right to accept or reject the application, and the company did not agree to the terms, but issued a policy with different terms, and sent the same to the agent, but before delivery the applicant died, his note being unpaid, it was held that there was no mutual assent of parties, and no contract of insurance.[17]

can Ins. Co. 2 Ga. App. 789, 59 S. E. 94.

Illinois.—Covenant Mutual Benefit Assn. v. Conway, 10 Brad. (10 Ill. App.) 348.

Massachusetts.—Quill v. Boston Ins. Co. 197 Mass. 216, 83 N. E. 401; Cunningham v. Connecticut Fire Ins. Co. 200 Mass. 333, 86 N. E. 787, 38 Ins. L. J. 315; Goddard v. Monitor Mutual Fire Ins. Co. 108 Mass. 56, 11 Am. Rep. 307.

Michigan.—Serane v. Portland, 9 Mich. 493.

New York.—Bradley v. Standard Life & Accident Ins. Co. 98 N. Y. Supp. 797, 112 App. Div. 536 (considered under § 62a herein); Trustees of First Baptist Church v. Brooklyn Fire Ins. Co. 28 N. Y. 153.

North Carolina.—Ross v. New York Life Ins. Co. 124 N. Car. 395, 32 S. E. 733.

Oklahoma.—Shawnee Mutual Fire Ins. Co. v. McClure, 39 Okla. 535, 49 L.R.A.(N.S.) 1054, 35 Pac. 1150.

South Dakota.—Nordness v. Mutual Cash Guaranty Fire Ins. Co. 22 S. Dak. 1, 114 N. W. 1092.

West Virginia.—McCully's Adm'r v. Phœnix Mutual Life Ins. Co. 18 W. Va. 782.

Wisconsin.—Costello v. Grant County Mutual Fire & Lightning Ins. Co. 133 Wis. 361, 113 N. W. 639; Whitman v. Milwaukee Fire Ins. Co. 128 Wis. 124, 116 Am. St. Rep. 25, 5 L.R.A.(N.S.) 680n, 107 N. W. 291; John R. Davis Lumber Co. v. Scottish Union & National Ins. Co. 94 Wis. 472, 69 N. W. 156.

[14] Roberta Manufacturing Co. v. Royal Exchange Assur. Co. 161 N. Car. 88, 76 S. E. 865.

[15] Mutual Life Ins. Co. v. Young, 23 Wall. (90 U. S.) 85, 23 L. ed. 152; Eliason v. Henshaw, 4 Wheat. (17 U. S.) 225, 228, 4 L. ed. 556, 557; Hallock v. Commercial Ins. Co. 27 N. J. L. 645, 72 Am. Dec. 379; Strohn v. Hartford Ins. Co. 37 Wis. 625, 19 Am. Rep. 777.

[16] Schwartz v. Germania Ins. Co. 18 Minn. 448, 455.

[17] Mutual Life Ins. Co. v. Young, 23 Wall. (90 U. S.) 85, 23 L. ed. 152.

Cited in:

United States.—Giddings v. Northwestern Mut. L. Ins. Co. 102 U. S. 112, 26 L. ed. 93; La Compania Bilbaind v. Spanish American Light & Power Co. 146 U. S. 483, 497, 36 L. ed. 1054, 13 Sup. Ct. Rep. 142; Pendleton v. Knickerbocker L. Ins. Co. 7 Fed. 178; Hamblet v. City Ins. Co. 36 Fed. 122; Paine v. Pacific Mut. L. Ins. Co. 2 C. C. A. 461, 10 U. S. App. 256, 51 Fed. 691; Starr & Co. v. Galgate Ship Co. 15 C. C. A. 373, 29 U. S. App. 599, 68 Fed. 241;

In case the correspondence between the parties shows that their minds never met with respect to the terms, there is no contract, nor is the company bound in such case by mailing to the applicant a policy which he is not bound to accept.[18] So, where an application for insurance was made in the regular form, and everything was satisfactory except the rate of premium, and correspondence was had on this subject, whereby the owner of the property, being unable to make better terms elsewhere, finally notified the company that he agreed to the rate required, it was held that a valid contract of insurance had been made, upon which the company was liable, where the property was burned before the premium was paid or the policy written.[19] Again, where there was an agreement to accept

Bowen v. Hart, 41 C. C. A. 396, 101 Fed. 381; Travis v. Nederland L. Ins. Co. 43 C. C. A. 656, 104 Fed. 488; Miller v. Northwestern Mut. L. Ins. Co. 49 C. C. A. 334, 111 Fed. 469; Mohrstadt v. Mutual L. Ins. Co. 52 C. C. A. 678, 115 Fed. 84; Rickard v. Taylor, 122 Fed. 937; Shattuck v. Mutual L. Ins. Co. 4 Cliff. 611, Fed. Cas. No. 12,715.

Alabama.—Alabama Gold L. Ins. Co. v. Mayes, 61 Ala. 167.

California.—Yore v. Bankers' & Merchants' Mut. L. Asso. 88 Cal. 612, 26 Pac. 514.

Iowa.—Stephens v. Capital Ins. Co. 87 Iowa, 287, 54 N. W. 139.

Maine.—Clark v. Insurance Co. of N. A. 89 Me. 36, 35 L.R.A. 279, 35 Atl. 1008.

Oklahoma.—Home Forum Benefit Order v. Jones, 5 Okla. 614, 50 Pac. 165.

Wyoming.—Summers v. Mutual L. Ins. Co. 12 Wyo. 394, 66 L.R.A. 820, 107 Am. St. Rep. 952, 75 Pac. 937.

See Costello v. Grant County Mutual Fire & Lightning Ins. Co. 133 Wis. 361, 113 N. W. 639 (the policy issued here was based upon a changed application of which applicant had no knowledge); Doherty v. Millers & Manufacturers Ins. Co. 4 Ont. L. Rep. 303, where renewal contract had not complete. See § 104 herein.

[18] Hamblet v. City Ins. Co. 36 Fed. 118. See Sheldon v. Hekla Fire Ins. Co. 65 Wis. 436. See §§ 57, 62, 63 herein.

[19] Eames v. Home Ins. Co. 94 U. S. 621, 24 L. ed. 298. *Cited* in:

United States.—Laclede Fire-Brick Mfg. Co. v. Hartford Steam-Boiler Inspection & Ins. Co. 9 C. C. A. 8, 19 U. S. App. 510, 60 Fed. 359; Schultz v. Phenix Ins. Co. 77 Fed. 389.

Alabama.—Hartford F. Ins. Co. v. King, 106 Ala. 522, 17 So. 707.

Illinois.—Continental Ins. Co. v. Roller, 101 Ill. App. 77, 79.

Indiana.—Western Assur. Co. v. McAlpin, 23 Ind. App. 225, 77 Am. St. Rep. 423, 55 N. E. 119.

Massachusetts.—Emery v. Boston M. Ins. Co. 138 Mass. 412; Davis v. Ætna Mut. F. Ins. Co. 67 N. H. 219, 34 Atl. 464.

Ohio.—Newark Mach. Co. v. Kenton Ins. Co. 50 Ohio St. 556, 22 L.R.A. 773, 35 N. E. 1060.

Oregon.—Sproul v. Western Assur. Co. 33 Or. 105, 54 Pac. 180.

Pennsylvania.—Smith v. Sugar Valley Mut. F. Ins. Co. 5 Pa. Dist. R. 339.

Wisconsin.—Van Slyke v. Trempealeau County Farmers Mutual Fire Ins. Co. 48 Wis. 683, 687, 5 N. W. 236.

See Doherty v. Millers & Manufacturers Ins. Co. 4 Ont. Law Rep. 303, where higher rate of premium charged and contract held not complete. Loomis v. Jefferson County Patrons Fire Relief Assoc. 87 N. Y. Supp. 5, 92 App. Div. 601. See § 104 herein.

Completion of contract: negotiations through mail, see §§ 57, 62 herein.

the risk as soon as the rate of premium should be fixed, which was not done, and a loss occurred, it was held that no insurance was effected, although the company entered the insurance in its order-book, and the number and date of the proposed policy in its ledger, and the secretary told the applicant to consider himself insured.[20] So where it appeared that a "risk was taken for two thousand five hundred dollars at two per cent," and that the applicant's insurance broker threw a policy down on the secretary's desk and said, according to one witness, "There is a policy, if you take it," or according to another witness, "You are to make out a like policy," but tendered no premium till the premises to be insured were burned, it was held that the contract was too vague and indefinite to be binding.[1] But the agreement will be complete, although a bond to pay assessments be not executed, it being customary to do that upon delivery of the policy.[2]

The minds of the parties must also meet as to the subject matter,[3] and, if the insurer acted on his application describing one house, and issued a policy thereon, the insured cannot recover under such policy for the loss of another house, which was one he intended to have taken insurance upon, on the ground that he applied for an insurance on the latter, but the agent of the company, by mistake, described the former in the application.[4] In another case the broker, without the owner's knowledge or authority, stated in the application that the risk was a machine shop, when in fact it was an organ factory, which was a more hazardous risk, and the owner accepted the policy expressed to be on a machine shop, and paid the premium. It was held in an action after loss that the policy was void, as the minds of the parties never met on the subject matter of the contract;[5] and in a case where the application was for insurance on one house and the policy covered another which the agent thought was the one meant, there was no insurance, as the

As to necessity of fixing rate of premium, see Hartford Fire Ins. Co. v. Whitman, 75 Ohio St. 312, 79 N. E. 450, 9 Am. & Eng. Ann. Cas. 218, 36 Ins. L. J. 19. See Roberta Manufacturing Co. v. Royal Exchange Assur. Co. 161 N. Car. 88, 76 S. E. 865; Wheaton v. Liverpool & London & Globe Ins. Co. 20 S. Dak. 62, 104 S. W. 850. *Compare* next following sections herein.

[20] Christy v. North Brit. Ins. Co. 3 Ct. Sess. (1st series, 1825) p. 360.

[1] Tyler v. New Amsterdam Fire Ins. Co. 4 Rob. (N. Y.) 151, 156.

[2] Van Loan v. Farmers' M. Fire Ins. Co. 24 Hun (N. Y.) 132.

[3] Dixie Fire Ins. Co. v. Wallace, 153 Ky. 677, 156 S. W. 140; Sanders (Landers) v. Cooper, 115 N. Y. 279, 12 Am. St. Rep. 801, 5 L.R.A. 638 and note, 22 N. E. 212.

[4] Sanders (Landers) v. Cooper, 115 N. Y. 279, 12 Am. St. Rep. 801, 5 L.R.A. 638n, 22 N. E. 212.

[5] Goddard v. Monitor Mutual Fire Ins. Co. 108 Mass. 56, 11 Am. Rep. 307.

minds of the parties never met.[6] So again where two vessels with the same name were lying in port, and the insurance was on goods laden or to be laden on board a vessel of a certain name, and there was a doubt as to which vessel was intended, it was held, in the absence of proof that the goods were laden on board the vessel contemplated by the parties, that the policy did not attach.[7] The rule is otherwise, however, if both parties intend the same subject, but make a mistake in the name.[8] Again, an oral agreement by an insurance agent to take $5,000 upon mill property is not a completed contract of insurance if there was to be an apportionment between real and personal estate, and none had been made when the property was destroyed by fire.[9] So where an undated note with a blank application was given to an agent of an insurance company, with an agreement by the latter that such acts constituted an agreement of insurance, and that when the owner gave the company a description of the property the policy should issue, and the note and application be filled out, this does not constitute a contract of insurance.[10]

Again, where the agent upon application gave a receipt for the premium, which contained only a brief statement of the risk insured, specifying the rate of the premium, amount of insurance, the property, the time insured, but did not specify the peril or risk insured against, it was held not a contract, but merely evidence that the insured was entitled to a contract in the usual form, and that the usual policy must be looked to to ascertain the limitations and conditions of the contract and the company's liability.[11] In another case the defendant's agent agreed to insure one C. by an "open policy" upon tobacco belonging to C. and others, stored in C.'s warehouse at a certain rate per annum, the amount insured being variable from time to time as the amount of tobacco in the store should vary. The time for which the insurance should continue was not fixed, and no premium was received by the agent, on the ground that he could not determine what amount of premium would become due under the policy. After this agreement plaintiff's tobacco stored in the warehouse was destroyed by fire, and it was held that in the absence of any definite agreement as to the duration of the

[6] Mead v. Westchester Fire Ins. Co. 3 Hun (N. Y.) 608.

[7] Sea Ins. Co. v. Fowler, 21 Wend. (N. Y.) 600. See Hughes v. Mercantile Mutual Ins. Co. 55 N. Y. 265, 14 Am. Rep. 254.

[8] Hughes v. Mercantile Mutual Ins. Co. 55 N. Y. 265, 14 Am. Rep. 254; Sanders (Landers) v. Cooper, 115 N. Y. 279, 5 L.R.A. 638, 22 N. E. 212. See § 44b herein.

[9] Kimball v. Lion Ins. Co. 17 Fed. 625.

[10] Mattoon Manufacturing Co. v. Oshkosh Mutual Fire Ins. Co. 69 Wis. 564, 35 N. W. 12.

[11] De Grove v. Metropolitan Ins. Co. 61 N. Y. 594, 19 Am. Rep. 305.

risk there was no complete contract of insurance.[12] So a definite statement of the period of insurance is indispensable where the Code requires a writing.[13] But an insurer who has left the value of the property blank, to be determined after loss, is estopped to insist that an oral statement as to its value was material to the validity of the contract.[14]

But a contract of fire insurance is complete when it appears that the terms of the contract have been settled by the concurrent assent of the parties, and nothing remains to be done but to deliver the policy.[15] And, if oral contracts of life insurance be completed by a meeting of the minds of the parties, the insurer will be liable for a loss occurring before the issuance and delivery of the policy.[16]

§ 45a. Same subject: where impossible to obtain definite particulars or important facts.—Although all the essential elements of the contract must ordinarily be agreed upon in order to bind the parties, still if it is at the time impossible to obtain important facts affecting the subject of their dealing, they can make a general agreement to accomplish their purpose as well as they can, and where a contract is made in the absence of definite particulars, it is the duty of assured to furnish them within a reasonable time, and a breach of this duty annuls the contract.[17]

§ 46. Essentials need not be expressly agreed upon: prior course of dealing, custom, etc.—All the essentials need not, however, be expressly negotiated upon, since they may be understood, as where the terms of the usual policy are presumed to have been intended.[18] or where the usual rate of premium is presumed to have been meant; [19] or in case the duration of the risk is understood to be the

[12] Strohn v. Hartford Fire Ins. Co. 37 Wis. 625, 19 Am. Rep. 777. See §§ 46, 50 herein.

[13] Clark v. Brand, 62 Ga. 23, 25; Ga. Code, sec. 2794. See § 1440 herein.

[14] Bardwell v. Conway Mutual Fire Ins. Co. 122 Mass. 90.

[15] Stephenson v. Allison, 165 Ala. 238, 138 Am. St. Rep. 26, 51 So. 622; Todd v. German-American Ins. Co. 2 Ga. App. 789, 59 S. E. 94.

[16] Summers v. Mutual Life Ins. Co. 12 Wyo. 369, 66 L.R.A. 812, 109 Am. St. Rep. 992, 75 Pac. 937.

[17] Scammell v. China Mutual Ins. Co. 164 Mass. 341, 49 Am. St. Rep. 462, 41 N. E. 649.

[18] J. C. Smith & Wallace Co. v. Prussian Nat. Ins. Co. 68 N. J. L. 674, 54 Atl. 458, 32 Ins. L. J. 559, per Garretson, J.; Ruggles v. American Central Ins. Co. 114 N. Y. 415, 21 N. E. 1000; DeGrove v. Metropolitan Ins. Co. 61 N. Y. 602, 19 Am. Rep. 305; Boice v. Thames Ins. Co. 38 Hun (N. Y.) 246. See also House v. Security Fire Ins. Co. 145 Iowa 462, 121 N. W. 509, 38 Ins. L. J. 875; Queen Ins. Co. v. Hartwell Ice & Laundry Co. 7 Ga. App. 787, 68 S. E. 310, 39 Ins. L. J. 1125; Todd v. German-American Ins. Co. 2 Ga. App. 789, 59 S. E. 94; State Mutual Fire Ins. Co. v. Taylor (1913) — Tex. Civ. App. —, 157 S. W. 950.

[19] Audubon v. Excelsior Ins. Co. 27 N. Y. 216; Perkins v. Washington Ins. Co. 4 Cow. (N. Y.) 645; Winne

same as in a former policy;[20] or where by custom or usage a certain course of dealing has been established.[1] It is said in an Illinois case that: "It has been held that such an oral contract will sustain an action although no express agreement was made as to the amount of premium to be paid or the duration of the policy, if the intention of the parties to the contract in these particulars can be gathered from the circumstances of the case."[2] So where, during negotiations, nothing is said about special conditions of the policy, it will be presumed that those which are usual and customary were intended.[3] And although the rate is an element of the contract which must be agreed upon, yet if the proximate amount of premium is known and the exact amount is a mere matter of calculation, and the applicant agrees to pay whatever amount the calculation shows it to be the contract can be enforced.[4]

§ 47. The usual rate of premium will be presumed to have been intended, and the minds of the parties will be assumed to have met and fixed the rate where a prior course of dealing would reasonably warrant such intendment.[5] So, where nothing is said, during the negotiations about special rates, it will be presumed that those which are usual and customary were intended.[6] The fact that the amount

v. Niagara Fire Ins. Co. 91 N. Y. 185; Home Ins. Co. v. Adler, 71 Ala. 516. See next following sections herein. See also Queen Ins. Co. v. Hartwell Ice & Laundry Co. 7 Ga. App. 787, 68 S. E. 310, 39 Ins. L. J. 1125, 1131; Todd v. German-American Ins. Co. 2 Ga. App. 789, 59 S. E. 94; Jacobs v. Atlas Ins. Co. 148 Ill. App. 325; Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co. 92 Mich. 482, 20 L.R.A. 277, 52 N. W. 1070; Ames-Brooks Co. v. Ætna Ins. Co. 83 Minn. 346, 86 N. W. 344, 30 Ins. L. J. 802; J. C. Smith & Wallace Co. v. Prussian National Ins. Co. 68 N. J. L. 674, 32 Ins. L. J. 561, 54 Atl. 458.

[20] Winne v. Niagara Fire Ins. Co. 91 N. Y. 185. See also Concordia Fire Ins. Co. v. Heffron, 84 Ill. App. 610.

[1] Hartshorne v. Union Mutual Ins. Co. 36 N. Y. 172. See also Todd v. German-American Ins. Co. 2 Ga. App. 789, 59 S. E. 94; Western Assurance Co. v. McAlpin, 23 Ind. App. 220, 77 Am. St. Rep. 423, 55 N. E. 119. (See this case under § 44 herein.) Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co. 92 Mich. 482, 20 L.R.A. 277, 52 N. W. 1070; J. C. Smith & Wallace Co. v. Prussian National Ins. Co. 68 N. J. L. 674, 54 Atl. 458, 32 Ins. L. J. 559, per Garretson, J.

[2] Concordia Fire Ins. Co. v. Heffron, 84 Ill. App. 610, per Sears, P. J.

[3] Newark Machine Co. v. Kenton Ins. Co. 50 Ohio St. 549, 22 L.R.A. 768, 35 N. E. 1060.

[4] State Mutual Fire Ins. Co. v. Taylor (1913) — Tex. Civ. App. —, 157 S. W. 950.

[5] See Jacobs v. Atlas Ins. Co. 148 Ill. App. 325; Concordia Fire Ins. Co. v. Heffron, 84 Ill. App. 610; Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co. 92 Mich. 482, 20 L.R.A. 277, 52 N. W. 1070; Ames-Brooks Co. v. Ætna Ins. Co. 83 Minn. 346, 86 N. W. 344, 30 Ins. L. J. 802. See § 46 herein.

[6] Newark Machine Co. v. Kenton Ins. Co. 50 Ohio St. 549, 22 L.R.A. 768, 35 N. E. 1060.

of premium is not fixed does not necessarily prove that the contract of insurance had not become operative. Therefore, a memorandum stating in general terms the amount of insurance desired on chartered freight of a designated vessel, "Premium, open for particulars," marked "binding" before the signature of the parties, and "Send policy to Walker & Hughes, 63 Wall street, New York," is an obligatory policy of insurance. It is equivalent to an agreement that the insurance shall be upon a reasonable rate of premium until the assured shall have an opportunity to furnish further particulars, and that he will furnish them within a reasonable time. His failure to do so avoids the contract.[7] In Audubon v. Excelsior Insurance Company[7a] an application was made for insurance against fire of certain engravings similar in all respects to others on which the assurer had recently issued a policy to the same applicant. The parties agreed verbally upon all the terms of such insurance, except the rate of premium. The previous insurance was mentioned in the conversation, and the assurer promised to make out a policy and send it to the assured at a near date, and it was held that there was a contract to insure at the former rate of premium, and that recovery might be had for loss thereon though the policy was not made out when the loss happened. But if anything remains so that it appears that the rate of premium is not fixed, or that the usual rates do not apply, then the contract is incomplete.[8] and where there is a verbal agreement for a continuous insurance, and the rate of premium is changed, this terminates such agreement, and it requires a new bargain to effect a continuing contract.[9] So where an agent had authority to receive applications and forward the same with the premium for approval, and the policy issued was to be of effect as of the time of the agreement, and the usual rate was paid, but a loss occurred before the agent forwarded the risk and premium, the contract was held binding, although it was claimed by the company that it had not assented to the rate of premium.[10]

§ 48. **Both the rate of premium and the duration of the risk may be understood,** and a valid contract exist, as where an agent had insured certain property for several years, and upon expiration of the insurance an application was made to him for another policy

[7] Scammel v. China Mutual Ins. Co. 164 Mass. 341, 49 Am. St. Rep. 462, 41 N. E. 649. See Queen Ins. Co. v. Hartwell Ice & Laundry Co. 7 Ga. App. 787, 68 S. E. 310, 39 Ins. L. J. 1125.

[7a] 27 N. Y. 216.

[8] Orient Mutual Ins. Co. v. Wright, 23 How. (64 U. S.) 401, 16 L. ed. 524.

[9] Trustees of First Baptist Church v. Brooklyn Fire Ins. Co. 28 N. Y. 153.

[10] Perkins v. Washington Ins. Co. 4 Cow. (N. Y.) 645.

thereon, which was written by him, and thereupon he directed it to be reported to the defendant, and entered upon the register of completed contracts. The rate of premium and duration of the risk were not specified when the agreement was made, but the agent had been accustomed to give credit for premiums and to keep the policies until called for. Before delivery the property was burned, and it was held that the same term and rate of premium as the expired policy must have been intended, notwithstanding the amount of insurance was reduced in the last policy.[11]

§ 49. The rate of premium and amount may be understood.—An agreement to insure a cargo to be laden, provided the vessel sail within a given time, which agreement, though contingent as to the amount to be covered and the rate of premium, provides means for ascertaining them with certainty as soon as the lading is completed and the day of sailing fixed, is valid, and the insurers are bound to give a policy on the vessel's sailing within the given time, and the insured is bound to pay the premium accordingly.[12]

§ 50. Whether contract exists may be governed by custom or usage of the parties or of the insurance business at a place.—It is well settled that insurers are bound to know the customs of a place where they transact business, and are assumed to have made their contracts in reference to such customs. So in a New York case, a custom had existed for many years, and had become an established usage and course of business by which the insurance business was transacted at a certain place in the following manner: Persons engaged in receiving consignments of cotton at that place obtained from the insurer a certificate of insurance expressed to cover shipments of cotton from various points on the river to the holder of such certificate to said place. The holder kept a book in which he entered as received all shipments of the description specified in the certificate, with the values and requisite particulars, and after the end of each month he exhibited such pass-book to the insurer, and had the premium fixed. The fact of shipment was rarely known to the consignee or insurer before the termination of the risk. The defendants, a New York company, delivered to their agents an open policy of marine insurance for two hundred and fifty thousand dollars; a certificate of renewal of this policy, and an additional policy was thereafter issued for two hundred and fifty thousand dollars, and delivered to said agents at the same time a

[11] Winne v. Niagara Fire Ins. Co. 91 N. Y. 185. See also Concordia Fire Ins. Co. v. Heffron, 84 Ill. App. 610; Walker v. Metropolitan Ins. Co. 56 Me. 371.

[12] Bunten v. Orient Mutual Ins. Co. 8 Bosw. 448. See Concordia Fire Ins. Co. v. Heffron, 84 Ill. App. 610. See §§ 46, 47 herein.

large number of certificates to be used in their insurance agency, one of which was issued to the plaintiff and pasted into his pass book. The agents at the time made an entry in their pass book, "To cover all cotton shipped by or for ac't of the following parties, valuation per bale annexed to each name." Then followed the names and value per bale. Thereafter the agents wrote on the original certificate to the plaintiff a renewal of the policy, and signed the same, and at the same time gave a renewal of the certificate for the same term. By instructions to the agents the certificates were covered by the policies, and considered as representing the policies, subject to the same terms and payable in like manner. Thereafter and before the termination of the renewal period a boat having cotton on board, consigned to the plaintiff on account of the persons named in the certificate, was destroyed with the cargo by fire. An action was brought demanding the issue of a formal policy and the amount due, and it was held that the defendants were liable, the certificate being declared to be in effect an open, continuous policy.[13] In another case, in the same state, a contract binding upon the company was permitted to be established by evidence that a custom existed between the plaintiffs and several insurance companies, including the defendant, by which applications were made for "not to exceed" a certain sum where the value of property upon which insurance was desired was not known at the time of the application, and that the company, not knowing the actual value of the property, had made insurances in like manner with certain of the other companies upon the property in various sums;[14] and a custom to consider that an open policy covered all cotton consigned to a party unless the bill of lading showed the contrary, binds the insurer in the absence of such reservation in the bill of lading.[15]

Subdiv. II. Completion of Contract—Proposal and Acceptance.

§ 53. Completion of contract: mutual benefit societies or associations.
§ 53a. Same subject: acceptance: approval.

[13] Hartshorne v. Union Mut. Ins. Co. 36 N. Y. 172. See Todd v. German-American Ins. Co. 2 Ga. App. 789, 59 S. E. 94, 37 Ins. L. J. 191; Concordia Fire Ins. Co. v. Heffron, 84 Ill. App. 610.

[14] Fabbri v. Mercantile Ins. Co. 6 Lans. (N. Y.) 446, Id. 64 Barb. (N. Y.) 85.

[15] Bramstein v. Crescent Mutual Ins. Co. 24 La. Ann. 589. See Delaware Ins. Co. v. S. S. White Dental Manufacturing Co. 109 Fed. 334, 48 C. C. A. 382, 65 L.R.A. 387, writ of certiorari denied (mem.) 183 U. S. 700, 46 L. ed. 396, 22 Sup. Ct. 937.

§ 53b. Same subject: signing.
§ 53c. Same subject: initiation: medical examination: signing.
§ 54. Completion of contract: proposal or application.
§ 54a. Effect of absence of signed proposal: Insurer may be estopped to set up want of proposal.
§ 54b. When contract of fidelity insurance complete, and not a mere proposal.
§ 55. Completion of contract: acceptance generally.
§ 55a. Mere intention to accept, insufficient.
§ 55b. To what extent acceptance must accord with terms of application.
§ 55c. Proposal and acceptance: counter propositions.
§ 55d. Whether acceptance of offer should be communicated to proposer.
§ 55e. Protection by insurer pending approval: date when policy in force
§ 56. Qualified acceptance: condition precedent.
§ 57. Acceptance: delay in acting on application.
§ 58. (Transferred to §§ 66b–66j herein.)
§ 59. Agent's agreement: liability not to attach till approval.
§ 59a. Usage or custom that agents can bind insurer until notice of refusal.
§ 60. Approval may be implied from the circumstances.
§ 61. Oral agreement of agent may be controlled by application.
§ 61a. Agent's statement that application accepted: when insurer estopped.
§ 61b. Agent's statement that certificate or application binding: mutual benefit insurance.
§ 62. Completion of contract: negotiations through mail.
§ 62a. Employers' liability insurance: when contract incomplete: negotiations with insurance agent through mail.
§ 62b. Contracts of insurance: telegraphic agency.
§ 63. No contract where acceptance mailed differs in terms from proposal.
§ 64. Agent's receipt pending approval or issuance of policy: "binding slip:" "binding receipt."
§ 65. Same subject: effect of memorandum: binding slip, indorsement, etc.
§ 66. Completion of contract, marine and fire: binding slip.
§ 66a. Binding slips, etc., continued: new terms: rate of premium: parol evidence.
§ 66b. Delivery to and acceptance by applicant: generally.
§ 66c. Right of applicant to reject policy: generally.
§ 66d. Stipulation or agreement for return of policy by applicant: option to accept or reject.
§ 66e. Where applicant receives policy for examination: acceptance.
§ 66f. Applicant not bound to accept policy when it does not conform to proposal or agreement.
§ 66g. Where policy does not conform to proposal: neglect of applicant or assured to read policy: duty to notify company or rescind.

§ 66h. When applicant may reject policy not conforming to agent's representations.

§ 66i. Effect of retention of policy by applicant: unreasonable delay.

§ 66j. Acceptance by insured father for infant beneficiaries.

§ 53. Completion of contract: mutual benefit societies or associations.—In mutual benefit societies the by-laws and charter of the company are of great weight in determining what constitutes the completion of the contract, as where the by-laws provide that the beneficiary shall be named in the certificate, involving thereby the question whether the company has power to complete a contract otherwise than in the precise manner provided, and whether or not a compliance with the by-laws is not a condition precedent. In New York it has been held that it is not.[16] Issuing a policy of insurance, however, within the power of a mutual benefit society under its charter, but conflicting with its by-laws, will be deemed a waiver of such by-laws in favor of the assured, and will be controlling.[17] And it has been determined that a valid contract of insurance existed between the owner of a schooner and an insurance company at the time of her loss, although on the application book of the company certain blanks left for the value of the vessel and the amount insured were not filled as provided in the by-laws.[18] We have, however, already [19] given some attention to the question of the power of such corporations to make a parol contract of insurance, and have seen that while in some states the courts have been inclined to limit such corporations strictly to their statutory or charter powers, yet in other states a more liberal construction has been given.[20] But, as we have stated, the by-laws, however, are made to govern the officers and members of the company, rather than persons who are about to become members; [1] and such persons

[16] Bishop v. Grand Lodge of Empire Order of Mutual Aid, 112 N. Y. 627, 20 N. E. 562, revg. 43 Hun (N. Y.) 472.

[17] Davidson v. Old People's Mutual Ben. Assoc. 39 Minn. 303, 1 L.R.A. 482, 39 N. W. 803.

[18] Dodd v. Gloucester Mutual Fire Ins. Co. 120 Mass. 468.

[19] § 34 ante.

[20] See also Bacon's Benefit Soc. & Life Ins. sec. 147.

[1] The court in Somers v. Kansas Protective Union, 42 Kan. 619, 622, 22 Pac. 702; Titsworth v. Titsworth, 40 Kan. 571, 20 Pac. 213. *Compare* Home Forum Beneficial Order v. Jones, 5 Okla. 598, 50 Pac. 165, 27 Ins. L. J. 8, 18, where the court, per Dale, C. J., says: "If we apply to this case the rules which seem generally to prevail we must hold that the parties to the contract were governed by the constitution and laws of the order. . . . We must further hold that Jones was presumed to have known, and joined the order under a knowledge of such laws" a case, however, relating to agency of subordinate lodges. See § 407 herein.

Application may provide that it is

are not members, but rather strangers to the company in prior negotiations with it relative to granting insurance, for membership does not date before consummation of the contract.[2]

The following general rules, however, govern in such companies in relation to the consummation of the contract. The contract is complete upon proposal and acceptance of the terms,[3] provided that the terms are so definitely agreed upon as to all the essentials that all that remains is to comply therewith;[4] and the company may waive provisions in its by-laws where they are for its benefit,[5] and acts done by an agent within the scope of his authority, although in disregard of the express provisions of the by-laws, may be binding on the company.[6] And in a mutual benefit order case it was contended that the agent who obtained the application and forwarded it to the company had no power to waive any of the provisions of the application or policy, but it was held that the agent was a soliciting agent, and that his knowledge of facts before the application was sent to the order was the knowledge of the order; and the doctrine of estoppel was applied to prevent a forfeiture of the policy. It was also decided that a person appointed as agent by the company to solicit insurance, forward applications, and deliver policies, is in effect the general agent of the company, and his knowledge of any fact that might increase the risk is the knowledge of the company.[7] In a case which arose in Nebraska in an action brought against a railroad relief association, it appeared that the by-laws of the association provided that those who desired to become

subject to by-laws and charter of company as in Winchell v. Iowa State Ins. Co. 103 Iowa, 189, 72 N. W. 503.

[2] Eilenberger v. Protective Mutual Fire Ins. Co. 89 Pa. St. 464; Stratton v. Allen, 16 N. J. Eq. 229; Franklin Fire Ins. Co. v. Martin, 40 N. J. L. 579, 29 Am. Rep. 271; Columbia Ins. Co. v. Cooper, 50 Pa. St. 331; Cumberland Valley Mutual Protective Co. v. Schell, 29 Pa. St. 31. *Compare* quotation in last preceding note. See §§ 317, 393 herein.

The application may be such that the applicant will be presumed to be acquainted with the rules of the association. Court of Honor v. Hering, 178 Mich. 377, 144 N. W. 843.

[3] Oliver v. American Legion of Honor (Cal 1882) 17 Am. L. Rev. 301.

[4] Connecticut Mutual Life Ins. Co. v. Rudolph, 45 Tex. 454; Todd v. Piedmont & Arlington Life Ins. Co. 34 La. Ann. 63.

[5] Manning v. Ancient Order United Work. 86 Ky. 136; 5 S. W. 385; Cumberland Valley Mutual Protect. Co. v. Schell, 29 Pa. St. 31; Splawn v. Chew, 60 Tex. 532.

[6] Union Mutual Life Ins. Co. v. Wilkinson, 13 Wall. (80 U. S.) 222, 20 L. ed. 617; Somers v. Kansas Protective Union, 42 Kan. 619, 22 Pac. 702; Emery v. Boston Marine Ins. Co. 138 Mass. 398. See §§ 393, 395 herein.

[7] Thomas v. Modern Brotherhood of America, 25 S. Dak. 632, 127 N. W. 572, 39 Ins. L. J. 1539, and note. See §§ 393, 395, 424 et seq. herein.

members should make application in a certain manner, and also submit to a physical examination. W., on July 21st, stated his desire to become a member to a soliciting agent of the department, who gave written notice of W.'s application to the officers of the association, specifying July 21st as the day for the application to take effect. On July 22d, however, W. was taken sick. The prescribed manner of making the application was not complied with, nor was any physical examination made, and no request was made of W. for compliance with either requirement. His name was placed on the roll of members and an assessment deducted from his wages. On August 7th, the association, through its officers, was notified of W.'s disability, and subsequently tendered back his assessment in the form of a "time check," which he refused a few hours before his death. It was held that the company was estopped from denying the completion of the contract.[8]

§ 53a. Same subject: acceptance: approval.—Membership in a mutual company may be obtained by acceptance of a policy issued by the company; and liability as a member upon dissolution proceedings will thereby be created.[9] No proposal for absolute indemnity is contained in an application for insurance which does not allude to the method of raising the fund, so as to render necessary an acceptance of the policy, where it provides for the levying of an assessment to meet the obligation.[10] And a deduction by a railroad company of dues to an employees' relief association, from the wages of an employee, does not amount to an acceptance of the employee's application to become a member of the association, where the constitution and by-laws of the association authorized the company to deduct dues from members, but it does not appear that the company had been officially notified by the association that the employee had been admitted to membership.[11] If an agent has no authority to accept a person to membership but the application must be forwarded to the association for acceptance, the certificate does not relate back to the date of the application, where there is nothing in the latter to that effect, and the association is not liable in such case, where an accident occurs to the applicant before ac-

[8] Burlington Voluntary Relief Department v. White, 41 Neb. 547, 59 N. W. 747, 751. See §§ 34, 510 herein.

[9] Swing v. Kaufman, 115 N. Y. Supp. 143. See (mem.) 117 N. Y. Supp. 1148, 132 App. Div. 932.

[10] Tuttle v. Iowa State Traveling Men's Assoc. 132 Iowa 652, 7 L.R.A. (N.S.) 223, 104 N. W. 1131. "Receipt and acceptance" of application and fee, see § 1437 herein.

[11] Baltimore & Ohio Employee's

ceptance.[12] But where a benefit certificate contained conditions which were not in a prior one, in lieu of which it was issued, and therefore an acceptance of the later certificate was necessary, although it did not appear that a written acceptance was required, a finding in an action thereon that the member had accepted said later certificate is warranted where it is shown that it was found among his private papers.[13] Again, the enumeration in the application for insurance in a mutual benefit association of certain exceptions from liability does not, by exclusion, prevent the operation of an exception of suicide contained in the insurer's by-laws, so as to render acceptance necessary to make binding a policy containing such exception, where the application makes the by-laws a basis of membership in the association.[14] The issuance of a policy to a member of a mutual fire insurance company may be found from admissions in the pleading or answer.[15] If a policy is issued by the secretary of a mutual fire insurance company with the knowledge of the directors, their nonaction constitutes an approval or ratification which is binding where approval of applications by the board is provided for by the constitution, even though they supposed the policy was issued upon an application which had been approved by the promoters of the company, who in fact, had never passed upon the amended application.[16]

§ 53b. Same subject: signing.—The acceptance by a member of a mutual benefit association, of a certificate issued for him and in accordance with his directions, will be presumed, although he never signed the blank form of acceptance printed upon its face, where it does not appear that such signature was made in the slightest degree a requisite for showing acceptance.[17] In a Michigan case the constitution and regulations of the lodge provided that the contract should be complete on examination of the applicant and approval of the application by the supreme lodge, and upon the signing the certificate and forwarding it to the subordinate lodge, which was done, but the subordinate lodge retained it on the ground of

Relief Assoc. v. Post, 122 Pa. St. 579, 9 Am. St. Rep. 147, 2 L.R.A. 44, 15 Atl. 885.

[12] Rogers v. Equitable Mutual Life & Endowment Assoc. 103 Iowa 337, 72 N. W. 538. *Compare* New York Life Ins. Co. v. Moats, 207 Fed. 481, 125 C. C. A. 143.

[13] Wood v. Brotherhood of American Yeomen, 140 Iowa, 98, 117 N. W. 1123.

[14] Tuttle v. Iowa State Traveling Men's Assoc. 132 Iowa 652, 7 L.R.A. (N.S.) 223, 104 N. W. 1131.

[15] Spencer v. Farmers Mutual Ins. Co. 79 Mo. App. 213, 2 Mo. App. Rep. 377.

[16] Farmers Co-operative Ins. Assoc. v. Taliaferro, 107 Ga. 326, 33 S. E. 26.

[17] Luhrs v. Luhrs, 123 N. Y. 367, 9 L.R.A. 534, 25 N. E. 388.

Countersigning policy—death before, see § 1438 herein.

fraud in the application, and the court determined that the beneficiary might recover without producing the certificate, no fraud in the application being shown.[18] And if a policy against loss by fire is issued by a mutual protective association to one who has not signed its constitution, he may be estopped when sued for an assessment, and the association when sued upon a liability arising under the policy, from asserting that he is not a member of the association because of such failure to sign.[19] But where the constitution of a fraternal association provides, as a condition precedent to a beneficiary certificate becoming in force, that it shall be executed by the supreme president and supreme secretary and countersigned by certain officers of the local council, and the conditions accepted in writing on the certificate by the member to whom it is issued, such conditions must be complied with before the assessment, paid when the application was made, can be applied.[20] It has also been held that a person enrolled as a member of a mutual benefit association, without having signed the application required, cannot claim any insurance, even though he did not know that his application had never been received.[1] Where under the laws of a society no certificate was to be issued until full membership should be conferred, and a person made and signed an application for membership, attended one meeting, and was notified to attend the next, when full membership would be conferred, and at the time of the next meeting he was too ill to attend and died shortly after, it was held that the contract was not completed.[2]

§ 53c. Same subject: initiation: medical examination: signing.—A benefit certificate cannot become effective until an applicant has been initiated into the order, where such initiation is, by the laws of the order, made a condition precedent to the execution of a contract of insurance.[3] And where one of the rules of a fraternal benefit society provides that no certificate of benefit membership shall

[18] Lorscher v. Supreme Lodge Knights of Honor, 72 Mich. 316, 40 N. W. 545.

[19] Richards v. Louis Lipp Co. 69 Ohio St. 359, 100 Am. St. Rep. 679, 69 N. E. 616.

[20] Triple Tie Benefit Assoc. v. Wood, 73 Kan. 124, 84 Pac. 565.

[1] Supreme Lodge of Protection Knights & Ladies of Honor v. Grace, 60 Tex. 569. But see Somers v. Kansas Protective Union, 42 Kan. 619, 22 Pac. 702.

On failure to sign application as avoiding accident, life, or mutual benefit policy, see note in 4 B. R. C. 468.

[2] Taylor v. Grand Lodge Ancient Order U. W. 75 Hun (N. Y.) 612, 29 N. Y. Supp. 773, 61 N. Y. St. Rep. 510.

Countersigning policy: death before, § 1438 herein.

[3] Sovereign Camp Woodmen of the World v. Hall, 104 Ark. 538, 41 L.R.A.(N.S.) 517, 148 S. W. 526; Kolosinski v. Modern Brotherhood of America, 175 Mich. 582, 141 N. W. 589; Lord v. Modern Woodmen of America, 113 Mo. App. 19, 87 S. W. 530. See McWilliams v. Modern Woodmen of America (1912) — Tex. Civ. App. —, 142 S. W. 641.

be in force until the applicant shall have been initiated or obligated at a meeting of the district court or under a dispensation granted, and until he shall have signed and accepted the certificate and made full payment of the assessment and dues as provided in the constitution, and before the recorder shall deliver a benefit certificate, the initiate must, in person, while in good health, sign the certificate in his presence, it cannot be held that the risk was assumed until the law was complied with or the compliance waived; and where the applicant reached the point where he paid an assessment and certain dues and was initiated, but broke down with paresis before the certificate was received and it was not delivered to him or to any person for him nor demanded by him, and he died from said ailment it was held that there was no binding contract.[4] If the procedure is that applications for membership in a fraternal benefit society are forwarded by the secretary of the local colony to the home office, and if in proper form, and the applicant duly found initiated and the fee for the benefit certificate paid, a benefit certificate, reciting that it is issued upon condition that the insured complies with the laws, rules, and regulations of the society and indorses thereon his acceptance in writing of the certificate upon the conditions named, is then forwarded by the home office to the secretary of the local colony for the acceptance of the member, the contract of the benefit certificate becomes effective when formally accepted by insured. Such acceptance is the final act consummating the contract, although delivery may be conditioned upon any act such as payment of premium to a local agent.[5] Where the application of respondent's (the beneficiary) wife was approved by the home office and returned to the local deputy, who delivered it to the applicant with the declaration that it was in force, and the lodge was organized a week later, and she was voted in as a member, but was prevented by sickness from attending, and so was not initiated and did not receive the obligation, and after the lodge was organized, the certificate was attested by respondent as secretary and by the president, and redelivered to her, it was held that she did not become a member of the society, the contract was not completed, and the certificate was void.[6] And even

[4] Court of Honor v. Hering, 178 Mich. 377, 144 N. W. 843.

[5] Supreme Colony United Order, Pilgrim Fathers v. Towne, 87 Conn. 644, 89 Atl. 264.

[6] Loudon v. Modern Brotherhood of America, 107 Minn. 12, 119 N. W. 425.

The question of sickness, etc., pending acceptance may depend, so far as the completion or validity of the contract is concerned upon the question of concealment or fraud. Equitable Life Assur. Soc. v. McElroy, 83 Fed. 631, 49 U. S. App. 548, 28 C. C. A. 365, 27 Ins. L. J.

though an applicant has taken all requisite steps and has been initiated, and the supreme medical examiner has approved the application and medical examination as required by the by-laws, still where such requirement is a condition precedent to beneficial membership, the beneficiary has no claim for benefits where the member was accidentally killed before said approval, although on the same day.[7] Where, under the constitution and laws of a beneficiary order, it is provided that the local lodge may receive applications for benefit certificates, and that such application shall, if acceptable to the local lodge, and the medical examiner thereof, be at once forwarded to the grand secretary of the order, who shall submit the same to the grand medical examiner, who has, under the constitution and laws of such order, authority to reduce the sum named in the application for a beneficiary certificate, or to reject the same altogether; and where it is further provided that no beneficiary certificate shall be binding upon the order until the same has been approved by the grand medical examiner, and signed by the president and secretary of the order; the approval and action of such officers are essential to create an obligation upon the beneficiary certificate, and in such case delay on the part of the local lodge in forwarding the application to the grand lodge will not create a contract in the face of the provisions of the constitution and laws of the order, even though the applicant had been initiated into the order and paid the required dues and assessments.[8] If a medical examination is made a condition precedent to one's admission to the mutual benefit class of a fraternal order his heirs cannot recover, even though he pays the first assessment, where it is to be applied partly in payment of his fee in the nonbeneficial or social class, and part is to be refunded in case of his rejection in the other class.[9] The initiation as a member of a local camp of an applicant for membership in a fraternal or beneficial order before the receipt by such camp of a certificate from the sovereign camp, if unauthorized by the constitution and by-laws, is not a waiver of conditions precedent to his becoming a beneficial member of the order, but can, at the

561, as to concealment in other than marine risks, see §§ 1844 et seq. herein.

[7] Patterson v. Supreme Commandery United Order of Golden Cross of the World, 104 Me. 355, 71 Atl. 1016. See also Rogers v. Equitable Mutual Life & Endowment Assoc. 103 Iowa 337, 72 N. W. 538.

[8] Home Forum Beneficial Order v. Jones, 5 Okla. 598, 50 Pac. 165, 27 Ins. L. J. 165. See § 407 herein. See also Patterson v. Supreme Commandery United Order of Golden Cross of the World, 104 Me. 355, 71 Atl. 1016.

[9] Asselto v. Supreme Tent Knights of Maccabees, 192 Pa. 5, 43 Atl. 400.

most, make him only a fraternal member.[10] An application for life insurance and medical examination are preliminaries solely for the benefit and protection of the insurer in issuing the policy. He may entirely dispense with or waive them, and issue a policy which is valid and binding.[11] So the issuance of a relief certificate is evidence that conditions precedent to receiving benefits thereunder, such as a medical examination, payment of the assessment and fee and initiation, have been complied with or waived.[12] In a suit upon a mutual benefit certificate, in order to sustain a defense that the medical examination of the insured was reconsidered and rejected within six months by the secretary of the medical board of the defendant, in accordance with a provision therefor in the certificate, the defendant must show that the reconsideration and rejection were for a sufficient cause which existed at the time of the original examination. And the fact that one parent of an insured died of phthisis before the medical examination is not of itself enough to prove that sufficient cause existed for rejection of the insured.[13] Again, the initiation, as a member of a local camp, of an applicant for membership in a fraternal and beneficial order before the receipt by such camp of a certificate from the sovereign camp, if unauthorized by the constitution and by-laws, is not a waiver of conditions precedent to his becoming a beneficial member of the order, but can, at the most, make him only a fraternal member.[14] Where respondent, the beneficiary, reported as secretary of the local lodge to the head office that the applicant had become a member, and paid several assessments, which were received and applied in payment thereof by the head office, in ignorance of the facts as to noncompliance by the applicant with the by-laws as to the necessary steps to be taken to become a member, it was held that the acceptance of the money did not constitute a waiver by the association of the right to repudiate the transaction and the certificate upon discovery of the facts. On the undisputed evidence the company was entitled to judgment, notwithstanding the verdict.[15] A med-

[10] McLendon v. Sovereign Camp Woodmen of the World, 106 Tenn. 695, 52 L.R.A. 444, 64 S. W. 36.

[11] Malheit v. Metropolitan Life Ins. Co. 87 Me. 374, 47 Am. St. Rep. 336, 32 Atl. 989.

[12] Wagner v. Supreme Lodge Knights & Ladies of Honor, 128 Mich. 660, 8 Det. Leg. N. 815, 87 N. W. 903.

[13] Gilroy v. Supreme Court Independent Order of Foresters, 75 N. J. L. 584, 14 L.R.A.(N.S.) 632, 67 Atl. 1037.

[14] McLendon v. Sovereign Camp of Woodmen of the World, 106 Tenn. 695, 52 L.R.A. 444, 64 S. W. 36. See Hoefner v. Canadian Order of Chosen Friends (Ont. H. C. J.) 18 Canadian L. T. 86.

[15] Loudon v. Modern Brotherhood of America, 107 Minn. 12, 119 N. W. 425.

ical examination by an authorized physician may become a prerequisite to the issuance of a certificate under a statute making a contract of an association with its members one of life insurance.[16]

§ 54. Completion of contract: proposal or application.—The proposal for insurance may be made by written application or orally, and it is generally upon reliance of the facts stated therein that the insurer accepts the risk. A written application is now generally dispensed with by fire insurance companies. The application is not the contract, but a mere proposal for insurance.[17]

If, however, an application for accident insurance provides that the contract shall be complete when received at the insurer's office and accepted by its secretary, the application accompanied by the premium and their acceptance by the insurer forms the contract of insurance until the policy is issued and received.[18]

No obligation rests upon the company to accept,[19] and a life insurance company has an absolute right to insist that it shall accept an application and issue a policy before it shall be bound as an insurer,[20] and it may reject the proposal even though there may have been a payment of part or even all of the premium.[1] So, where there is the payment by an applicant of the admission fee and an acceptance by him of a receipt stating that the policy is not to go into effect until the application has been approved and accepted, and there is a statement in the application that the annual dues must be paid and the policy actually delivered to the applicant, and the application is not accepted nor are the dues paid,

[16] State v. Willett, 171 Ind. 296, 23 L.R.A.(N.S.) 197, 86 N. E. 68; Burns' Ann. Stat. Ind. sec. 4713.

On whether a benefit association is an insurance company, see note in 38 L.R.A. 33. On what constitutes insurance, note in 48 L.R.A.(N.S.) 1051.

[17] Travis v. Nederland Life Ins. Co. Ltd. 104 Fed. 486, 43 C. C. A. 653; Covenant Mutual Benefit Assoc. v. Conway, 10 Brad. (10 Ill. App.) 348; Schwartz v. Germania Ins. Co. 18 Minn. 448; Heiman v. Phœnix Mutual Life Ins. Co. 17 Minn. 157, 10 Am. Rep. 154; McCully v. Phœnix Mutual Life Ins. Co. 18 W. Va. 782. See Hogben v. Metropolitan Life Ins. Co. 69 Conn. 503, 38 Atl. 214, 26 Ins. L. J. 998. But *compare* Commercial Mutual Accdt. Co. v. Bates, 176 Ill. 194, 52 N. E. 49, 74 Ill. App. 335, where the written application was held to constitute the contract. In Home Life Ins. Co. v. Myers, 112 Fed. 846, 50 C. C. A. 544, it was held that the application and certain questions and answers therein amounted at best to only a contract for insurance, provided the application should be approved.

When insurance contract is complete, see note 69 Am. St. Rep. 143–153.

[18] Robinson v. United States Benevolent Soc. 132 Mich. 695, 102 Am. St. Rep. 436, 94 N. W. 211.

[19] Mutual Life Ins. Co. v. Young, 23 Wall. (90 U. S.) 85, 23 L. ed. 152; Harp v. Grangers' Mutual Fire Ins. Co. 49 Md. 309.

[20] Summers v. Mutual Life Ins. Co. 12 Wyo. 369, 109 Am. St. Rep. 992, 66 L.R.A. 812, 75 Pac. 937.

[1] Otterbein v. Iowa State Ins. Co. 57 Iowa, 274, 10 N. W. 667; Arm-

there is no valid contract created. The payment of the admission fee under such circumstances creates no contract of insurance of itself.[2]

There may be an acceptance for a limited period of time with the right reserved to reject: as in a case where a fire insurance company, having received an application for a policy, contracted to accept the risk for the term of thirty days from date, "unless the applicant is sooner notified of its rejection. If he receives no notice that the risk is rejected, the insurance will cease at the end of the thirty days, unless a regular policy has been issued." After expiration of the thirty days a loss occurred, no policy having been issued nor notice of rejection given; it was held that the company was not liable.[3]

So the acceptance may be conditional.[4]

If the application is not made in writing and there are no statements contained in any written application as to the risk or subject-matter, *then oral proof of such facts is admissible.*[5] Though oral statements are not admissible, as a rule, to alter the application, if in writing,[6] for such application is itself the best evidence of its contents.[7]

Where the custom of the company has been to issue a new policy covering a former risk without a new written application therefor, the secretary of the company has authority to issue a new policy without a new written application, notwithstanding a by-law provides that all applications shall be examined and approved before a policy is issued.[8]

§ 54a. Effect of absence of signed proposal: insurer may be estopped to set up want of proposal.—In an English case a policy was effected by a wife upon her husband's life, who was the assured under said policy which was issued under the seal of insurer and stated that it was granted in consideration that the proposer had signed and delivered a proposal to the company which constituted the agreed basis of the contract. It was also stipulated that any untrue statement therein as to assured's health should render the policy void and all moneys paid thereunder on account of the

strong v. State Ins. Co. 61 Iowa, 212, 16 N. W. 94.

[2] Weinfeld v. Mutual Reserve Fund Life Assoc. 53 Fed. 208.

[3] Barr v. North American Ins. Co. 61 Ind. 488.

[4] Hamilton v. Lycoming Ins. Co. 5 Pa. St. 339. See § 56 herein.

[5] The court in Hoose v. Prescott Ins. Co. 84 Mich. 309, 11 L.R.A. 340, 47 N. W. 587, 32 Cent. L. J. 226

[6] Ashworth v. Builders' Mutual Fire Ins. Co. 112 Mass. 422; 17 Am. Rep. 117; Jenkins v. Quincy Mutual Fire Ins. Co. 7 Gray (73 Mass.) 370; Tibbets v. Hamilton Mutual Ins. Co. 5 Allen (85 Mass.) 569. See Commercial Mutual Accident Co. v. Bates, 176 Ill. 194, 52 N. E. 49.

[7] Lewis v. Hudmon, 56 Ala. 186.

[8] Zell v. Herman Farmers Mutual Ins. Co. 75 Wis. 521, 44 N. W. 828.

insurance should be forfeited. Said wife, who had duly paid the premiums, claimed the policy amount upon assured's death. The insurer resisted the claim on the ground that the proposal on which the policy had been issued contained misrepresentations as to the assured's health. At the hearing before justices of a complaint for nonpayment of the sum insured, the wife satisfied the justices that a proposal produced by the company and purporting to be signed by her was not signed by her or with her authority, and she further stated that no proposal at all had been signed by her or with her authority. It was held that the company, having issued the policy and received the premiums, was estopped from contending that in consequence of the want of a proposal there was no contract; that the mere fact that the wife, instead of confining her evidence to the disproof of the proposal put forward by the company, made the admission, irrelevant to her own case, that there had been no proposal at all, did not prevent her from taking the benefit of that estoppel; and that the company was liable on the policy.[9]

§ 54b. When contract of fidelity insurance complete, and not a mere proposal.—A temporary contract executed and delivered to an employer, upon his application, which expressly states that the company "hereby guaranties the fidelity" of an employee and that all liability shall cease upon issuance of the regular bond or in a certain number of days if no bond is issued, is binding and is not converted into a mere proposal for a contract by writing across the face of the contract the words: "subject to result of investigation." Such words should be so construed as merely to give to defendant the right to cancel the contract on further investigation, so as to prevent future liability.[10]

§ 55. Completion of contract: acceptance generally.—A proposition only becomes a binding contract when the party to whom it is made signifies his acceptance to the proposal,[11] so that in the absence of some provision to the contrary there must be an actual acceptance of the proposal for insurance, some act to bind the com-

[9] Pearl Life Assur. Co. v. Johnson, [1909] 2 K. B. L. R. 288 (above text is partly the syllabus in this case).

On when contract is deemed to have been made, see notes in 63 L.R.A. 833, and 23 L.R.A.(N.S.) 968.

[10] Hall v. United States Fidelity & Guarantee Co. 177 Minn. 24, 79 N. W. 590, 28 Ins. L. J. 661.

Fidelity insurance; employee insured from "issuance" of policy: construction. Allis Chalmers Co. v. Fidelity & Deposit Co. 29 T. L. R. 506, Phillimore, J.

[11] Bentley v. Columbia Ins. Co. 17 N. Y. 421, 423; Hartford Fire Ins. Co. v. Davenport, 37 Mich. 609. See §§ 66b–66j herein.

Acceptance and issuing policy complete contract. Devine v. Federal Life Ins. Co. 250 Ill. 203, 95 N. E. 174, 40 Ins. L. J. 1513.

pany, or some act must be done which is equivalent thereto, and from which the company cannot recede without liability.[12]

If the act done by the insurer be such that a liability would exist against him were he to withdraw, or, in other words, if he has so acted that he cannot recede without liability, there is an acceptance, and the contract is complete.[13] So a contract of life insurance is consummated upon the unconditional written acceptance of the application for insurance by the company to which such application is made.[14] And where a written proposal for fire insurance is accepted by the company there is a meeting of the minds of the parties, and a valid contract of insurance which will be enforced.[15] And acceptance of a proposal to insure for a premium offered completes the negotiations; and where upon the same day that an application for insurance was filed the company made out and signed the policy, it thereby ratified the application, and its consent was complete.[16]

So a fire insurance company admits its liability and is estopped to claim that a policy was not accepted or in force, where it issued and delivered the policy antedating its liability and accepted proofs of a loss occurring between the two dates, and participated in an

[12] *United States.*—Shattuck v. Mutual Life Ins. Co. 4 Cliff (C. C.) 598, Fed. Cas. No. 12,715.

Alabama.—Alabama Gold Life Ins. Co. v. Mayes, 61 Ala. 163.

Georgia.—W. P. Harper & Co. v. Ginners Mutual Ins. Co. 6 Ga. App. 139, 64 S. E. 567.

Indiana.—New England Ins. Co. v. Robinson, 25 Ind. 536.

Maine.—Carleton v. Patrons Androscoggin Mutual Fire Ins. Co. 109 Me. 79, 39 L.R.A.(N.S.) 951, 954, 82 Atl. 649.

Massachusetts.—Markey v. Mutual Benefit Ins. Co. 103 Mass. 92.

Minnesota.—Schwartz v. Germania Ins. Co. 18 Minn. 448; Heiman v. Phœnix Mutual Life Ins. Co. 17 Minn. 153, 10 Am. Rep. 154.

Missouri.—Keim v. Home Mutual Fire Ins. Co. 42 Mo. 38, 97 Am. Dec. 291.

New Jersey.—Hallock v. Commercial Insurance Co. 26 N. J. L. 278.

Oklahoma.—Shawnee Mutual Fire Ins. Co. v. McClure, 39 Okla. 535, 49 L.R.A.(N.S.) 1054, 35 Pac. 1150.

Texas.—Connecticut Mutual Life Ins. Co. v. Rudolph, 45 Tex. 454.

Virginia.—Haden v. Farmers' & Mechanics' Fire Assoc. 80 Va. 683; Haskin v. Agricultural Fire Ins. Co. 78 Va. 707.

"Negotiation" means the entire transaction of applying for and finally issuing the completed contract of insurance. Everson v. General Fire & Life Assur. Corp. Ltd. 202 Mass. 169, 88 N. E. 658, 38 Ins. L. J. 923 and note 931.

[13] Mead v. Davison, 3 Ad. & E. 303; Dunlop v. Higgins, 1 H. L. Cas. 381; Kentucky Mutual Ins. Co. v. Jenks, 5 Ind. 96; Vassar v. Camp, 14 Barb. (N. Y.) 341.

[14] New York Life Ins. Co. v. Babcock, 104 Ga. 67, 69 Am. St. Rep. 134, 42 L.R.A. 88, 30 S. E. 273, 27 Ins. L. J. 649.

[15] Herring v. American Ins. Co. 123 Iowa 533, 99 N. W. 130, 33 Ins. L. J. 558.

[16] Keim v. Home Mutual Fire Ins. Co. 42 Mo. 38, 97 Am. Dec. 291.

adjustment based on the validity of four policies that relieved it of one fourth of its liability, and issued its check therefor.[17] And when an open policy is issued "on property on board vessel," etc., "with such other risks as may be agreed on, as per indorsement hereon, accepted by the company," and the risk is agreed upon, the premium paid, and the indorsement made by the agent, the insurance is effected; but a different rule obtains where the risk is "to be accepted."[18] But a present contract of insurance is not effected by signing an application, followed by the statement of the agent that he would "see to it, take care of it so it would be all right," would "get a policy."[19] If an application for accident insurance provides that the contract shall be complete when received at the insurer's office and accepted by its secretary, the application accompanied by the premium and their acceptance by the insurer forms the contract of insurance until the policy is issued and received.[20]

In an action on a policy of insurance which had been filled up and signed, but not delivered, and on which no premiums had been paid, it is for the jury to determine what constitutes a reasonable time within which the insured should pay the premium and accept the policy.[1] It is also a question for the jury whether an application to an insurance company by a party desiring to be insured has been declined or not,[2] and the question whether a policy was issued on a written application may be one for the jury,[3] but the effect of an acceptance is a question for the court.[4]

If the policy ever attached, the insurer has a claim for premium; if otherwise, he has not.[5]

§ 55a. Mere intention to accept, insufficient.—A mere intention by the insurer to accept the proposal is of itself alone insufficient,

[17] Finley v. Western Empire Ins. Co. 69 Wash. 673, 125 Pac. 1012.

[18] Wass v. Maine Mutual Marine Ins. Co. 61 Me. 537.

[19] Whitman v. Milwaukee Fire Ins. Co. 128 Wis. 124, 5 L.R.A.(N.S.) 407, 116 Am. St. Rep. 25, 107 N. W. 291.

[20] Robinson v. United States Benevolent Soc. 132 Mich. 695, 102 Am. St. Rep. 436, 94 N. W. 211. The application here was marked "approved and accepted" by the secretary.

[1] Baxter v. Massasoit Ins. Co. 13 Allen (95 Mass.) 320.

[2] Mutual Benefit Life Ins. Co. v. Wise, 34 Md. 582; Manson v. Metropolitan Surety Co. 112 N. Y. Supp. 886, 128 App. Div. 577 (mem.) aff'd 199 N. Y. 590. See Robinson v. Union Central Life Ins. Co. (U. S. C. C.) 144 Fed. 1005, rev'd 148 Fed. 358, 78 C. C. A. 268.

[3] Cronin v. Fire Assoc. of Phila. 123 Mich. 277, 6 Det. L. N. 1048, 82 N. W. 45, 29 Ins. L. J. 564.

[4] Manson v. Metropolitan Surety Co. 112 N. Y. Supp. 886, 128 App. Div. 577 aff'd (mem.) 199 N. Y. 590.

[5] Cleveland v. Fittyplace, 3 Mass. 392, 395; Merchants' Ins. Co. v. Clapp, 11 Pick. (28 Mass.) 56, 61; Homer v. Dorr, 10 Mass. 26; Taylor v. Lowell, 3 Mass. 331, 3 Am. Dec. 141; Elbers v. United Ins. Co. 16 Johns. (N. Y.) 128; Hendricks v. Commercial Ins. Co. 8 Johns. (N. Y.) 1.

as such intention may be changed even though certain preliminary acts have been done by the insurer in view of a subsequent consummation of the contract.[6] And in case of a mere offer or bare proposal, a mental determination to accept, or even acts done in pursuance thereof are not sufficient, when not completed by a reciprocal promise.[7]

§ 55b. To what extent acceptance must accord with terms of application.—It may be stated as a general rule that the applicant has a right to assume that his policy will be in accordance with his application, and it is the duty of the insurer to so write it. If other and different clauses not in accord therewith are inserted by the insurer he should call insured's attention to them.[8] It is also necessary, in order to establish an insurance contract, where the parties are at the same place, that there should be, according to the principles of the common law an offer and an acceptance thereof in accordance with its terms.[9] In a Maryland case it is held that where the binding slip given by a fire insurance company for temporary insurance is in the form of an executed contract, and not in the form of a contract executory only, the conditions of a policy issued and tendered, after the applicant has sustained a loss, cannot be read into the contract; and where such binding slip is silent as to the question of other insurance it is not competent to inject into the contract any restrictions of that character. It is also too late, in such a case, to reject the application after a loss has occurred.[10] If a signed application expressly provides the basis on which the insurance is to be effected the insurer cannot, whether by inadvert-

[6] Allen v. Massachusetts, Mutual Accident Assoc. 167 Mass. 18, 44 N. E. 1053, 26 Ins. L. J. 316.

[7] New v. Germania Fire Ins. Co. 171 Ind. 35, 131 Am. St. Rep. 245, 85 N. E. 703.

[8] German-American Ins. Co. v. Darrin, 80 Kan. 578, 103 Pac. 87, 38 Ins. L. J. 1008, citing and quoting from Gristock v. Royal Ins. Co. 87 Mich. 428, 49 N. W. 634; McElroy v. British American Assur. Co. 94 Fed. 990, 36 C. C. A. 615. See also Mohrstadt v. Mutual Life Ins. Co. 115 Fed. 81, 52 C. C. A. 675. See § 63 herein.

As to neglect of applicant to read application or policy, see §§ 66g, 1974, 3514 note, herein.

[9] Busher v. New York Life Ins. Co. 72 N. H. 551, 58 Atl. 41, 33 Ins. L. J. 761 (a distinction is made in this case between bilateral and unilateral contracts). See § 63 herein.

"Acceptance must correspond to offer in every respect leaving nothing open to future negotiations." 1 Page on Contracts (ed. 1905) sec. 45.

"It becomes a contract only when the proposition is met by an acceptance which corresponds with it entirely and adequately, an assent, however, may bind the party, although not express or in writing, if it can be fairly inferred from his profiting by the stipulations of the contract." 1 Parsons on Contracts (ed. 1904) bottom p. 513 (Book II. *p. 476).

[10] Mutual Fire Ins. Co. Mont. County v. Goldstein, 119 Md. 83, 86 Atl. 35.

ence, mistake or design, change such basis of contract and substitute another in its stead and thereby bind the applicant without his knowledge or consent and the latter has the right to assume that the policy if issued will be upon the stated basis as offered, and it is the duty of the assurer to so write it or reject it. If such an application is received and retained by the company, and a policy be written and delivered, and the premium paid by the applicant and retained by the company, a binding contract of insurance is effected on the basis of the application.[11] If an agent has authority to negotiate, write, and transmit applications, he has for such purposes all the power the company itself possesses, and agreements made with him as to what the terms of the application should be, are made with the company. It is the agent's duty to frame the application in accordance with his agreement with the applicant and his neglect to do so is the company's neglect. His knowledge is his principal's knowledge and where the company in such case accepts and approves the application, receives and retains the first year's premium and issues the policy a binding contract of insurance is effected according to the agreement.[12]

It may be stated, however, that conditions not mentioned in the application may be inserted in the policy by the insurer, but with this qualification that if the policy issued contains any clause, to which assured does not agree, he is at liberty to reject it, and either demand a rescission and return of the premium paid, or insist upon a policy without the condition to which he does not assent, and if such a policy is received and accepted without objection and renewed, the objectionable clause cannot be eliminated on the ground that it is not expressly referred to in the application.[13] In a Massachusetts case the court says: "The application not only did not contain the terms and conditions which the defendant says they did not, but, so far as appears, they did not contain many other terms and conditions which are in the policies. Ordinarily it is not expected that an application for insurance will contain all the terms and conditions which are included in the policy when it is issued. Certain particulars are named; others are not. The application is for such insurance on such terms and conditions as, in view of the particulars submitted, the company sells. It is to be presumed that,

[11] German American Ins. Co. v. Darrin, 80 Kan. 578, 103 Pac. 871, 38 Ins. L. J. 1008.

[12] Pfiester v. Missouri State Life Ins. Co. 85 Kan. 97, 116 Pac. 245, 40 Ins. L. J. 1651.

Presumption that terms of policy in conformity with application, see Lee v. Union Central Life Ins. Co. 22 Ky. L. Rep. 1712, 56 S. W. 724, 29 Ins. L. J. 516.

[13] Blunt v. Fidelity & Casualty Co. 145 Cal. 268, 67 L.R.A. 793, 104 Am. St. Rep. 34, 78 Pac. 729, 34 Ins. L. J. 166.

as in other cases, the purchaser has made himself acquainted with what he is purchasing. On the delivery of the policy, therefore, the contract becomes complete without any further assent on the part of the insured. Possibly, if the policy contains any extraordinary provisions such as are generally or often found in policies, the insured on receiving it might have a right to rescind. But that was not the case here. Morever, the plaintiff is a mutual company. . . . The provision contained in one of the policies in regard to coinsurance or average is not shown to have been an unusual or extraordinary provision, and it appears that the brokers who were acting for the defendant knew that it was frequently inserted in policies, and knew when the applications were sent what the uniform provisions of the policies issued by the plaintiff were." [14]

§ 55c. Proposal and acceptance: counter propositions.—If the applicant rejects the contract offered and makes a counter proposition and refuses to pay the premium until it is accepted, there is no contract unless such proposition is accepted and notice of acceptance given to the proposer.[15] If the company rejects the application and makes a counter proposition which is accepted and the required premium is paid it is a valid insurance contract even though no policy of insurance is issued.[16] But if the insurer replies to the application by proposing different terms, or by sending a policy differing in essential matters no contract is made until the counter proposition or policy has been accepted by the applicant.[17]

§ 55d. Whether acceptance of offer should be communicated to proposer.—A contract may be completed by notice of acceptance, as where there was some correspondence as to the rate of premium and the applicant finally notified the company that he agreed to the rate required, it was held that a valid contract of insurance had been made.[18]

[14] Commonwealth Mutual Fire Ins. Co. v. Wm. Knabe & Co. 171 Mass. 265, 50 N. E. 516, 29 Ins. L. J. 34, per Morton, J., *cited* in Paquette v. Prudential Ins. Co. 193 Mass. 215, 220, 79 N. E. 250, to point that a policy of life insurance may contain conditions not found in the application, but outside of any independent agreement the application and policy together usually form the contract.

[15] Equitable Life Assurance Soc. v. McElroy, 83 Fed. 631, 49 U. S. App. 548, 28 C. C. A. 365, 27 Ins. L. J. 561. *Examine* Manson v. Metropolitan Surety Co. 112 N. Y. Supp. 886, 128 App. Div. 577, aff'd (mem.) 199 N. Y. 590. But see § 55d herein.

[16] Carter v. Bankers Life Ins. Co. 83 Neb. 810, 120 N. W. 455. See § 66c herein.

[17] See Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co. 92 Mich. 482, 491, 20 L.R.A. 277, 289, 52 N. W. 1070, 1073. See §§ 66e–66h herein.

[18] Eames v. Home Ins. Co. 94 U. S. 621, 24 L. ed. 298. See this case under § 45 herein.

As to negotiations through mail or telegrams, see §§ 62, 62a, 63 herein.

So where the company's officers merely place an initial letter on the application, upon notice to the applicant that the policy is prepared and ready for him there is an acceptance by the company.[19] But the question has been raised as to the necessity of such a communication and in a Federal case it is directly held that the acceptance of an offer not communicated to the proposer does not make a contract, but this was a case of a counter proposition.[20] In a New Hampshire case it is also decided that the acceptance to be complete must be actually communicated to the offerer, except that in cases of offers by mail or telegraph constructive notice of acceptance may be sufficient.[1] In a West Virginia case it is held that a contract cannot bind the party proposing it, until the acceptance of the other party is in some way actually or constructively communicated to him.[2] In an Indiana case it is deter-

Delivery: notice to assured of execution of policy, see § 100 herein.

Binding slip, etc., see §§ 65 et seq. herein.

[19] Armstrong v. Provident Saving Life Assur. Soc. (D. C. Ont.) 2 Ont. L. Rep. 771.

[20] Equitable Life Ins. Co. v. McElroy, 83 Fed. 631, 49 U. S. App. 548, 28 C. C. A. 365, 27 Ins. L. J. 561. The court, per Sanborn, C. J., cites Kendall's Admr. v. Pacific Mutual Life Ins. Co. 51 Fed. 689, 2 C. C. A. 459, 10 U. S. App. 256; Jenness v. Iron Co. 53 Me. 20, 23; Thayer v. Middlesex Mutual Fire Ins. Co. 10 Pick. (27 Mass.) 325, 331; McCullough v. Eagle Ins. Co. 1 Pick. (18 Mass.) 278; Beckwith v. Cheever, 21 N. H. 41, 44; White v. Corlies, 46 N. Y. 467; Borland v. Guffey, 1 Grant's Cas. (Pa.) 394; Duncan v. Heller, 13 S. C. 94, 96.

"An acceptance which does not go beyond an uncommunicated mental determination, cannot create a binding agreement simply because the intention to accept did in fact exist. . . . But in the rule that acceptance of an offer must be communicated, the word 'communicated' does not mean actual notice." Lawson on Contracts (ed. 1905) sec. 26. See 1 Page on Contracts (ed. 1905) sec. 43, where the cases considered are to the effect that a communication or notice of acceptance is necessary. "A mere mental intention to accept, not followed by such act or notice as is sufficient in law to charge the party making the offer with notice of the acceptance, does not have any legal effect in converting the offer into a contract." Id.

[1] Busher v. New York Life Ins. Co. 72 N. H. 551, 58 Atl. 41, 33 Ins. L. J. 761. See Kilcullen v. Metropolitan Life Ins. Co. 108 Mo. App. 61, 82 S. W. 966, holding that there was no completed contract, and no communicated acceptance of the application.

[2] McCully's Admr. v. Phœnix Mutual Life Ins. Co. 18 W. Va. 782, (following the language of 1 Parsons' Con. 483). In this case the application provided that the "contract shall be completed only by the delivering of the policy," but the above was also decided as a general principle. The court said: "In the case of Barr v. Insurance Co. of North America, 61 Ind. 488, it was held that a company may be bound, though no policy was issued; but there must be a valid contract subsisting between the parties. A mere acceptance of the proposition by the company would not create a valid contract without a notification to the insured. . . . In Hobb's Case, Law Rep. 4 Eq. 9, it was held, that a

mined that in case of a mere offer or bare proposal, mental determination to accept or even acts done in pursuance thereof are not sufficient to bind the party who makes the offer, a reciprocal promise is required, and therefore in addition to consent the party to whom the offer is made must communicate his acceptance directly or constructively to the other party, that is he must, in the latter case, use such agency as amounts to constructive notice.[3] In Massachusetts it is held that where the application provides that it must be received and accepted by the company before it is liable and that it is not responsible for money paid to any other than its treasurer, or those authorized by him in writing, the signing of an application and the payment of money to an agent by the applicant constitutes no acceptance even though the company had received the application and had been intending to accept it, and had made some minutes on it at the home office but had changed its intention when it heard of an accident to the applicant, no acceptance having been communicated to him prior thereto.[4]

But under a Michigan decision actual acceptance at the home office may be sufficient without notice of acceptance especially so where the application provides that the contract shall be complete upon such approval.[5] And where upon the same day that an application was filed and the premium offered, the company made out and signed the policy, it thereby ratified the application and its consent was complete.[6] In Oklahoma proof of approval of an application, independently of the issuance and delivery of a policy, may be made by direct evidence of the act of approval itself, or in an implied way by the acceptance and application of the premium, and it is declared that the correct rule seems to be that the obligation of the insurer or insurance company depends on the fact of the acceptance or approval of the application for insurance and not on notice of such acceptance to the insured.[7] And the sole question should be, as we have stated elsewhere,[8] whether the insurer has signified his acceptance by some binding act from

proposed contract is not binding on the party who proposes it until its acceptance by the other party has been communicated to him or his agent. Vide also Dunlop v. Higgins, 1 H. L. Cases, 381; Tayloe v. Merchants Fire Ins. Co. 9 How. (50 U. S.) 390, 402, 13 L. ed. 187; Trevor v. Wood, 36 N. Y. 307."

[3] New v. Germania Fire Ins. Co. 171 Ind. 33, 131 Am. St. Rep. 245, 85 N. E. 703. Question of acceptance by mail, although general principle held to be as above stated.

[4] Allen v. Massachusetts Mutual Accident Assoc. 167 Mass. 18, 44 N. E. 1053, 26 Ins. L. J. 316.

[5] Robinson v. United States Benevolent Soc. 132 Mich. 695, 102 Am. St. Rep. 436, 94 N. W. 211.

[6] Keim v. Home Mutual Fire Ins. Co. 42 Mo. 38, 97 Am. Dec. 291.

[7] Van Arsdale-Osborne Brokerage Co. v. Cooper, 28 Okla. 598, 115 Pac. 779, 40 Ins. L. J. 1625.

[8] See § 55 herein.

which he cannot recede. The test is not intention alone but whether that intention has been effected.

§ 55e. Protection by insurer pending approval; date when policy in force.—A notification from an insurance company that it would protect until the application is acted upon does not place the insurance in force from that date for the purpose of determining the truthfulness of statements in the application at the inception of the contract.[9]

§ 56. Qualified acceptance: conditions precedent.—An acceptance may be qualified or made dependent upon the performance of some condition precedent, in which case notice of compliance therewith will bind the insurer. This is illustrated by a case where a person having an interest in an academy building applied to the agent of a mutual office for insurance, paid what cash was required, and gave the necessary premium note. The insurance company agreed to issue a policy on the application on certain alterations being made in the building, and on authority from the trustees of the academy to effect the insurance. These conditions were complied with, and the agent was notified to examine the building, which he did not do. It was held that the risk commenced from the time of the notice that the conditions were performed.[10] In case of a conditional acceptance of the risk, if the conditions specified are not complied with no valid contract is effected,[11] and if the time or place of acceptance is specified, the acceptance must conform thereto.[12] In case the policy does not conform to that contemplated by the application, there must be an acceptance of such policy, or there is no binding contract, and where there is such a change of terms acceptance by the company is a qualified acceptance which the applicant is not bound to accept and if he does not accept the company is not bound.[13] Again, the acceptance may be qualified by the terms of the binding receipt as where the insurance is to be effective from the date of the receipt subject however to the company's approval or rejection of the risk.[14]

§ 57. Acceptance: delay in acting on application.—There is, as we have seen, no obligation resting upon the insurer to accept

[9] Carleton v. Patrons Androscoggin Mutual Fire Ins. Co. 109 Me. 79, 39 L.R.A.(N.S.) 951, 82 Atl. 649. See §§ 59, 64–66 herein.

[10] Hamilton v. Lycoming Ins. Co. 5 Pa. St. 339.

[11] Gauntlett v. Sea Ins. Co. 127 Mich. 504, 86 N. W. 1047. See also Quill v. Boston Ins. Co. 197 Mass. 216, 83 N. E. 401.

[12] Eliason v. Henshaw, 4 Wheat. (17 U. S.) 225, 4 L. ed. 556.

[13] Mutual Life Ins. Co. v. Young, 23 Wall. (90 U. S.) 85, 23 L. ed. 152.

[14] Mohrstadt v. Mutual Life Ins. Co. 115 Fed. 81, 52 C. C. A. 675. See §§ 64, 96 herein.

a proposal or application for insurance,[15] and therefore delay in acting thereon will not in itself warrant a presumption of acceptance.[16] Thus, in an Alabama case, a receipt was given by an agent reciting that the applicant was to be considered insured from date, "if said application shall be approved and accepted by said company." After several weeks the application was rejected, and it was held that no acceptance could be implied from such delay, even though the note for the premium was not surrendered, it not appearing that the agent claimed the power to contract.[17] So the company will not be bound by a mere delay of five months without reply to the proposal;[18] nor by a delay of two months and the retention of a note for the first premium;[19] nor will unreasonable delay bind the company,[20] and it was held a question for the jury whether a delay of twenty seven days was unreasonable;[1] and where the application provided "the policy to bear date and take effect at noon of the day this application is approved," this was held to mean approval by the home or principal office, and that a delay of eighteen days before rejecting the application would not warrant a presumption of acceptance.[2] In another case an application for fire insurance was made to a mutual company August 7th, the application being subject to the approval of the directors, and was delivered to one of the directors August 9th. On the 19th of August the directors had a meeting for the transaction of special business, and no action was at that time taken on the application. August 30th the house was burned. September 25th, at the first regular meeting of the executive committee, the application was rejected, and the committee's action was approved by the directors. It was held that there was no such negligence on the part of the company as would entitle the plaintiff to recover.[3]

Again, an insurance company does not, by delay in passing

[15] § 53 herein.

[16] Equitable Assurance Soc. v. McElroy, 83 Fed. 631, 49 U. S. App. 548, 28 C. C. A. 365, 27 Ins. L. J. 561; Herman v. Phœnix Mutual Life Ins. Co. 17 Minn. 153; Hallock v. Commercial Ins. Co. 26 N. J. L. 268, 27 Id. 645, 72 Am. Dec. 379; Haskin v. Agricultural Fire Ins. Co. 78 Va. 707.

That mere delay in acting upon an application cannot be construed into an acceptance is supported by an overwhelming weight of authority. See notes 36 L.R.A.(N.S.) 1211, and 51 L.R.A.(N.S.) 873.

[17] Alabama Gold Life Ins. Co. v. Mayes, 61 Ala. 163.

[18] New York Mutual Ins. Co. v. Johnson, 23 Pa. St. 72.

[19] Ross v. New York Life Ins. Co. 124 N. Car. 395, 32 S. E. 733.

[20] Misselhorn v. Mutual Reserve Fund Life Assn. 30 Fed. 545, per Brewer, J.

[1] Duffy v. Bankers Life Assoc. 160 Iowa, 19, 46 L.R.A.(N.S.) 25, 139 N. W. 1087.

[2] Winnesheik Ins. Co. v. Holzgrafe, 53 Ill. 516, 5 Am. Rep. 64.

[3] Harp v. Grangers' Mutual Fire Ins. Co. 49 Md. 307.

upon an application presented by an uninsurable risk, assume the obligation of an insurer upon the theory that its conduct prevents the securing of insurance elsewhere and creates a legal presumption of acceptance.[4] And mere delay in rejecting a receipt for renewal of an accident policy does not amount to an acceptance which will continue the policy in force.[5] So where the agent, who knew of the rejection of the application, failed for eighteen days thereafter to notify the insured, and a fire occurred, the company is not liable.[6]

But retention of the premium and failure to reject within a reasonable time, may imply an acceptance;[7] and if through negligence of the agent the application is not received or acted upon, until a loss occurs, the company is liable.[8]

In case of a proposal by mail an offer to insure should be accepted within a reasonable time, or the party might assume that it was rejected.[9] But if the company agrees to notify the applicant of rejection of his proposal, and receives the application and premium note, but fails to send such notification for seven months, and the property is burned in the meantime, this is such a delay as to render the company liable.[10]

The applicant has also the right to assume that his application was rejected after a delay of forty days where the receipt for the premium so provided and no explanation of the delay was offered.[11]

§ 58. Transferred to §§ 66b–66j herein.

[4] Northwestern Mut. Life Ins. Co. v. Neafus, 145 Ky. 563, 36 L.R.A. (N.S.) 1211, 140 S. W. 1026.

[5] Richmond v. Travelers' Ins. Co. 123 Tenn. 307, 30 L.R.A.(N.S.) 954, 130 S. W. 790.

[6] More v. New York Bowery Fire Ins. Co. 130 N. Y. 537, 29 N. E. 757, rev'g 10 N. Y. Supp. 44, 55 Hun 540.

[7] Robinson v. United States Benevolent Soc. 132 Mich. 695, 102 Am. St. Rep. 436, 94 N. W. 211 (in this case application was made June 29, accepted June 30; policy was received by agent July 2, and insured was killed July 2). The court, per Grant, J., *considers* Preferred Accident Ins. Co. v. Stone, 61 Kan. 48, 58, 986, and *quotes* therefrom as follows: "The retention of the premium and its failure to reject the application, its holding of it while it took time to adjust a matter of concern only to itself were tantamount to an acceptance of the application of an agreement to issue the policy." In this case insured met with an accident before the policy was delivered. The court in the principal case also *considers* Campbell v. American Fire Ins. Co. 73 Wis. 100, 40 N. W. 661; New York Life Ins. Co. v. Babcock, 104 Ga. 67, 69 Am. St. Rep. 134, 42 L.R.A. 88, 30 S. E. 273, and *cites* Continental Ins. Co. v. Haynes, 10 Ky. L. Rep. 276; Hartford Fire Ins. Co. v. King, 106 Ala. 519, 17 So. 507.

[8] Fish v. Cottenet, 44 N. Y. 538.

[9] Thayer v. Middlesex Mutual Fire Ins. Co. 10 Pick. (27 Mass.) 326.

[10] Somerset County Mutual Fire Ins. Co. v. May, 2 Week. Not. Cas. (Pa.) 43.

[11] Stillwell v. Covenant Mutual Life Ins. Co. 83 Mo. App. 215.

§ 59. Agent's agreement: liability not to attach till approval.—If the application provides that no liability shall attach until approval by the principal, such approval is necessary to complete the contract, and if a loss occurs before such approval, the insurance company is not liable, though the premium has been delivered to the local agent.[12] If a person applies for life insurance and pays an amount equal to the first premium, but the application and the receipt for the money paid stipulate that the insurance is to become effective only when the application is approved and the policy issued, the transaction does not amount to an agreement for preliminary or temporary insurance.[13] And where if an agent has authority merely to receive applications and forward the same for approval and to deliver policies and receive premiums, and the applicant knows the extent of the agent's authority, but that the policy was to be issued by the general agent on his approval of the risk, and the risk is rejected after the property is burned, but without knowledge of the fact, there is no valid contract of insurance.[14] In another case an insurance solicitor received a written application for insurance, with the understanding that no liability should attach until approval by the company. The solicitor also accepted the premium and gave a receipt therefor providing that it should be returned in case of nonapproval of the risk. The solicitor mailed the application and premium to the company, but the company never received or heard of them, no policy was issued, and the premium was not returned to the applicant. It was decided that the company was not liable.[15] In a New York case a general agent appointed a subagent, with authority to make contracts for insurance which should be binding upon the company from the date of application until, upon reference to the general agent, they should be rejected. The plaintiff claimed to have been appointed a subagent, and sent a letter proposing insurance. The letter was delivered to the general agent. There was conflicting evidence as to whether the latter read plaintiff's letter until after he had knowledge of the fire; but after he knew of the fire he executed and delivered a policy to the plaintiff, and it was held that the policy was invalid, and that the agent had no authority to issue a policy to himself.[16]

An application to an insurance company for a policy of fire

[12] Pickett v. German Fire Ins. Co. 39 Kan. 697, 18 Pac. 903; Jacobs v. New York Life Ins. Co. 71 Miss. 658, 29 Atl. 606. See §§ 64–66, 96 herein.

[13] Cooksey v. Mutual Life Ins. Co. 73 Ark. 117, 108 Am. St. Rep. 26, 83 S. W. 317.

[14] Fleming v. Hartford Fire Ins. Co. 42 Wis. 616.

[15] Atkinson v. Hawkeye Ins. Co. 71 Iowa, 340, 32 N. W. 371. This was a fire risk; the agent was a soliciting agent only.

[16] Bentley v. Columbia Ins. Co. 17 N. Y. 421.

insurance, and a promise by its agent to attend in due time to the matter of taking such further steps as were necessary to effect the insurance, subject to the action of the insurer, do not constitute a valid contract for insurance in præsenti.[17] If the application taken by a local agent is conditioned that it shall attach only upon the general agent's approval, and he approves it, but with a modification which the applicant accepts, a subsequent approval by the general agent is unnecessary.[18]

§ 59a. Usage or custom that agents can bind insurer until notice of refusal.—A general usage or custom to the effect that persons authorized to solicit insurance can bind their principal until notice of the refusal of the risk is received by the agent and communicated to the person desiring insurance is valid, and is binding both upon stock and mutual insurance corporations insuring against loss by fire.[19]

§ 60. Approval may be implied from the circumstances.—Receipt of a premium from a local agent, by the general agent, followed by an instruction from the latter to the former to cancel the policy, will be such a recognition of the existence of the policy as to constitute the requisite "approval" of the general agent for its validity;[20] and if after the execution and delivery of a policy by an agent of the insurers duly authorized to make insurance upon vessels and who had in fact previously insured the same vessel for the same applicant, a memorandum is signed by the insured that the insurance is to take effect "when approved by the general agent at Buffalo," and a loss occurs, the insurers are liable although the insurance was disapproved by the general agent, who directed the agent to return the premium note and cancel the policy; no notice of the disapproval having been given to the insured till after the loss.[1] Again, the insurance was to inure from the time of the payment of the premium to the agent, provided the company approved the risk, and the agent having had negotiations with a party accepted a premium for insurance for a certain sum to commence then, and gave a receipt therefor as agent. Before

[17] Whitman v. Milwaukee Fire Ins. Co. 128 Wis. 124, 116 Am. St. Rep. 25, 5 L.R.A.(N.S.) 407 (annotated on the requisites of an oral contract of insurance) 107 N. W. 291.

[18] Born v. Home Ins. Co. 120 Iowa, 299, 94 N. W. 849.

[19] Brown v. Franklin Mut. Fire Ins. Co. 165 Mass. 565, 52 Am. St. Rep. 534, 43 N. E. 512. See also Insurance Co. of Valley of Va. v. Mordecai, 22 How. (63 U. S.) 111, 16 L. ed. 329. *Cited* in Concordia Fire Ins. Co. v. Heffron, 84 Ill. App. 612; Underwood v. Greenwich Ins. Co. 161 N. Y. 413, 55 N. E. 936, 29 Ins. L. J. 149 (as to this last case see note 12 under § 66a herein). *Examine* §§ 46, 50, 65 herein.

[20] Ætna Ins. Co. v. Maguire, 51 Ill. 342. See § 73 herein.

[1] Ætna Ins. Co. v. Webster, 6 Wall. (73 U. S.) 129, 18 L. ed. 888.

the premium was received by the company or the policy made out the premises were burned. Had the premium been immediately remitted by the agent to the home office, it would have been received there before the loss. In the lower court it was held that there could be no binding contract until the receipt of the premium and approval of the risk at the home office. The court of errors, however, decided that a recovery could be had.[2]

§ 61. Oral agreement of agent may be controlled by application.—If the application particularly specifies when the contract will take effect, this, it is held, will control a contemporaneous oral agreement differing in terms therefrom, and made with the agent of the insurer, in a case where the plaintiff, at the solicitation of an agent signed an application for a policy, wherein it was provided that the policy should take effect from the day the application was approved and gave his note for the premium. The agent gave a receipt for the note, at the same time promising plaintiff that the policy would take effect from the date of the application. The application was sent to the principal office and was rejected; but, before the agent had informed plaintiff of the failure of the negotiations the property proposed to be insured was destroyed by fire. It was held that there was no valid contract of insurance.[3] And even though if the agent who solicited the insurance assured the applicant that it would go into effect at once, and he signs the application which stipulates that the insurer incurs no liability until the policy is issued and delivered, and the receipt for the first premium contains a like stipulation, the insurer incurs no liability until the policy is issued and delivered, nor can there be any recovery in the absence of such issuance and delivery, as such written contract governs and cannot be varied by parol evidence, and the applicant is negligent in not reading the agreement.[4] And where from the terms of the application the only reasonable and natural inference to be drawn is, that the insurance, if granted, would take effect from the date and delivery of the policy, a mere oral statement from an agent that the insurance if granted would be operative from the date of the application, is not binding, said agent's authority, known to the applicant, being limited to forwarding the application to the company for approval or rejection.[5]

§ 61a. Agent's statement that application accepted: when insurer estopped.—An insurance company may be estopped to repudiate

[2] Perkins v. Washington Ins. Co. 4 Cow. (N. Y.) 645, 6 Johns. Ch. (N. Y.) 485.

[3] Winnesheik Ins. Co. v. Holzgrafe, 53 Ill. 516, 5 Am. Rep. 64.

[4] Chamberlain v. Prudential Ins. Co. 109 Wis. 4, 83 Am. St. Rep. 85, 85 N. W. 128.

[5] Firemen's Fund Ins. Co. v. Rogers, 108 Ga. 191, 33 S. E. 954, 28 Ins. L. J. 1025.

the announcement of its agent that an application has been accepted if the applicant while relying thereon dies, or, by reason of intervening sickness, has become incapable of securing other insurance.[6]

§ 61b. Agent's statement that certificate or application binding: mutual benefit insurance.—A benefit certificate to which by its terms only a member of a particular association is entitled, is not void, because at the time the application is made the applicant is not a member of the association, if the agent soliciting the application agreed that the certificate should become binding when applicant was admitted into the association, and he was in fact admitted before a liability arose under the certificate.[7] So a mutual life insurance company whose by-laws reserve to its board of directors the power to accept the applications for insurance, but authorize the secretary to receive the applications and the advance premium thereon and conduct all correspondence with applicants in making insurance contracts, will be bound by the written, though erroneous, statement of that officer to an applicant that his application had been accepted, and that a policy would be issued, if, before making it, the secretary had received and was retaining the advance premium, and if the applicant died before either he or his beneficiary became aware of the real facts.[8]

§ 62. Completion of contract: negotiations through mail.—Negotiations are frequently carried on by mail, and some question has arisen as to what constitutes an acceptance in such cases. If the application and premium be mailed, and they are never received nor heard of by the company, no contract exists even though a receipt is given by the company.[9] In the well-known case of McCulloch v. The Eagle Insurance Company[10] a letter was written inquiring on what terms the company would take a risk for a stated amount on a certain brig and cargo between specified termini. The company replied stating the terms, and on the same day the answer was received the party wrote requesting a policy on the terms specified. The day before this letter of acceptance was mailed the company had written refusing the risk, which, however, was not re-

[6] Kimbro v. New York Life Ins. Co. 134 Iowa, 84, 12 L.R.A.(N.S.) 421, 108 N. W. 1025. See Christy v. North Brit. Ins. Co. 3 Ct. Sess. (1st series, 1825) p. 360, noted under § 45 herein. *Examine* §§ 64 et seq. herein.

[7] Delaney v. Modern Accident Club, 121 Iowa, 528, 63 L.R.A. 603, 97 N. W. 91.

[8] Moulton v. Masonic Mutual Benefit Soc. 64 Kan. 56, 67 Pac. 533. Examine Gillespie Home Tp. Mutual Fire Ins. Co. v. Prather, 105 Ill. App. 123, agent's authority an important factor.

[9] Atkinson v. Hawkeye Ins. Co. 71 Iowa, 340, 32 N. W. 371. See § 3300 herein.

[10] 1 Pick. (18 Mass.) 277.

ceived at the time of mailing the letter of acceptance. All the letters were duly received in regular course of mail by both parties. Upon a loss and action brought for recovery thereof the court held that there was no completed contract. In a later case, however, in the same state,[11] it was declared by the court in argument that a "notice actually put into the mail, especially if forwarded and beyond the control or revocation of the party sending it, may be a good notice."[12] In view of the McCulloch v. Eagle Insurance Company case, we will state that a locus poenitentiae exists so long as either party may withdraw. But the rule clearly is that the mailing a letter of acceptance in like cases completes the contract, as the locus poenitentiae is ended when the acceptance has passed beyond the control of the party, notwithstanding before that the company may have mailed another letter rejecting the risk, unless such notice has reached the insured before his acceptance had been mailed.[13] And if the acceptance is made by the deposit of a policy

[11] Thayer v. Middlesex Mutual Fire Ins. Co. 10 Pick. (27 Mass.) 326, 331.

[12] See also 1 Duer on Ins. (ed. 1845) 121. Mr. Phillips (1 Phillips on Ins. (3d ed.) p. 18, sec. 17) says: "The doctrine decidedly predominating in the cases, accordingly, is that a written offer by insurers of terms on which they will insure where the subject risks and terms are adequately specified, becomes binding on dispatch of an acceptance, provided the acceptance reaches them before being countermanded, and in reasonable time, or within the time prescribed."

[13] *United States.*—Taylor v. Merchants Fire Ins. Co. 9 How. (50 U. S.) 390, 13 L. ed. 187 (see citations of this case below, in this note).

Alabama.—Triple Link Mutual Indemnity Assoc. v. Williams, 121 Ala. 138, 77 Am. St. Rep. 34, 26 So. 19.

Arkansas.—Travelers Fire Ins. Co. v. Globe Soap Co. 85 Ark. 169, 122 Am. St. Rep. 22, 107 S. W. 386; Mutual Reserve Fund Life Assoc. v. Farmer, 65 Ark. 581, 47 S. W. 850.

Colorado.—Mutual Life Ins. Co. v. Reid, 21 Colo. App. 143, 121 Pac. 132.

Illinois.—National Mutual Church Ins. Co. v. Trustees Meth.-Epis. Church, 105 Ill. App. 143.

Indiana.—Swing v. National Pulp Co. 47 Ind. App. 199, 93 N. E. 1004, 40 Ins. L. J. 807.

Minnesota.—Kilborn v. Prudential Ins. Co. 99 Minn. 176, 108 N. W. 861, 35 Ins. L. J. 840.

Missouri.—Welsh v. Chicago Guaranty Fund Life Soc. 81 Mo. App. 30.

New Hampshire.—Busher v. New York Life Ins. Co. 72 N. H. 551, 58 Atl. 41, 33 Ins. L. J. 761, *considered* under § 62a herein.

New York.—Hammond v. International Ry. Co. 116 N. Y. Supp. 854, 63 Misc. 437, aff'd (mem.) 119 N. Y. Supp. 1127.

North Carolina.—Kendrick v. Mutual Benefit Life Ins. Co. 124 N. Car. 315, 70 Am. St. Rep. 592, 32 So. 728.

Texas.—Fidelity Mutual Life Assoc. v. Harris, 94 Tex. 25, 86 Am. St. Rep. 813, 57 S. W. 635.

Vermont.—Hartford Steam Boiler Inspection & Ins. Co. v. Lasher Stocking Co. 66 Vt. 439, 44 Am. St. Rep. 859, 29 Atl. 629.

West Virginia.—Galloway v. Standard Fire Ins. Co. 45 W. Va. 237, 31 S. E. 969, 28 Ins. L. J. 125.

England.—Adams v. Lindsell, 1 Barn. & Ald. 681, 6 Eng. Rul. Cas. 80.

in the mail, the contract is consummated, for the company thereby does an overt act which signifies that the policy should have present

See also 1 Wood's Fire Insurance, 2d ed. 40, sec. 15 et seq. and notes.

The case of Tayloe v. Merchants' Fire Ins. Co. cited above in this note, is *cited* on the above point in:

United States.—McDonald v. Chemical National Bk. 174 U. S. 610, 620, 43 L. ed. 1110, 19 Sup. Ct. 787; Patrick v. Bowman, 149 U. S. 411, 424, 37 L. ed. 795, 13 Sup. Ct. 811; Utley v. Donaldson, 94 U. S. 29, 45, 24 L. ed. 55; Pennsylvania Lumberman's Mutual Fire Ins. Co. v. Meyer, 126 Fed. 352, 354, 61 C. C. A. 254, 256; Sea Ins. Co. v. Johnston, 105 Fed. 286, 291, 44 C. C. A. 477, 482; Andrews v. Schreiber, 93 Fed. 369; Phenix Ins. Co. v. Schultz, 80 Fed. 337, 343, 42 U. S. App. 483, 25 C. C. A. 453, 459; Schultz v. Phenix Ins. Co. 77 Fed. 375, 394; Garrettson v. North Atchison Bank, 47 Fed. 869; Northwestern Mutual Life Ins. Co. v. Elliott, 7 Sawy. 21, 5 Fed. 225, 229; Winterport Granite & Brick Co. v. The Jasper, Holmes, 102, Fed. Cas. No. 17,898; Humphrey v. Hartford Fire Ins. Co. 15 Blatchf. 511, Fed. Cas. No. 6,875; Dodge, In re, 9 Ben. 482, 17 Nat. Bankr. Reg. 506, Fed. Cas No. 3,948; Garfielde v. United States, 11 Ct. Cl. 601.

Alabama.—Mobile Marine Dock & Mutual Ins. Co. v. McMillan, 31 Ala. 711, 720.

Arkansas.—State Mutual Fire Assoc. v. Brinkley Stave & Heading Co. 61 Ark. 1, 5, 25 L.R.A. 713, 54 Am. St. Rep. 191, 31 S. W. 869.

Georgia.—Hollingsworth v. Germania, Niagara, Hanover & Republic Fire Ins. Cos. 45 Ga. 294, 297, 12 Am. Rep. 579.

Illinois.—Firemen's Ins. Co. v. Kuessner, 164 Ill. 275, 280, 45 N. E. 540; Haas v. Myers, 111 Ill. 421, 426, 53 Am. Rep. 634; Hartford Fire Ins. Co. v. Farrish, 73 Ill. 166, 168; Continental Ins. Co. v. Roller, 101 Ill. App. 80.

Indiana.—Barr v. Ins. Co. of North America, 61 Ind. 488, 495; New England Fire & Marine Ins. Co. v. Robinson, 25 Ind. 536, 539; Kentucky Mutual Ins. Co. v. Jenks, 5 Ind. 96, 100; Western Assur. Co. v. McAlpin, 23 Ind. App. 220, 223, 77 Am. St. Rep. 423, 55 N. E. 119; Union Central Life Ins. Co. v. Pauley, 8 Ind. App. 85, 94, 35 N. E. 190.

Iowa.—Ferrier v. Storer, 63 Iowa, 484, 487, 50 Am. Rep. 752, 19 N. W. 288.

Kansas.—Preferred Accident Ins. Co. v. Stone, 61 Kan. 48, 53, 58 Pac. 986.

Kentucky.—Security Fire Ins. Co. v. Kentucky Marine & Fire Ins. Co. 7 Bush (Ky.) 81, 86, 3 Am. Rep. 301.

Maryland.—Latrobe v. Winans, 89 Md. 636, 647, 43 Atl. 829; Hand v. Evans Marble Co. 88 Md. 226, 231, 40 Atl. 899; Phœnix Ins. Co. v. Ryland, 69 Md. 437, 447, 1 L.R.A. 548, 550, 16 Atl. 109; Wheat v. Cross, 31 Md. 99, 103, 1 Am. Rep. 28.

Massachusetts.—Brauer v. Shaw, 168 Mass. 198, 201, 60 Am. St. Rep. 387, 46 N. E. 617; Sanborn v. Firemen's Ins. Co. 16 Gray (82 Mass.) 448, 454, 77 Am. Dec. 419.

Michigan.—Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co. 92 Mich. 482, 491, 20 L.R.A. 277, 289, 52 N. W. 1070.

Minnesota.—Horn v. Western Land Assoc. 22 Minn. 236; Heiman v. Phœnix Mutual Life Ins. Co. 17 Minn. 153, 157, Gil. 127, 10 Am. Rep. 154; Lanz v. McLaughlin, 14 Minn. 72, 75, Gil. 55.

Mississippi.—Alabama Gold Life Ins. Co. v. Herron, 56 Miss. 643, 646; Robertson v. Cloud, 47 Miss. 210.

Missouri.—Day v. Mechanics & T. Ins. Co. 88 Mo. 325, 337, 57 Am. Rep. 416; Lungstrass v. German Ins. Co. 48 Mo. 201, 204, 8 Am. Rep. 100; Keim v. Home Mutual Fire & Marine Ins. Co. 42 Mo. 38, 41, 97 Am. Dec.

vitality.[14] And where a properly addressed contract is deposited in the post office it constitutes a delivery there.[15] And the deposit of a policy in the mail properly addressed to the insured, with postage prepaid is a delivery to him even though death, sickness or loss occurs thereafter but before the policy is received, and a recovery may be had for such loss or death.[16] If, however, the postage is not

291; Wallingford v. Home Mutual Fire & Marine Ins. Co. 30 Mo. 46, 55; Misselhorn v. Mutual Reserve Fund Life Assoc. 30 Mo. App. 589, 600; Estey v. Truxel, 25 Mo. App. 238, 245.

New Hampshire.—Davis v. Home Manufacturers Ins. Co. 67 N. H. 218, 219, 34 Atl. 464.

New Jersey.—McClave v. Mutual Reserve Fund Life Assoc. 55 N. J. L. 187, 191, 26 Atl. 78; Northampton Mutual Live Stock Ins. Co. v. Tuttle, 40 N. J. L. 479; Hallock v. Commercial Ins. Co. 26 N. J. L. 268, 283, 27 N. J. L. 645.

New York.—Bentley v. Columbia Ins. Co. 17 N. Y. 421, 423; McCluskey v. National Life Assoc. 77 Hun, 556, 558, 28 N. Y. Supp. 931; Post v. Aetna Ins. Co. 43 Barb. (N. Y.) 351,

North Carolina.—Wylie v. Brice, 70 N. Car. 425.

Ohio.—Palm v. Medina County Mut. Fire Ins. Co. 20 Ohio, 529, 539.

Oregon.—Hacheny v. Leary, 12 Oreg. 40, 43, 7 Pac. 329.

Pennsylvania.—Hamilton v. Lycoming Ins. Co. 5 Pa. St. 339; McKee v. Harris, 16 Phila. 150. See Standard Wheel Co. v. Phoenix Ins. Co. 29 Pa. Co. Ct. Rep. 367.

Tennessee.—Otis v. Payne, 86 Tenn. 663, 666, 8 S. W. 848.

Texas.—Matkin v. Supreme Lodge Knights of Honor, 82 Tex. 301, 303, 27 Am. St. Rep. 886, 18 S. W. 306; Blake v. Hamburg Bremen Fire Ins. Co. 67 Tex. 160, 163, 60 Am. Rep. 15, 2 S. W. 368.

West Virginia.—McCully v. Phoenix Mutual Life Ins. Co. 18 W. Va. 782, 785; Woody v. Old Dominion Ins. Co. 31 Gratt. (Va.) 362, 364, 31 Am. Rep. 732.

Wisconsin.—Fuller v. Madison Mutual Ins. Co. 36 Wis. 599, 603.

As to the general rule in other contracts that the acceptance takes effect from the mailing of the letter of acceptance and a retraction from the receipt of the letter. See the following cases:

Georgia.—Bryan v. Booze, 55 Ga. 438.

Iowa.—Ferrier v. Storer, 63 Iowa, 484, 50 Am. Rep. 752, 19 N. W. 288.

Kentucky.—Hutcheson v. Blakeman, 3 Met. (Ky.) 80.

Maryland.—Stockham v. Stockham, 32 Md. 196; Wheat v. Cross, 31 Md. 99, 1 Am. Rep. 28.

New Hampshire.—Abbott v. Shepherd, 48 N. H. 14, 17.

New Jersey.—Potts v. Whitehead, 20 N. J. 55.

Pennsylvania.—Greer v. Chartiers R. Co. 96 Pa. St. 391, 42 Am. R. 548.

Wisconsin.—Washburn v. Fletcher, 42 Wis. 152.

England.—Duncan v. Topham, 8 Comm. B. (O. S.) 225.

See also 2 Kents Comm. (13th ed.) 477 and cases in the paragraph last preceding in this note.

[14] Tayloe v. Merchants' Fire Ins. Co. 9 How. (50 U. S.) 390, 13 L. ed. 187; Oliver v. American Legion of Honor (Cal. 1882) 17 Am. L. Rev. 301; Commercial Ins. Co. v. Hallock, 27 N. J. L. 645; Hallock v. Commercial Ins. Co. 26 N. J. L. 268, 72 Am. Dec. 379; Vassar v. Camp, 11 N. Y. 441; Mactier v. Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262, 2 Kent's Commentaries, 13th ed. 477. See Eames v. Home Ins. Co. 94 U. S. 621, 24 L. ed. 298.

[15] Galloway v. Standard Fire Ins. Co. 45 W. Va. 237, 31 S. E. 969, 28 Ins. L. J. 125. See § 231 herein.

[16] Triple Link Mutual Indemnity

prepaid there is no presumption that it was received by addressee, and depositing a letter without postage is not prima facie evidence of its receipt,[17] as a proposal by mail requesting an answer may be withdrawn before it is accepted but not thereafter.[18] The underlying principle is this, that a person makes the mail, or similar agency his agent to receive the acceptance, by making his offer through that medium and the acceptance when mailed or properly delivered, as in case of a telegram, is then constructively communicated to the proposer, except of course, where the proposal has been withdrawn prior to said mailing or delivery.[19] So where the status of the parties becomes fixed by a completed contract of insurance it cannot be affected and the contract ignored or repudiated by subsequent letters.[20] A policy is also delivered when mailed from the home office to the agent for delivery to assured.[1] If an application is accepted and the contract is put in force by issuing and mailing a policy, the fact that it is then sent to an insurance agent for unconditional delivery does not alter the effect of the transaction.[2] If an applicant for insurance delivers his application to the special agent of a foreign insurance company, who transmits it to the office of the company, and the policy is issued and mailed to the applicant, the contract takes effect when the policy is mailed. It being a foreign contract the question as to whether the insurance company, or its agent, had a license to transact business in the state where the application was made is immaterial in an action by the company to recover a premium.[3]

Assoc. v. Williams, 121 Ala. 138, 77 Am. St. Rep. 34, 26 So. 19, 28 Ins. L. J. 621; Travelers Fire Ins. Co. v. Globe Soap Co. 85 Ark. 169, 122 Am. St. Rep. 22, 107 S. W. 386; Mutual Reserve Fund Life Assoc. v. Farmer, 65 Ark. 581, 47 S. W. 850; Kimbro v. New York Life Ins. Co. 134 Iowa, 84, 12 L.R.A.(N.S.) 421, 108 N. W. 1025, 35 Ins. L. J. 57. See §§ 103–108 herein.

On presumption as to receipt of communication sent through mail, see note in 49 L.R.A.(N.S.) 458. On effect of death of party after the mailing but before the receipt of his letter accepting an offer, see note in 12 L.R.A.(N.S.) 439.

[17] Welsh v. Chicago Guaranty Fund Life Soc. 81 Mo. App. 30.

[18] Jones v. New York Life Ins. Co. 15 Utah, 522, 50 Pac. 620.

[19] Busher v. New York Life Ins. Co. 72 N. H. 551, 58 Atl. 41, 33 Ins. L. J. 761, *considered* under § 62b.

[20] Welsh v. Chicago Guaranty Fund Life Soc. 81 Mo. App. 30.

[1] Mutual Life Ins. Co. v. Reid, 21 Colo. App. 143, 121 Pac. 132.

On where insurance contract is deemed to have been made when policy is mailed to local agent of insurer see notes in 63 L.R.A. 840; 23 L.R.A.(N.S.) 969; 52 L.R.A.(N.S.) 276; or to insured or his agent, see note in 52 L.R.A.(N.S.) 275.

[2] Fidelity Mutual Life Assoc. v. Harris, 94 Tex. 25, 36 Am. St. Rep. 813, 57 S. W. 635.

[3] Hartford Steam Boiler Inspection & Ins. Co. v. Lasher Stocking Co. 66 Vt. 439, 44 Am. St. Rep. 859, 29 Atl. 629. See Harrigan v. Home Life Ins. Co. 128 Cal. 531, 58 Pac. 180, 61 Pac. 99.

In a case in the United States circuit court a life insurance, upon due application, was issued under a contract with the local agent, whereby it was substantially agreed that the agent should pay the first quarter's premium and take the applicant's note for the same, and the policy was mailed from the home office July 28, 1885, and received by the local agent August 5, 1885, but was never actually delivered into the possession of the applicant, who was taken ill August 6th, and died September 9, 1885, and it was held that as between the applicant and the company the policy became effective and binding when placed in the mail July 28, 1885, and if not then, certainly when it reached the hands of the agent, August 5, 1885.[4] So, also, where an accident policy was sent by mail but did not reach its destination until after the death of assured, it was held that the contract was complete when the policy was deposited in the mail and credit given for the premium.[5] And where a policy insuring against loss by boiler explosion was deposited in the mail, together with the report of the company's boiler inspector and suggestions as to changes in the setting of the boiler, it was held that the contract was complete and that compliance with the suggestions was not a condition precedent to the completion of the contract.[6] Again, if at the direction of the insurer's agent a check for the premium is sent by mail to the company, the time of payment is that of the mailing, where the check is honored.[7] And where a new policy, substituted for the old one, in accordance with an agreement, is delivered by mail, the old one being surrendered, the contract is completed even though the premium is not prepaid as required and a delivery in person is also required.[8] A proposal by an insurance company by letter to renew a policy must be accepted or there is no binding contract.[9]

§ 62a. Employers' liability insurance: when contract incomplete: negotiations with insurance agent through mail.—The rule that the minds of the parties must meet on all the essential elements of the contract[10] applies to employers' liability insurance; and when a contractor holds such an insurance covering or connected

[4] Young v. Equitable Life Ins. Co. 30 Fed. 902.

[5] Dailey v. Preferred Masonic Mutual Accident Assn. 102 Mich. 289, 26 L.R.A. 171, 57 N. W. 184. Reversed upon other points on rehearing, 102 Mich. 299, 60 N. W. 694.

[6] Hartford Steam-Boiler Inspection & Ins. Co. v. Lasher Stocking Co. 66 Vt. 439, 44 Am. St. Rep. 859, 29 Atl. 629.

[7] Kendricks v. Mutual Benefit Life Ins. Co. 124 N. Car. 315, 70 Am. St. Rep. 592, 32 S. E. 728; Tayloe v. Merchants Fire Ins. Co. 9 How. (50 U. S.) 390, 13 L. ed. 187.

[8] Lamb v. Mutual Reserve Fund Life Assoc. (U. S. C. C.) 106 Fed. 637, aff'd 108 Fed. 961, 48 C. C. A. 164, s. c. 109 Fed. 81.

[9] W. P. Harper & Co. v. Ginners Mutual Ins. Co. 6 Ga. App. 139, 64 S. E. 567.

[10] See §§ 45 et seq. herein.

with certain work, on beginning another piece of work writes to the insurer's general agent that he understands that the policy covers the new work but is advised by the agent, by letter, that it is not covered but that he will bind the risk until the contractor decides just what he wants to do, and requests the latter to call him up on the telephone the following day, or that he will come to see the contractor on that day if the latter so desires, and no reply is made to the agent's communication, the two letters do not constitute a contract of insurance on which the insurer is liable for an injury to an employee occurring ten days after the negotiations.[11]

§ 62b. Contracts of insurance: telegraphic agency.—Contracts may be made through the medium of a telegraph, as well as through the mail and such contracts are as binding and obligatory as if made in the ordinary way. The entire transaction may be by telegraphic communication entirely or partly by letters and partly by telegram, or the telegraphic communication may be one of several factors necessary to constitute a complete contract. An acceptance by telegram must be one that binds both the proposer and acceptor. Where the telegraph is adopted as the medium of communication between parties contemplating a contract, an acceptance of a proposal completes the contract, if sent within the time agreed upon, or if no time is specified or indicated, then if sent within a reasonably prompt time, having in view all the circumstances. The time of telegraphing is the time from which the contract becomes closed and binding; or to be more exact, the time when the proper telegram is deposited in the telegraph office, or delivered to the telegraph company or its authorized agent for transmission, is the time from which the completion of the contract dates. This is by analogy to the acceptance of a proposal through the mail. This rule assumes, of course, that the offer has not been withdrawn at the time of such acceptance. Where the proper telegram accepting a proposal is sent as above, a subsequent revocation of the proposition will not be effectual as against the contract or the accepting party, even though such revocation be telegraphed by the proposer before the message of acceptance is received by him. And this rule as to acceptance applies, it is held, even though the telegram so accepting does not reach the proposer.[12] The above rules may be qualified by the rule stated in the preceding section as to negotiations by mail, and locus poenitentiae.[13] In case a proposal for insurance is made by telegram the contract is completed by delivery at the tele-

[11] Bradley v. Standard Life & Accident Ins. Co. 98 N. Y. Supp. 797, 112 App. Div. 536.

[12] Joyce on Electric Law (2d ed.) secs. 878–910a.

[13] See § 62 herein.

graph office and placing beyond the acceptor's control a properly addressed telegram accepting the proposal.[14]

If negotiations are carried on by telegrams and there is a *conditional acceptance* of the risk, and the imposed conditions are not complied with, no contract is effected.[15] A contract of insurance is not made by telegram and a letter where the rate of premium is not settled and the letter also encloses a form but not of the character indicated by previous letters and negotiations.[16]

In case the negotiations are partly by telegram and partly by mail the acceptance and policy become effective on the date when it is mailed from the place where the insurance company is located.[17]

§ 63. No contract where acceptance mailed differs in terms from proposal.—If the policy sent by mail is not an acceptance of the terms proposed, but is in different terms, there is no contract, as the minds of the parties never met, although the insurers answer that they accept the terms proposed.[18] So if the correspondence shows that the minds of the parties never met upon the terms, mailing a policy which the applicant is not bound to accept does not bind the company.[19] The acceptance must be an absolute and

[14] Busher v. New York Life Ins. Co. 72 N. H. 551, 58 Atl. 41, 33 Ins. L. J. 761. In this case the court, per Bingham, J., said that where the offer is sent by mail or by telegraph "it is commonly held, and such is the law in this State—that the reply accepting the offer may be sent through the same medium, and the contract will be complete when the acceptance is mailed, or delivered to the telegraph office properly addressed to the party making the offer, and beyond the acceptor's control: Abbott v. Shepard, 48 N. H. 14; Davis v. Home Manufacturers' Ins. Co. 67 N. H. 218. The theory advanced in support of such a holding is that when one makes an offer through the mail, or like agency, he authorizes the acceptance to be made through the same medium, and constitutes that medium his agent to receive the acceptance, and that the acceptance when mailed or delivered at the telegraph office, is then constructively communicated to the offerer; 2 Lang. Cont. 995, sec. 15, par. 2. While constructive notice of acceptance is permitted to take the place of actual communication in such cases, still the law requires that the message of acceptance shall pass beyond the control of the acceptor."

[15] Gauntlett v. Sea Ins. Co. 127 Mich. 504, 86 N. W. 1047.

[16] Phenix Ins. Co. v. Schultz, 80 Fed. 337, 25 C. C. A. 453, 42 U. S. App. 483, rev'g 77 Fed. 375.

[17] Hammond v. International Ry. Co. 63 Misc. 437, 116 N. Y. Supp. 854.

On telegram as preliminary step in negotiation of contract, see note in 4 L.R.A.(N.S.) 177. On time and place of consummation of contract where offer by letter is accepted by telegram or vice versa, see note in 6 L.R.A.(N.S.) 1016.

[18] Ocean Ins. Co. v. Carrington, 3 Conn. 357; Duncan v. Topham, 8 Com. B. (O. S.) 225; Costello v. Grant County Mutual Fire & Lightning Ins. Co. 133 Wis. 361, 113 N. W. 639. See §§ 45 et seq. 55b, 66f herein; Nordness v. Mutual Cash Guaranty Fire Ins. Co. 22 S. Dak. 1, 114 N. W. 1092.

[19] Piedmont & Arlington Life Ins. Co. v. Ewing, 92 U. S. 377, 23 L. ed. 610; Hamblet v. City Ins. Co. 36 Fed. 118.

unconditional one.[20] And this applies to the renewal of a policy where there is an increase in the rate of premium, and the correspondence shows that there was no agreement fixing the rate, and, therefore, there is no acceptance.[1] But where, in the correspondence respecting an agreement to insure, the letter of the applicant states that the rate per cent "is pretty heavy, but I guess we will have to stand it." There is an acceptance of the proposal to insure.[2] And where an agent sent a policy by mail to an applicant, with a statement that the premium charged was higher than usual, and requesting a return of the policy by mail should he decline it, or if retained, to send the premium, it was held that retaining the policy was an acceptance, or, at all events, the question was one for the jury.[3] In a Connecticut case, one C. signed an application for life insurance, and submitted to a medical examination under an agreement that the policy, when issued, should be forwarded by mail to C.'s address in New York, who, if it was found to be as agreed, was to send the premium, or if not, to return the policy; the policy to take effect when the premium was paid. Afterward, the agent mailed it to C. at New York, the envelop being marked "return in ten days if not called for." It was returned uncalled for. The agent then sent the policy to another place where he supposed C. might be, but C. had died two days before it was sent. It was held to be an inchoate and not a complete contract of insurance, and that no liability attached under it.[4]

Again, a subsequent acceptance of a proposition which has been signed and mailed is not binding as a contract where before acceptance a new condition or term has been added by the proposer and rejected, since in such case there has been no such meeting of minds as is essential to complete the contract, even though the applicant sent with the original application his personal notes for the first year's premium.[5] If upon receipt of the application, further information is requested and it is sent by the applicant with a statement that if it is not satisfactory it should consider the application withdrawn and return his check, which had been given for the first premium, and the application is rejected by letter sent to the local agent with a return of the premium on the same day that the applicant died no contract of insurance is made.[6] In case

[20] Hartford Steam Boiler Inspection & Ins. Co. v. Lasher Stocking Co. 66 Vt. 439, 44 Am. St. Rep. 859, 29 Atl. 629.

[1] Doherty v. Millers & Manufacturers Ins. Co. 4 Ont. Law Rep. 303.

[2] Eames v. Home Ins. Co. 94 U. S. 621, 24 L. ed. 298.

[3] Sheldon v. Atlantic Fire & Marine Ins. Co. 26 N. Y. 460, 84 Am. Dec. 213.

[4] Rogers v. Charter Oak Life Ins. Co. 41 Conn. 97.

[5] Travis v. Nederland Life Ins. Co. Ltd. 104 Fed. 486, 43 C. C. A. 653.

[6] Miller v. Northwestern Mutual

of such negotiations by mail if conditions precedent to writing the policy are imposed by the insurer, and are not complied with by the applicant, there is no completed contract of insurance.[7] An insurance company may, however, be estopped to deny the issuance of a policy where the applicant receives and relies upon a letter from the insurer's agent stating that the company had reconsidered the application and would issue a policy covering the full amount from the start on the plan applied for and that the agent would send the policy as soon as it arrived.[8] A proposal by letter, the forwarding of policies for examination and the acceptance thereof effect a contract, and if the one who makes the proposal, has no original authority as the company's agent, but is made its agent by the company's act, evidenced by correspondence, his delivery of the policy before loss effects the contract.[9]

§ 64. Agent's receipt pending approval or issuance of policy: "binding slip:" "binding receipt."—To what extent a company is bound by a receipt given by an agent pending an approval by the company or until the policy is issued depends greatly upon the agent's authority and the particular circumstances of each case, and for these reasons the decisions are not perfectly in accord. The following general rules will, however, be found to be in conformity with the law as laid down by the adjudicated cases: 1. If the act of acceptance of the risk by the agent and the giving by him of a receipt is within the scope of the agent's authority, and nothing remains but to issue a policy, then the receipt will bind the company.[10] 2. Where an agreement is made between the applicant and the agent whether by signing an application containing such condition, or otherwise, that no liability shall attach until the principal approves the risk and a receipt is given by the agent, such acceptance is merely conditional, and is subordinated to the act of the company in approving or rejecting;[11] so in life insurance a

Life Ins. Co. 111 Fed. 465, 49 C. C. A. 330.

[7] Quill v. Boston Ins. Co. 197 Mass. 216, 83 N. E. 401.

[8] New York Life Ins. Co. v. McIntosh, — Miss. —, 41 So. 381, 35 Ins. L. J. 857, s. c. 86 Miss. 236, 38 So. 775, 34 Ins. L. J. 1054. See also Kimbro v. New York Life Ins. Co. 134 Iowa 84, 12 L.R.A.(N.S.) 421, 108 N. W. 1025, 35 Ins. L. J. 57.

[9] National Mutual Church Ins. Co. v. Trustees Methodist Episcopal Church, 105 Ill. App. 143.

[10] Fish v. Cottenet, 44 N. Y. 538; § 57 herein, and cases. See also Lee v. Union Central Life Ins. Co. 19 Ky. L. Rep. 608, 41 S. W. 319; Mutual Life Ins. Co. v. Herron, 79 Miss. 381, 30 So. 691 (here receipt was signed by a solicitor appointed by the general manager).

[11] See § 57 herein, and cases. See also Mohrstadt v. Mutual Life Ins. Co 115 Fed. 81, 52 C. C. A. 675; Pace v. Provident Savings Life Assur. Soc. 113 Fed. 13, 51 C. C. A. 32; Union Central Life Ins. Co. v. Phillips, 102 Fed. 19, 41 C. C. A. 263, rev'g 101 Fed. 33; Steinle v.

"binding slip" or "binding receipt," does not insure of itself. When properly executed it protects the applicant for insurance against the contingency of sickness intervening its date and the delivery of the policy, if the application for insurance is accepted. If the latter is not accepted, or refused, in the valid exercise by the company of its rights, the "binding" slip ceases eo instanti to have any effect.[12] 3. Where the acceptance by the agent is within the scope of his authority, a receipt containing a contract for insurance for a specified time which is not absolute but conditional, upon acceptance or rejection by the principal, covers the specified period, unless the risk is declined within that time,[13] and it has been held in these cases that the company may not arbitrarily reject after a loss.[14]

In connection with the above rules the following decisions are important: Where an agent gave a binding receipt pending the company's approval and told the applicant that the risk had been accepted, and the evidence of the agent showed that it had in fact been accepted, the contract was held good after loss, and the company estopped to deny acceptance,[15] and it is also held where the agent gave a receipt for certain money intended as part payment of premium and duty, under an agreement of insurance for one month, or unless rejected by the company before the expiration of the month, and the property was burned before a policy was issued, that giving the receipt completed the contract, unless rejected by the principal.[16] and the company will be bound where a local insurance agent authorized to deliver "binding receipts," signed by the general agent, agrees in good faith and for value to assume the payment to the company of the first cash instalment, and delivers to the insured a "binding receipt" properly signed.[17] But it is

New York Life Ins. Co. 81 Fed. 489, 26 C. C. A. 401, 52 U. S. App. 235, 27 Ins. L. J. 174 (*Distinguished* in Starr v. Mutual Life Ins. Co. 41 Wash 228, 83 Pac. 116, 35 Ins. L. J. 137).

[12] Gardner v. North State Mutual Life Ins. Co. 163 N. Car. 367, 48 L.R.A.(N.S.) 714, 79 S. E. 806. See also Grier v. Mutual Life Ins. Co. 132 N. Car. 542, 44 S. E. 28. *Examine* New York Life Ins. Co. v. Moates, 207 Fed. 481, — C. C. A. —.

[13] Goodfellow v. Times & Beacon Assur. Co. 17 U. C. Q. B. 411. See also Robinson v. Union Central Life Ins. Co. (U. S. C. C.) 144 Fed. 1005, rev'd 8 L.R.A.(N.S.) 883, 148 Fed. 358, 78 C. C. A. 268; Starr v. Mutual Life Ins. Co. 41 Wash. 228, 83 Pac. 116, 35 Ins. L. J. 137.

[14] Fish v. Cottenet, 44 N. Y. 538; Palm v. Medina Ins. Co. 20 Ohio 529. See also Union Central Life Ins. Co. v. Phillips, 102 Fed. 19, 41 C. C. A. 263, rev'g 101 Fed. 33. But *compare* Shawnee Mutual Fire Ins. Co. v. McClure (1913) 39 Okla. 535, 49 L.R.A. (N.S.) 1054, 135 Pac. 1150.

[15] Penley v. Beacon Ins. Co. 7 Grant U. C. 130.

[16] Mackie v. Enropean Ins. Co. 21 L. T. N. S. 102. See Barr v. North American Ins. Co. 61 Ind. 488.

[17] Mississippi Valley Life Ins. Co. v. Neyland, 9 Bush (Ky.) 430. But see Todd v. Piedmont & Arlington Life Ins. Co. 34 La. Ann. 63.

held that it is competent for the agent to explain what was understood between the parties by the words, "this receipt being binding," etc., where the receipt was signed by the agent and read as follows: "Received of S. three hundred and seventy-five dollars in payment of insurance in the C. S. Insurance Company, this receipt being binding, on said company until policy is received."[18] In another case A. applied to an agent for insurance on certain property, and the terms were agreed upon and the premium paid, but the agent having no blanks for policies agreed to send a policy to A., and gave him a receipt specifying the property to be insured and providing that a policy should be sent as soon as the blanks were received, and it was held that the effect of the receipt was to bind the company the same as if a policy with the ordinary conditions had been issued. The policy, however, was declared void for breach of certain conditions relating to "other insurance" contained therein.[19] But where a receipt was given by the general agent of an insurance company, who agreed if the application should be approved by the company to furnish a policy within thirty days, "or, if the application is declined, to return the above amount to him, or his order, on demand and return of this receipt," and the application was approved by the company and a policy was sent to the agent within thirty days; but before delivery the applicant died and the agent returned the policy to the company, the court decided that the receipt did not operate as a present insurance for thirty days or until a policy should be furnished.[20] In another case the applicant signed an application providing that only the home office had authority "to determine whether or not a policy shall issue on application." The agent gave a receipt, specifying the amount received and expressed to be in payment of insurance in the company. It was also set forth that the receipt should be binding upon the company, until the policy was received. An action being brought, the court decided that the receipt was not binding after the application was rejected, and also that the company was not bound to issue a policy. No decision was given, however, as to the point whether the receipt was binding on the company until action had by it on the application, as the question was not considered as raised by the facts in the case.[1]

Where a receipt by an insurance agent to an applicant for pay-

[18] Scurry v. Cotton States Life Ins. Co. 51 Ga. 624.

[19] Hubbard v. Hartford Fire Ins. Co. 33 Iowa, 325, 11 Am. Rep. 125.

[20] Marks v. Hope Mutual Life Ins. Co. 117 Mass. 528.

[1] Cotton States Life Ins. Co. v. Scurry, 50 Ga. 48. *Examine* New York Mutual Ins. Co. v. Johnson, 23 Pa. St. 72.

ment of premium, states that if the application is approved the insurance will be in force from the date of the medical examination, it refers to the examination the result of which is forwarded to the company and not to one which is withheld by the examiner because not satisfactory. Such a receipt does not put the insurance in force pending a decision upon the application.[2] Again, where the agent acknowledged receipt of the application in a specified company "subject to approval by" a named manager "all for the term of one year and one note payable on" a certain date also a stated amount "in cash, all to be restored if policy is not issued" and "if policy is not received within thirty days from date of this receipt, report that fact to" said manager at a designated place, and the application and premium were returned to the agent and the risk rejected, it was held that there was no contract of insurance even though the applicant never received back said application or premium, where he gave no notice of the nonreceipt of the policy as requested.[3]

§ 65. Same subject: effect of memorandum: binding slip: indorsement, etc.—The memorandum of insurance and the receipt for the premium, both signed by the agent of the underwriter, form a contract of insurance between the parties,[4] and where no policy is made out or delivered, an action can be maintained on the memorandum, since the contract will be presumed to be that evidenced by the usual policies issued in like cases by the company,[5] and an ordinary binding slip is an agreement to issue a policy in the form the insurer is accustomed to issue, and furnishes indemnity to the assured pending action upon his application by the insurer, subject to the terms and conditions contained in such policy.[6] Again, a binding slip containing a memorandum to identify the parties to a contract of insurance, the subject-matter, and the principal terms, "to be binding until policy is delivered," is a contract for temporary insurance subject to the conditions contained in the ordinary policy in use by the company,[7] and if the terms of a

[2] Northwestern Mutual Life Ins. Co. v. Neafus, 145 Ky. 563, 36 L.R.A. (N.S.) 1211, 140 S. W. 1026.

[3] Easley v. New Zealand Ins. Co. 5 Idaho 593, 51 Pac. 418, 27 Ins. L. J. 289. *Compare* Stilwell v. Covenant Mutual Life Ins. Co. 83 Mo. App. 215.

[4] State Fire & Marine Ins. Co. v. Porter, 3 Grant Cas. (Pa.) 123 (a marine risk). See Pattison v. Mills, 2 Bligh, N. S. 519 (marine risk).

[5] Eureka Ins. Co. v. Robinson, 56 Pa. St. 256, 94 Am. Dec. 65; State Fire & Marine Ins. Co. v. Porter, 3 Grant Cas. (Pa.) 123.

[6] Mutual Fire Ins. Co. Montgomery County v. Goldstein, 119 Md. 83, 86 Atl. 34. Binding slip defined. See also Gardner v. North State Mutual Life Ins. Co. 163 N. Car. 367, 48 L.R.A. (N.S.) 714, 79 S. E. 807.

[7] Lipman v. Niagara Fire Ins. Co. 121 N. Y. 454, 8 L.R.A. 719, 24 N. E. 699.

standard policy are attached to the binder as a part thereof the insurance company may be liable in accordance therewith.[8] So a memorandum, made by a company's agent, that a vessel's freight is insured in a specified sum, effects such insurance by a policy in blank, issued according to the custom of the company, at that place.[9] So when goods are insured on "memorandum" or open policy, entries of shipments made on the blank-book to which the policy is attached are as valid as if made on the sheet on which the policy was written;[10] and the company may be bound by a memorandum that the subject "stand insured" until a certain date, and although loss occurs before that time.[11] And a recognized custom among insurance companies that upon the agent's taking the memorandum of an application the insurer became immediately bound, may constitute an important factor as to the existence of a contract.[12] But where the plaintiff, wishing to obtain insurance on his interest in the barque P., his agents, L. C. & Co., employed F., an insurance broker, who obtained from W., agent of the company, this paper, dated June 20, 1878: "No. 1002. $1,200. D. S. F. & M. Ins. Co., Wilmington, Del. This certifies that we have this day entered in the name of L. C. & Co., for whom it may concern, on our open policy No. 1002, with (said Co.) a risk of $1,200 on barque P. at and from June 20, 1878, to June 20, 1879, loss, if any, payable in current funds to Messrs. L. C. & Co., or order, according to the terms and conditions of the policy." (Signed) "J. S. W., agent." The paper was delivered by the broker to L. C. & Co., and by them assigned in writing to plaintiff. No policy was ever prepared or issued by the company. In a suit on said paper for a loss on said vessel, it was held that the same did not constitute a valid and binding contract of insurance, nor could an action be maintained on it as such.[13] An agent may bind the company by an entry or memorandum of the contract in what is known as a "binding book." So where an entry of insurance was made by a local agent, with authority "to receive proposal of insurance," in the "binding book," to continue in force until the premises, the risk being specially hazardous, should be inspected by a special agent, and the property was burned before the policy is-

[8] Abel v. Atlas Ins. Co. 148 Ill. App. 325.

[9] Insurance Co. of Valley of Va. v. Mordecai, 22 How. (63 U. S.) 111, 16 L. ed. 329. *Cited* in Concordia Fire Ins. Co. v. Heffron, 84 Ill. App. 612.

[10] Edwards v. Mississippi Valley Ins. Co. 1 Mo. App. 192.

[11] Neville v. Merchants' & Manufacturers' Mutual Ins. Co. 17 Ohio, 192.

[12] Southern Ins. Co. v. Hannah (1904) — Miss. —, 37 So. 506.

[13] Delaware State Fire & Marine Ins. Co. v. Shaw, 54 Md. 546. But see Mobile Marine Dock & Mutual Ins. Co. v. MacMillan, 31 Ala. 711.

sued, the company was bound thereby;[14] and where the agent entered the amount upon his register the terms being agreed upon and the premium received by the agent, the contract was held valid.[15] So an indorsement on an application for reinsurance that the risk is taken will be binding.[16] So the company may be bound by a certificate given by the secretary of an insurance company to an applicant consenting that a policy already issued to him might cover property not included therein.[17] In Thompson v. Adams[18] the plaintiffs in New Zealand instructed their representatives to obtain insurance for them upon certain goods in New Zealand. Their representatives communicated with a firm of brokers who undertook to effect insurance for twenty thousand pounds. Insurance had been effected in the same way before. The insurance brokers communicated with another broker, B., entitled to effect insurances at Lloyds. B., as was customary, prepared a slip showing the particulars as in case of a marine risk; this risk was shown to the defendant, who initialed the slip. Ordinarily, this slip was followed with a policy. This slip was initialed October, 1886, but no policy was tendered for signature until February following, and on the 28th of that month news came that the premises and goods were destroyed by fire, but no policy had been issued nor premium tendered. Premiums were afterward tendered but defendant refused to accept them or to sign the policy. It was held that the slip was a binding contract to insure and enforceable. A "binder" is not invalid for failure to state the premium, and it is so executed as to become an obligation of the company where the chief clerk of insurer's agent signed it and the agent ratified the act.[19]

§ 66. Completion of contract: marine and fire: binding slip.— In marine insurance in England the usual course of business is for the broker to prepare a slip or brief memorandum, containing the particulars of the proposed insurance, and showing the risk. This slip is presented, if at Lloyds, to the underwriters, and, if the risk is accepted, is initialed successively by them for the sum agreed to be taken by each underwriter. Within about the last twenty-seven years fire risks have been underwritten at Lloyds, the same course being pursued as in marine risks, and when the slip has been completely initialed the policy is prepared by the broker and submitted

[14] Putnam v. Home Ins. Co. 123 Mass. 324, 25 Am. Rep. 93.

[15] Ellis v. Albany Fire Ins. Co. 50 N. Y. 402, 10 Am. Rep. 495.

[16] Woodruff v. Columbus Ins. Co. 5 La. Ann. 697.

[17] Goodall v. New England Fire Ins. Co. 25 N. H. 169.

[18] L. R. 23 Q. B. D. 361. See next section.

[19] Jacobs v. Atlas Ins. Co. 148 Ill. App. 325, 38 Nat. Corp. Rep. 483. In this case the amount of the insurance or risk was held to be five hundred dollars where expressed as 500, but with a line after the figure 5.

to the successive underwriters, and when they have signed the policy the contract is complete in all formal particulars, and an interval must elapse between initialing the slip and the date of the policy, which frequently runs into weeks and months. There is, however, in the English cases one essential and marked difference between the legal effect of the initialed slip in marine and fire policies, and this distinction is brought about clearly by force of the act of 1867, 30 Victoria, chapter 23, sections 7, 9. In marine risks the slip is, in practice and in accordance with a long-existing course of business, and the understanding of those engaged in marine insurance, the complete and final contract between the parties fixing the terms of the insurance and the premium, and is obligatory upon both parties. At least this is its effect as an honorary engagement, but under the legislative enactment above referred to requiring contracts and agreements for sea insurance to be expressed in a policy, and precluding the pleading or the admission in evidence of a policy not duly stamped, such slip is not a valid obligation, binding either in law or equity upon the insurers, in case they should seek to evade the honorary contract evidenced by the initialed slip, for the policy is the only legal evidence of the contract. On the contrary, in case a slip is initialed for a fire risk, there is no statutory difficulty in the way. A slip filled out and presented for fire insurance at Lloyds and initialed, is a binding legal contract to effect a subsequent insurance, and not merely an honorary undertaking. If the policy is put forward within a reasonable time the underwriter is obligated to subscribe, and during the interval between the slip and the policy he is legally bound, and the insured is liable for the premium. We deduce the distinction here made between the effect of the slip in marine and fire risks from the words of the statute and the cases cited below, and such is evidently the law of the present day in England.[20] But it is said that in case of an unstamped agreement to insure, the premium having been paid, a court of equity would compel the issuance of a policy,[1] although

[20] Fisher v. Liverpool Marine Ins. Co. (1873) L. R. 8 Q. B. 469, L. R. 9 Q. B. 418, 43 L. J. Q. B. 114; London Mutual Ins. Co. In re (Smith's case), 4 L. R. Ch. 611; Thompson v. Adams, L. R. 23 Q. B. D. 361; noted as last case under preceding section; Ionides v. Pacific F. & M. Ins. Co. L. R. 6 Q. B. 674, 13 Eng. Rul. Cas. 471; 17 Earl of Halsbury's Laws of England, pp. 348 et seq.; Arnold on Marine Ins. (Perkins' ed. 1850) 13, *13, 14, Id. (8th ed. Hart & Simey, 1909) §§ 34 et seq. pp. 48 et seq. See also Id. § 38, p. 55, upon the point, "Does the slip contain the requisites of a valid policy?" Also Id. § 39, p. 56, "agreements to issue policies" covering notes.

[1] Mead v. Davison, 3 Ad. & E. 303, 308. As to English stamp acts, see § 33 herein. As to stamp act 1891 see 17 Earl of Halsbury's Laws of England, p. 349.

the statute above referred to would seem to exclude even this proposition.[2] It is stated, however, that for the purpose of showing when the proposal was accepted reference may be made to the slip or covering note or other customary memorandum of the contract, although it be unstamped.[3] In this country, however, when a slip, application, or order for insurance is actually accepted, the terms being agreed upon and the contract otherwise complete except the issuance of the policy, whether the entry be made in the books of the company properly subscribed by an authorized agent, or the acceptance be otherwise evidenced, there would seem to be no valid reason why in the absence of a statutory or perhaps some charter prohibition there is not a valid enforceable contract of insurance, even though the policy is not issued, and such is evidently the law.[4] We may state here that in this country the general principles underlying and governing the completion and validity of contracts of insurance are equally applicable to cases of marine and fire contracts as in other cases, and those principles are set forth fully under this chapter. But upon the question whether the slip on application for a policy of insurance is admissible in evidence to show the intention of the parties to the policy a different question is presented; and although it is held not admissible in a court of law upon the general grounds that all prior negotiations are merged in the written contract, yet if the policy does not conform to the agreement contained in the slip, it might be admissible to show a mistake in a court of equity or in a court exercising equitable jurisdiction over the case, or even in a law court under certain circumstances.[5] An application for a policy may be validly drawn up in lead pencil.[6]

§ 66a. Binding slips, etc., continued: new terms: rate of premium: parol evidence.—A present contract of insurance upon new terms may arise and become of force from date by a binding slip containing a memorandum of the "accepted" terms.[7]

[2] Fisher v. Liverpool Marine Ins. Co. L. R. 8 Q. B. 469, L. R. 9 Q. B. 418, 43 L. J. Q. B. 114.

[3] 17 Earl of Halsbury's Laws of England, p. 348, *citing* marine ins. act, 1906 (8 Edw. 7, c. 41) § 21.

[4] Marx v. National Marine & Fire Ins. Co. 25 La. Ann. 39; Woodruff v. Columbus Ins. Co. 5 La. Ann. 697; Wass v. Maine Mutual Marine Ins. Co. 61 Me. 537; Loring v. Proctor, 26 Me. 18; Blanchard v. Waite, 28 Me. 51; Warren v. Ocean Ins. Co. 16 Me. 439; Ellis v. Albany City Fire Ins. Co. 50 N. Y. 402; Neville v. Merchants & Manufacturers Mutual Ins. Co. 17 Ohio 192. See also cases *cited* §§ 64, 65 herein.

[5] Phœnix Fire Ins. Co. v. Gurnee, 1 Paige (N. Y.) 278; Motteux v. London Assurance Co. 1 Atk. 545, 13 Eng. Rul. Cas. 467; Dow v. Whetten, 8 Wend. (N. Y.) 160, 168; Delaware Ins. Co. v. Hogan, 2 Wash. (U. S. C. C.) 4 Fed. Cas. No. 3765.

[6] City Ins. Co. v. Bricker, 91 Pa. St. 488.

[7] Belt v. American Central Ins. Co.

Where a memorandum states in general terms the amount of insurance desired on chartered freight on a designated vessel "premium, open for particulars," marked "binding" before the parties' signatures, "send policy" to a specified place, there is an obligatory temporary contract.[8]

In a Georgia case A. made a verbal application to a local agent of an insurance company for a policy of insurance on certain described property, then offering to pay the premium to the agent. The agent stated that he could not at that time issue the regular standard policy of the company, nor accept the tender of the premium because he did not know the rate on that class of property. The agent agreed, however, to enter upon the books of the company a written memorandum in the nature of a "binder," which he stated would be effective as a contract of insurance until the regular policy was issued by the company, and that, on receipt of this regular policy, A. could pay the premium. This was satisfactory to A., and the agent, in compliance with his agreement, did write, sign, and place in the book of policies issued by the company at his agency a statement or "binder," containing all the essential elements of a contract of insurance between A. and the company, and made a written report to the company of this memorandum or "binder," and of his action relating to the same, all of which was affirmed and ratified by the company. It was held: (a) A complete temporary contract of insurance existed between A. and the company during the period set out in the memorandum or binder. (b) For a loss which occurred during the existence of the temporary contract, and before the rate of premium had been fixed on the property covered thereby, A. could recover the amount stipulated as indemnity in the binder, less the rate of premium fixed by the company subsequently to the loss. It was also held that the property described in the memorandum or binder was insured during the term specified therein upon the terms and conditions of the regular standard policy of the company.[9]

In another case an insurance company, by its agent, issued and delivered to the insured a binder, or binding slip, whereby it assumed and bound $2,000 of insurance upon certain property of the insured; the binding slip to be void on delivery of the policy. When the binder was delivered it was assumed by the insured that the insurer proposed to charge a rate higher than it had charged for

163 N. Y. 555, 57 N. E. 1104, aff'g 53 N. Y. Supp. 316, 29 App. Div. 546.

[8] Scammel v. China Mutual Ins. Co. 164 Mass. 341, 49 Am. St. Rep. 462, 41 N. E. 649.

[9] Queen Insurance Co. v. Hartwell Lee & Laundry Co. 7 Ga. App. 787, 68 S. E. 310, 39 Ins. L. J. 1125.

the same insurance for the previous year, although no rate was mentioned in the binder, whereupon he requested the agent of the insurer to ascertain if he could not obtain from his principal some concession in the rate. This the agent consented to attempt, but before any attempt was made by the agent the building burned. It was held (1) That a complete temporary contract of insurance existed between the insurer and the insured from the time of the delivery of the binder. (2) That the insured having accepted the binder, the promise to pay the premium to be mentioned in the policy was a sufficient consideration for the contract. (3) That the agent of the insurer having failed to fix the rate before the policy was delivered and before the loss occurred, the insured was bound to pay a reasonable rate for the protection which he had received by the temporary contract.[10]

There may be such a latent ambiguity in a memorandum, with a "rider" attached, with reference to a policy designated by number as to permit parol evidence to explain the same.[11] And where a further claimed renewal of a policy was in the form of a binder or binding slip which stated no consideration, but provided: "memo. to be void on delivery of the policy," it was held that the slip, standing alone was not a complete and perfect contract, but was open to explanation by parol proof as to intention of the parties and the established custom of the business as to the issuance of such slips to brokers for temporary insurance pending approval of the risk, and also as to the brokers knowledge of such custom and that the contract was made in accordance therewith, and a recovery was precluded for a loss after notice of rejection of the risk.[12]

A receipt delivered by an agent to the assured for the first premium may be explained and avoided by parol evidence showing that no actual payment took place, and that the agent, without the authority of his principal, took the promissory note of the assured, which was never paid, the receipt containing a condition that the failure to pay the note at maturity ended the policy.[13] But if a receipt for a premium is given by a person who is the agent both

[10] J. C. Smith & Wallace Co. v. Prussian Nat. Ins. Co. 68 N. J. L. 674, 54 Atl. 458, 32 Ins. L. J. 559.

[11] St. Paul Fire & Marine Ins. Co. v. Balfour, 168 Fed. 212, 93 C. C. A. 498.

[12] Underwood v. Greenwich Ins. Co. 161 N. Y. 413, 55 N. E. 936, 29 Ins. L. J. 149 (rev'g Van Tassel v. Greenwich Ins. Co. 51 N. Y. Supp. 79, 28 App. Div. 163, 3 Justices dissenting. Same case, 151 N. Y. 130, 45 N. E. 365, rev'g 83 Hun, 612) 54 App. Div. 386, 66 App. Div. 531, 103 App. Div. 619 (memo.) 184 N. Y. 607 (memo.)

[13] Batson v. Fidelity Mutual Life Ins. Co. 155 Ala. 265, 130 Am. St. Rep. 21, 46 So. 578. But *compare* Chamberlain v. Prudential Ins. Co. 109 Wis. 4, 83 Am. St. Rep. 850, 85 N. W. 128.

of the insurer and the assured, who in giving the receipt was not acting as the agent of the insurer, but gave it for premiums paid or advanced for a building and loan association on policies in which it was interested, such receipt is not admissible against the insurer.[14]

§ 66b. Delivery to and acceptance by applicant: generally.—An applicant for insurance has a right to require delivery to and acceptance by him of the policy before he will be bound.[15] And where delivery and acceptance of the policy is necessary to put the insurance into effect, there can be no risk until the things precedent agreed upon shall happen.[16] But an acceptance of the policy by the insured will conclude the contract with the insurer.[17] Where the applicant, however, signs a paper reciting that he had "received and accepted from" the insurer's agent a policy there is no acceptance which is binding where the policy was not delivered to him until three days thereafter.[18]

Ordinarily and without special circumstances where the applicant accepts a policy based on his application he accepts all its stipulations as they are contained therein including conditions made a part thereof.[19] And an insured who accepts a policy incorporating the provisions of another policy as part of the contract is bound by such provisions, although the policy referred to is in possession of the insurer, and is never seen by the insured, who knows nothing of its terms.[20]

If different kinds of policies of life and endowment insurance are issued by an insurance company and the form of application for a policy calls upon the applicant to indicate which kind he desires, he becomes charged with knowledge of the provisions of the policy and it must be conclusively presumed that he received the kind of policy he desired and that he understood and assented to its terms and conditions.[1]

[14] Foreman v. German Alliance Ins. Assoc. 104 Va. 694, 113 Am. St. Rep. 1071, 52 S. E. 337, 3 L.R.A. (N.S.) 444n.

[15] Summers v. Mutual Life Ins. Co. 12 Wyo. 369, 109 Am. St. Rep. 369, 66 L.R.A. 812, 75 Pac. 937.

Contract of insurance is not complete until policy is delivered and accepted. Millard v. Brayton, 177 Mass. 533, 52 L.R.A. 117, 59 N. E. 436.

[16] Banco De Sonora v. Bankers' Mutual Life Co. 124 Iowa 576, 104 Am. St. Rep. 367, 100 N. W. 532; Summers v. Mutual Life Ins. Co. 12 Wyo. 369; 109 Am. St. Rep. 992, 66 L.R.A. 812, 75 Pac. 937.

[17] Wallingford v. Home Mutual Fire & Marine Ins. Co. 30 Mo. 46; Hartford Fire Ins. Co. v. Davenport, 37 Mich. 609.

[18] Priddy v. Baum, 140 N. Y. Supp. 481, 79 Misc. 607.

[19] Brown v. United States Casualty Co. (U. S. C. C.) 88 Fed. 38, 27 Ins. L. J. 951. Dismissed 88 Fed. 829.

[20] Conner v. Manchester Assur. Co. 130 Fed. 743, 65 C. C. A. 127, 70 L.R.A. 106. See § 66g herein.

[1] Danner v. Equitable Life Assur.

§ 66c. Right of applicant to reject policy: generally.—The applicant may refuse to accept a policy, even if he stipulates in his application to accept it if issued. Such an agreement is merely one not to withdraw his offer, is without consideration and not binding.[2] If the delivery of a policy of life insurance and the payment of the premium are conditioned upon this acceptance of the application at the home office and the issue of the policy and also upon acceptance by the applicant of the policy, there is no binding contract upon either party until the actual delivery of the policy and payment of the first premium as prior thereto the application may be rejected or the applicant may reject the policy.[3] In a Connecticut case it is held that the signing of an application for life insurance with the execution and tender of a policy does not effect a contract, where the applicant changes her mind and refuses to accept the policy when tendered, never receives it and does not pay the first premium, although the premiums are paid by another party without authority or interest.[4] And the refusal to accept a policy except upon a lower rate of premium precludes a delivery which would make a binding contract.[5] So where one is induced by the company's agent to surrender a policy and take out a new one upon the consideration that he will be allowed the surrender value of the first policy upon the first premium and insured did not accept the policy as delivered and never indicated that he was satisfied with it or upon the subject of the surrender value and the first premium, but merely took the policy for examination and never signified his approval, there is no unqualified delivery.[6] If after dissolution of a firm and the death of one partner, a new policy upon real estate, which had become the property of the estate of the deceased partner, is by the direction of the surviving partner issued in the deceased partner's name and it is antedated and is sent to the attorney for the heirs who refuses to accept the policy in the form issued but promises to see the agent about it but does not, no contract is completed.[7]

Soc. 141 N. Y. Supp. 442, 156 App. Div. 562, 565.

On effect of general notification by agent of arrival of policy, where the company has substituted another form of policy for that applied for, see note in 12 L.R.A.(N.S.) 421.

[2] Citizens National Life Ins. Co. v. Murphy, 154 Ky. 88, 156 S. W. 1069.

[3] McMaster v. New York Life Ins. Co. 99 Fed. 856, 40 C. C. A. 119, case was rev'd in 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. 10, but on points of forfeiture and estoppel, depending upon the date of the policy as affecting the time of payment of the premium.

[4] Hogben v. Metropolitan Life Ins. Co. 69 Conn. 503, 38 Atl. 214, 26 Ins. L. J. 998.

[5] Roberta Manufacturing Co. v. Royal Exchange Assur. Co. 161 N. C. 88, 76 S. E. 865.

[6] Westerfield v. New York Life Ins. Co. 129 Cal. 68, 61 Pac. 667, 29 Ins. L. J. 813, aff'g 58 Pac. 92.

§ 66d. Stipulation or agreement for return of policy by applicant: option to accept or reject.—The parties may, without making the contract invalid, stipulate that a life policy may be returned if not satisfactory to the applicant and that the note for the premium will be surrendered to him.[8] And evidence is admissible in an action on the policy of an agreement between insurer's agent and the applicant giving the latter an option to accept or reject the policy, to explain his acts in rejecting a policy and demanding its cancelation, and the act of the agent in collecting a payment on the note for the premium and returning the amount upon the repudiation of the transaction by the applicant.[9] In a New York case[10] it appeared that the agent of a company gave to A. a life insurance policy and received his note and a check therefor. A written agreement was entered into, providing that the policy should be returned unless the agent should obtain the surrender value or paid-up policies for certain policies delivered by A. to the agent. The agent failed to accomplish this result. The court held that no valid contract was created until the condition was complied with and that it was immaterial whether the agent of the company had power to make such conditional delivery or not, since if he had not, the result would still be that no contract was made.

§ 66e. Where applicant receives policy for examination: acceptance.—If a policy is merely submitted to the applicant for examination, to be finally delivered if he approves of it and pays the first premium, and he never signifies his approval, and does not pay the premium, there is no acceptance or delivery,[11] since the mere receiving of a policy by a person proposed to be insured, for the purpose of determining whether he will accept it, is not sufficient to conclude the contract.[12] And an acceptance of a policy by an applicant for insurance in order to "read it and look it over" does not constitute an acceptance binding as a contract.[13] Again, an applicant may reserve the right to inspect his policy before acceptance but he may waive such right.[14]

[7] Baldwin v. Pennsylvania Fire Ins. Co. 20 Pa. Super. Ct. 288.

[8] Parker v. Bond, 121 Ala. 529, 25 So. 898.

As to retention of policy see § 66i herein.

[9] Atkins v. New York Life Ins. Co. (1901) — Tex. Civ. App. —, 62 S. W. 563.

[10] Harnickell v. New York Life Ins. Co. 111 N. Y. 390, 18 N. E. 632, aff'g 40 Hun (N. Y.) 558.

[11] Westerfield v. New York Life Ins. Co. 129 Cal. 68, 61 Pac. 667, 29 Ins. L. J. 813, aff'g 58 Pac. 92.

[12] New v. Germania Fire Ins. Co. 171 Ind. 33, 131 Am. St. Rep. 245, 85 N. E. 703.

[13] Priddy v. Baum, 140 N. Y. Supp. 481, 79 Misc. 607.

[14] Going v. Mutual Benefit Life Ins. Co. 58 S. Car. 201, 36 S. E. 556, 29 Ins. L. J. 801.

§ 66f. Applicant not bound to accept policy when it does not conform to proposal or agreement.—Where the policy does not conform in terms to the proposal, there is no obligation resting upon the applicant to accept it.[15] Thus, in a New York case an agent, who had authority to solicit and make contracts for insurances, agreed to insure the plaintiff by a policy containing special provisions for refunding the money paid for premiums and received the plaintiff's note in part payment. The company tendered a policy without the provision, which policy the plaintiff refused. It was decided that the transaction did not constitute a binding contract.[16] Under a Kentucky decision the agent executed a writing showing that the applicant "was entitled to an ordinary life policy in accordance with the application, provided it was accepted by the company," and, if not accepted a note given the agent for the first premium "was to be returned." Nothing appeared in the application as to a limited risk, but the policy contained an exemption of liability in case of death from certain causes. It was held that as the policy was different from that for which the applicant had contracted he was not bound to accept it, and that the company was liable for the amount of the note.[17] And where an application for accident insurance is received and accepted by the insurer, the applicant is not bound by a policy containing conditions inconsistent with such application, which is issued and sent to a local insurance agent for delivery, until such applicant has had an opportunity to ratify or waive such inconsistent provisions.[18] So the issue of a policy of life insurance for one-half the amount proposed in the application is a rejection of the proposition of the applicant and is not binding upon the insurer until assented to by the applicant.[19] If the insurer proposes a form of insurance not in conformity with the application it will be liable pending the applicant's action on such change, where it is stipulated in the receipt for the premium that the insurance should be in force from the date thereof, and it was agreed with the agent that the insurance should begin at once, and the receipt also stipulated that the amount paid should be refunded if no policy should be issued.[20] The acceptance of a policy, without negligence on the part of the insured does not

[15] Mutual Life Ins. Co. v. Young, 23 Wall. (90 U. S.) 85, 23 L. ed. 152, See §§ 55b, *63 herein.

[16] Tifft v. Phœnix Mutual Life Ins. Co. 6 Lans. (N. Y.) 198.

[17] Mutual Life Ins. Co. v. Gorman, 19 Ky. L. Rep. 295, 40 S. W. 571, 26 Ins. L. J. 1014.

[18] Robinson v. United States Ben. Soc. 132 Mich. 695, 102 Am. St. Rep. 436, 94 N. W. 211.

[19] New York Life Ins. Co. v. Levy, 122 Ky. 457, 29 Ky. L. Rep. 21, 5 L.R.A. 739 and note, 92 S. W. 325, 35 Ins. L. J. 455.

[20] Halle v. New York Life Ins. Co. 22 Ky. L. Rep. 740, 58 S. W. 722.

make it the true and conclusive evidence of a prior parol agreement to insure, and a court will correct such policy when, by inadvertence or mutual mistake, or the fraud of one party and the mistake of the other it does not conform to the actual agreement.[1]

§ 66g. Where policy does not conform to proposal: neglect of applicant or assured to read policy: duty to notify company or rescind.—If the policy does not accord with the application the failure of insured to read it does not relieve the insurer from the duty of so writing it, and where the application is expressly made the basis on which insurance is to be effected it is of no consequence that the insured does not read the policy when delivered or promptly object to its terms.[2] But it is also held that if a person receives a policy of insurance ostensibly in response to an application therefor, which he signed and parted with in the belief, induced by the fraud of the agent taking the same, that it called for a policy different from that which it called for in fact, he is bound, as a matter of law, to examine the policy within a reasonable time after it comes to his hand, and to discover obvious departures therein from the one which he supposed he was to get, and promptly, upon discovering the same, to rescind the transaction, give the company due notice thereof, and do all on his part which justice requires to restore the former situation, or he will be held to have accepted the policy as satisfying his application, so as to be precluded from rescinding the same.[3] And the assured is charged with notice of the contents of a written application executed by him, and which, by the terms of the policy, is made a part thereof.[4]

§ 66h. When applicant may reject policy not conforming to agent's representations.—If an application for insurance does not set forth all the provisions which the policy is to contain, and the insurer's agent represents that the policy will contain certain lawful stipulations, the policy must contain them, or the insured will not be bound to accept it. In such case, however, it is incumbent upon the applicant immediately after receipt of the policy

[1] International Ferry Co. v. American Fidelity Co. 207 N. Y. 350, 101 N. E. 160 (marine vessel liability insurance).

On reformation of insurance policy for mistake of soliciting agent, see note in 11 L.R.A.(N.S.) 357.

[2] German-American Ins. Co. v. Darrin, 80 Kan. 578, 38 Ins. L. J. 1008, 103 Pac. 87, quoting from McElroy v. British American Assur. Co. 94 Fed. 990, 36 C. C. A. 615. See §§ 55b, 63, 66b herein.

[3] Bostwick v. Mutual Fire Ins. Co. 116 Wis. 392, 67 L.R.A. 705, 89 N. W. 538, 92 N. W. 246, 31 Ins. L. J. 412. See also Chamberlain v. Prudential Ins. Co. 109 Wis. 4, 83 Am. St. Rep. 850, 85 N. W. 128.

That neglect to read or have application read no excuse, warranties. See §§ 1974, 3514 and note herein.

On effect of delay in seeking relief from mistake in insurance contract, see note in 28 L.R.A.(N.S.) 890.

[4] Russell v. Prudential Life Ins.

to notify the company of his refusal to accept the policy.[5] So one who signs an application for life insurance without reading it, upon the assurance of the soliciting agent that it conforms to representations orally made, and that such signing is customary but not necessary, may refuse to accept a policy tendered him, on the ground that it does not meet such representations, notwithstanding the application contains a provision that no statement made by the solicitor would affect the rights of the company unless embodied in a written application.[6] And where the defendant's agent induced the applicant to take out a policy by a promise that the principal would make her a loan on her property taking the policy as part security therefor and the agreement was also that the applicant was to accept the policy only on condition that the loan be made she may refuse to accept the policy where the company declines to make the loan, and she may surrender the policy and recover back the premium paid.[7] But a false statement by an insurance agent, that the policies of a rival company did not contain a certain clause, will not justify the insured in refusing to receive his policy, where he has subsequently made an application therefor, after having been furnished with a blank policy which he retained about ten days, and having been requested by the agent to compare it with that used by the other company.[8]

§ 66i. Effect of retention of policy by applicant: unreasonable delay.—If fire policies are sent by mail to the applicant conditionally, that is with the privilege of returning them to the company within a specified time in case the terms on which they were sent

Co. 176 N. Y. 178, 98 Am. St. Rep. 656, 68 N. E. 252.

[5] American Ins. Co. v. Weiberger, 74 Mo. 167; Ribble v. Roberts, — Tex. Civ. App. —, 180 S. W. 630, 47 Ins. L. J. 156, 159.

[6] Evans v. Central Life Ins. Co. 87 Kan. 641, 41 L.R.A.(N.S.) 1130n, 125 Pac. 86. See §§ 489 et seq. herein.

Right to reject or rescind policy not conforming to representations of insurer's agent is headline to note 41 L.R.A.(N.S.) 1130, as follows: I. Scope. II. Rights to reject or rescind, in general. III. Necessity that applicant rely upon agent's misrepresentations. IV. Policy varying from agent's agreement treated as counter-proposal. V. Cases treating agent's statements as promissory representations. VI. Misrepresentations made when policy is exchanged. VII. Misrepresentations made by agent at time of delivering policy. VIII. Effect of agent's agreement that applicant might reject policy. IX. Misrepresentations made to illiterate persons. X. Where application is not intelligible to one induced to insure. XI. Where agent makes good his misrepresentation. XII. Admissibility of parol evidence conflicting with written application. XIII. Questions for the jury. XIV. Miscellaneous.

[7] Key v. National Life Ins. Co. 107 Iowa 446, 78 N. W. 68, 28 Ins. L. J. 259.

[8] American Steam Boiler Ins. Co. v. Wilder, 39 Minn. 350, 1 L.R.A. 671, 40 N. W. 252.

were not satisfactory and the applicant receives the policies and retains them beyond the time allowed for their return, the failure to take advantage of such option is in effect an act of acceptance, and the last act necessary to complete the contract and whether the time was allowed to pass either intentionally or unintentionally will make no difference.[9] And the insured is not justified in refusing to receive a policy notwithstanding the agent falsely states that the policies of a rival company did not contain a certain clause where the insured subsequently makes an application therefor, after having been furnished with a blank policy which he retained about ten days and having been requested by the agent to compare it with that used by the other company.[10] In Adams v. Eidan [11] it was held that a finding that an applicant receives and retains without objection policies made out and sent to him is equivalent to a finding that he had accepted them. And in such cases it would seem to be incumbent upon the applicant, immediately on receipt of the policy, to notify the company of his refusal to accept the policy. Under a Federal Supreme Court decision the retention of a policy containing a copy of the application, by assured, is an approval of such application.[12] Under a Wisconsin decision the reasonable time for discovering that a policy of insurance received ostensibly in response to an application therefor, signed in the belief, induced by the fraud of the agent that it called for a policy different from that actually called for, differs from the one supposed to have been applied for, commences to run immediately upon the receipt of the paper, nothing occurring then reasonably to excuse the applicant from omitting to examine his contract. And retaining the policy, in ignorance of the fraud because of failure to examine it, four and one half months

[9] Swing v. Marion Pulp Co. 47 Ind. App. 199, 93 N. E. 1004, 40 Ins. L. J. 807.

[10] American Steam Boiler Ins. Co. v. Wilder, 39 Minn. 350, 1 L.R.A. 671, 40n, 252.

[11] 47 Minn. 53, 43 N. W. 690.

[12] New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. 827.

Cited in:

United States.—John Hancock Mutual Life Ins. Co. v. Houpt, 113 Fed. 576; Caruthers v. Kansas Mutual Life Ins. Co. 108 Fed. 494; United States Life Ins. Co. v. Smith, 92 Fed. 507, 34 C. C. A. 510.

Arkansas.—King v. Cox, 63 Ark. 211, 37 S. W. 877; Providence Life Assurance Soc. v. Rentlinger, 58 Ark. 544, 25 S. W. 835.

Illinois.—National Union v. Arnhorst, 74 Ill. App. 482, 489.

Maryland.—Globe Reserve Mutual Life Ins. Co. v. Duffy, 76 Md. 301, 25 Atl. 227.

New York.—Hook v. Michigan Mutual Life Ins. Co. 90 N. Y. Supp. 56, 44 Misc. 478, 483.

North Dakota.—Johnson v. Dakota Fire & Marine Ins. Co. 1 N. Dak. 181, 45 N. W. 799.

Distinguished in State Ins. Co. v. Gray, 44 Kan. 735, 25 Pac. 197.

in such a case is, as a matter of law, unreasonable, and defeats the right of the insured to rescind the contract, where there was nothing to prevent his examining his policy as soon as it was delivered to him, and the substitution is plainly apparent on its face.[13] Again, silence on the part of a buyer of goods which the seller has offered to insure at their joint expense before delivery, coupled with the acceptance and retention of the policies by the former operates as an acceptance of the offer even though he has a secret intention not to accept and he becomes liable for premiums.[14]

But mere failure to reply to a letter containing a slip to be pasted to a policy of insurance, and which deals with a matter already embraced in the contract, will not make the slip binding on the insured, in the absence of anything to show that the insurer was injured by the silence.[15] But in a Massachusetts case [16] an insurance company issued a policy in the name of B., and sent it to B.'s agent, by whom it was returned with a request to make it payable to K., B.'s mortgagee. The first policy was canceled and a new policy was made out to K., but without B.'s knowledge of such return and substitution. The court determined that although the new policy was kept seven months by K., this did not constitute an acceptance thereof on the part of B., notwithstanding B. admitted that K.'s possession was not fraudulent. In Meyers v. Keystone Mutual Life Insurance Company,[17] it was determined that there was no sufficient acceptance of the policy to make it binding. There the agent of the company agreed on certain terms for a policy which were not ratified by the company, but a new policy was sent with a request to return it if the terms were not satisfactory, and both policies were kept without complying with the terms of the letter. The receipt and retention by assured of a renewal policy creates a binding contract even though the assured's name in the policy is that of the original corporation from which it had been changed.[18] An acceptance by assured of a policy of fire insurance, issued to take the place of another, is shown, notwithstanding assured retained the other policy, where assured at the time of the fire had no knowledge of the attempted substitution which was arranged by an agent acting as factor for both parties: and on being consulted after

[13] Bostwick v. Mutual Life Ins. Co. 116 Wis. 392, 67 L.R.A. 705 (annotated on retention of policy of insurance as waiver of mistake or fraud of the insurer or its agent), 89 N. W. 538, 92 N. W. 246, 31 Ins. L. J. 412.

[14] Bohn Manufacturing Co. v. Sawyer, 169 Mass. 477, 48 N. E. 620.

[15] Shakman v. United States Credit System Co. 92 Wis. 366, 53 Am. St. Rep. 920, 32 L.R.A. 383, 66 N. W. 528.

[16] Bennett v. City Ins. Co. 115 Mass. 241.

[17] 27 Pa. St. 268, 67 Am. Dec. 462.

[18] Peever Mercantile Co. v. State Mut. Fire Assoc. 23 S. Dak. 1, 119 N. W. 1008.

the fire, informed the company that he proposed to hang on to all the policies.[19]

§ 66j. Acceptance by insured father for infant beneficiaries.—Where a father insures his life for the benefit of his infant children, it is not essential to the interests of the beneficiaries that they have the nominal possession of the policy, the taking delivery of the policy by the insured constitutes an act of acceptance for such beneficiaries, and in subsequently holding the same he made himself a naked depositary without any interst for those entitled thereto.[20]

Subdiv. III. Completion of Contract—Prepayment of Premium.

§ 70. Prepayment of premium condition precedent.
§ 71. Actual prepayment of premium not in all cases essential to validity of contract.
§ 72. Prepayment of premium: oral agreement.
§ 73. Prepayment of premium to agent or broker.
§ 74. Effect of part payment.
§ 74a. Same subject: rebate: agent's commission released or property taken on credit therefor.
§ 74b. Part payment: good health.
§ 75. Payment by third person.
§ 76. Prepayment of premium may be waived.
§ 77. Waiver of prepayment by agent.
§ 78. Renewal: waiver of prepayment of premium.
§ 79. Prepayment of premium: effect of delivery of policy.
§ 80. Prepayment: credit may be given.
§ 80a. Same subject: promissory notes, checks, and drafts.
§ 81. Prepayment: mutual credits: application on agent's debt.
§ 82. Where there are mutual credits.
§ 83. Crediting premium on agent's indebtedness to applicant.
§ 84. Prepayment: course of dealings: allowing credit.
§ 85. Prepayment of premium: evidence of waiver.
§ 86. Effect of receipt in policy for premium.

§ 70. Prepayment of premium condition precedent.—Where it is expressly provided that the policy shall not take effect until the premium is paid, there is no binding contract until such payment is made, unless such provision is waived,[1] and if the application

[19] Finley v. Western Empire Ins. Co. 69 Wash. 673, 125 Pac. 1012.

[20] Ferguson v. Phœnix Mutual Life Ins. Co. 84 Vt. 350, 35 L.R.A. (N.S.) 844 (annotated on surrender of policy of ordinary life insurance without consent of beneficiary), 79 Atl. 997, 40 Ins. L. J. 1521.

[1] *United States.* — Giddings v. Northwestern Mutual Life Ins. Co.

provides that the policy shall not be in force until the first premium is paid, the legal result is that the insured covenants with the corporation directly, and not through its agents, that the policy shall

102 U. S. 108, 26 L. ed. 92; Miller v. Northwestern Mutual Life Ins. Co. 111 Fed. 465, 469, 49 C. C. A. 330, 334; Mutual Reserve Fund Life Assoc. v. Simmons, 107 Fed. 418, 46 C. C. A. 393; Lamb v. Mutual Reserve Fund Life Assoc. 106 Fed. 637, aff'd 108 Fed. 961, 48 C. C. A. 164, S. C. 109 Fed. 81; Travis v. Nederland Life Ins. Co. 104 Fed. 486, 488, 43 C. C. A. 653, 656; Weinfeld v. Mutual Reserve Fund Life Assoc. 53 Fed. 209. See McMaster v. New York Life Ins. Co. 99 Fed. 856, 40 C. C. A. 119 (aff'd 90 Fed. 40) rev'd 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. 10.

Arkansas.—Home Fire Ins. Co. v. Stancell, 94 Ark. 578, 127 S. W. 966.

California.—Westerfield v. New York Life Ins. Co. 129 Cal. 68, 77, 61 Pac. 667; Bergesen v. Builder's Ins. Co. 38 Ca. 541.

Colorado.—Newcomb v. Provident Fund Soc. 5 Colo. App. 140, 143, 38 Pac. 61.

Illinois.—Milwaukee Mechanics Ins. Co. v. Graham, 181 Ill. 158, 54 N. E. 914, 29 Ins. L. J. 175; Home Ins. Co. v. Field, 42 Ill. App. 392.

Indiana.—New v. Germania Fire Ins. Co. 171 Ind. 33, 131 Am. St. Rep. 245, 85 N. E. 703.

Kentucky.—Blue Grass Ins. Co. v. Cobb, 24 Ky. L. Rep. 2132, 72 S. W. 1099.

Massachusetts.—Wainer v. Milford Mutual Fire Ins. Co. 153 Mass. 335, 11 L.R.A. 598, 26 N. E. 877; Baxter v. Massasoit Ins. Co. 13 Allen (95 Mass.) 320; Mulrey v. Shawmut Mut. Fire Ins. Co. 4 Allen (86 Mass.) 116, 81 Am. Dec. 689.

Michigan.—Bowen v. Prudential Ins. Co. of America, 178 Mich. 63, 51 L.R.A.(N.S.) 587, 144 N. W. 543.

Minnesota.—Schwartz v. Germania Ins. Co. 18 Minn. 448.

Missouri.—Wilcox v. Sovereign Camp Woodmen of the World, 76 Mo. App. 573, 1 Mo. App. Reps. 525.

Nebraska.—Modern Woodmen Accident Assoc. v. Kline, 50 Neb. 345, 69 N. W. 943, 26 Ins. L. J. 724.

New York.—Russell v. Prudential Ins. Co. 176 N. Y. 178, 98 Am. St. Rep. 656, 68 N. E. 252; Babcock v. Baker, 56 N. Y. Supp. 239, 37 App. Div. 558; Sandford v. Trust Ins. Co. 11 Paige (N. Y.) 547.

North Carolina.—Perry v. Security Life & Annuity Co. 150 N. Car. 143, 63 S. E. 679, 38 Ins. L. J. 432; Ray v. Security Trust & Life Ins. Co. 126 N. Car. 166, 35 S. E. 246, 29 Ins. L. J. 369.

Ohio.—State Life Ins. Co. v. Harvey, 72 Ohio St. 174, 73 N. E. 1056; Flint v. Ohio Ins. Co. 8 Ohio 502; Union Central Life Ins. Co. v. Morrow, 7 Ohio Dec. 118.

Pennsylvania.—Brady v. Northwestern Masonic Aid Assoc. 190 Pa. 595, 42 Atl. 962.

Virginia.—Oliver v. Mutual Life Ins. Co. 97 Va. 134, 1 Va. Sup. Ct. Rep. 29, 33 S. E. 536, 28 Ins. L. J. 710. See Mutual Life Ins. Co. v. Oliver, 95 Va. 445, 28 S. E. 594, 27 Ins. L. J. 444.

If insured does not comply with a condition precedent in a policy no contract is effected. Banco de Sonora v. Bankers Mutual Casualty Co. 124 Iowa 576, 104 Am. St. Rep. 367, 100 N. W. 532; Summers v. Mutual Life Ins. Co. 12 Wyo. 369, 109 Am. St. Rep. 992, 75 Pac. 937, 66 L.R.A. 812.

A condition is valid in a fire policy issued in Iowa, providing "that no insurance, whether original or continued, shall be considered as binding until the actual payment of the premiums, nor shall this company be liable for any loss under this policy occurring when any note, or any part thereof, given for a part or whole of the premium, shall be due and unpaid." Harle v. Council Bluffs Ins. Co. 71 Iowa, 401, 32 N.

not be binding until such payment is made.[2] So where there is a special understanding between an insurance office and the agent of the insured that no insurance shall be considered as effected in behalf of himself or others until the premium is paid, and a rule of the company is kept posted up in the office not to consider an insurance effected until the premium is paid, the policy delivered, or a written acceptance entered on the books, no agreement for insurance can be perfected in equity when these conditions are not complied with.[3] So, also, where a policy is issued subject to the conditions on the back thereof, and one of the conditions is that the contract is not valid unless the premium is actually "paid in cash," and there is no waiver of this provision by the company, and the agent issuing the policy has no authority to alter these provisions, it is held that the acceptance of a promissory note of the insured by the agent as payment of the premium does not render the contract complete, and that there is no consideration for the note.[4] And where the application for a life policy provides that there shall be no contract until the policy is issued and delivered and the first premium paid during the life of the applicant while in the same condition of health as described in the application, and the applicant dies before the policy is issued, the contract is not complete.[5] So a policy of insurance issued on the express condition that the assured shall execute his negotiable promissory note to the company with a solvent indorser is of no binding force until the condition has been performed.[6] Where by the charter of the company the deposit of a premium note for a sum to be determined by the directors is made a condition precedent to receiving the policy, this condition must be complied with.[7] In New Jersey a by-law of the company required the execution of a premium note by the assignee before delivery to him of the approved policy, and the purchaser of insured property took an assignment of the policy and sent it to the secretary of the company for approval. This was given by indorsement on the policy, and entry on the company's

W. 396. See also Mutual Reserve Fund Life Assoc. v. Simmons, 107 Fed. 418, 46 C. C. A. 393. Perry v. Security Life & Annuity Ins. Co. 150 N. Car. 143, 63 S. E. 679, 38 Ins. L. J. 432.

[2] Russell v. Prudential Ins. Co. 176 N. Y. 178, 98 Am. St. Rep. 656, 68 N. E. 252.

[3] Flint v. Ohio Ins. Co. 8 Ohio, 502.

On promissory note as payment of insurance premium satisfying requirement that initial payment must have been actually paid, see note in 5 B. R. C. 372.

[4] Dunham v. Morse, 158 Mass. 132, 35 Am. St. Rep. 473, 32 N. E. 1116. See §§ 80, 80a, 1202 herein.

[5] Paine v. Pacific Mutual Life Ins. Co. 51 Fed. 689, 691. See § 104.

[6] Bidwell v. St. Louis Floating Dock & Ins. Co. 40 Mo. 42.

[7] Belleville Mutual Ins. Co. v. Van Winkle, 12 N. J. Eq. 333, § 34.

books. The policy, however, was retained until the required premium note should be executed, which was agreed to be done. This was neglected, a loss occurred, and defendant was assessed as a policy holder. He refused to pay. A bill was filed against him by the company. The court dismissed the bill on the ground that the property was not insured.[8] In Giddings v. Northwestern Mutual Life Insurance Company[9] an application was made by B. to the agent of a mutual life insurance company for a policy upon his life for six thousand dollars; the application was upon a form furnished by the agent. The charter of the company provided that before a person could become a member, he should "the first time he effects insurance, and before he receives his policy, pay the rates that shall be fixed upon and determined by the trustees." A policy was issued and forwarded to the agent, which provided that it should not be binding on the company until "the premium be actually paid, during the lifetime of the person whose life is assured, to the company, or some person authorized to receive it, who shall countersign the policy on receipt of the premium." The policy was not called for, but was returned and canceled. B. died prior to the return of the policy, and the administrator tendered the first premium to the agent, who refused to act in the matter. Thereupon, the administrator forwarded proofs of loss to the company, action was subsequently brought, and the court decided that the payment of the premium in the lifetime of B. was a condition precedent to A.'s liability, and the suit could not be maintained. In another case the policy expressly provided that the company should not be liable until the premium in full was actually paid, and that if the premium was not paid within fifteen days from the date of the policy, it should be null and void. Before the premium was paid, and before the expiration of the "fifteen days," the property was burned. Thereupon the insured within the "fifteen days" tendered the premium and claimed indemnity for the loss. The court, however, determined that actual payment of the premium, not only within the "fifteen days" but before loss, was necessary to render the company liable under the policy, and that the holder could not recover.[10] And where a party seeking insurance on his life has made some effort to pay the premium necessary to perfect the contract, but has not done all that he could, the company is not liable;[11] and such stipulation as to prepayment of premium is not complied with or waived by a payment of the premium to an in-

[8] Cranberry Mutual Fire Ins. Co. v. Hawk (N. J. Ch. 1888) 14 Atl. 745.

[9] 102 U. S. 108, 26 L. ed. 92.

[10] Bradley v. Potomac Fire Ins. Co. 32 Md. 108, 3 Am. Rep. 121. See Home Ins. Co. v. Field, 42 Ill. App. 392.

surance agent, through whom the application was made and the policy delivered, if the policy contains an express stipulation that every insurance agent, broker, or other person forwarding applications or receiving premiums is the agent of the applicant and not of the company, although the company were in the habit of settling a monthly account with him, and he, after the loss, tendered the premium to them.[12] It is also held in a North Carolina case that if the prepayment of dues is stipulated for in the application, it constitutes an essential part of the contract of insurance, with which the agent has no power to dispense even if an intent to do so can be inferred from his forwarding the policy with a receipt for the dues signed by the president, but not countersigned by him.[13] So the parties to a contract of insurance may stipulate that it shall not become operative as an indemnity until payment in full by the insured of all charges and assessments required by the constitution, rules, and regulations of the insurer.[14] An "advance premium" is in the nature of a membership fee, where the payment thereof is made a condition precedent to liability of the company under the express terms of the policy.[15] In Hubbell v. Pacific Mutual Insurance Company [16] the defendant agreed to insure plaintiff's cargo. The custom in such cases was to issue a policy in from ten to twenty days on payment of the premium or delivery of the note of the insured therefor. Within twenty days plaintiff became insolvent, and made an assignment. Defendant gave notice that the premium must be paid in cash or secured. Nothing more was done. Several years afterward, in a suit brought on the agreement, it was held that the agreement came to an end by the failure of plaintiff to comply with defendant's notice or to take some action at the time. In Buffum v. Fayette Mutual Fire Insurance Company,[17] it was determined that if the by-laws of a mutual insurance company provide that "each person, before the policy shall be binding on the company, shall pay to the treasurer or agent such premium and make such deposit as the directors shall determine," the company is not rendered liable on a policy which is executed, but not delivered, and for which no premium has been paid, by an oral promise of their treasurer to the applicant for insurance that if any-

[11] Cronkhite v. Accident Ins. Co. of North America, 35 Fed. 26.

[12] Mulrey v. Shawmut Mutual Fire Ins. Co. 4 Allen (86 Mass.) 116, 81 Am. Dec. 689. See Wallingford v. Home Mutual Fire & Marine Ins. Co. 30 Mo. 46.

[13] Ormond v. Fidelity Life Assn. 96 N. C. 158, 1 S. E. 796.

[14] Modern Woodman Accident Assoc. v. Kline, 60 Neb. 345, 69 N. W. 943, 26 Ins. L. J. 724.

[15] Smith v. Covenant Mutual Benefit Assoc. 16 Tex. Civ. App. 593, 43 S. W. 819.

[16] 100 N. Y. 41, 2 N. E. 470.

[17] 3 Allen (85 Mass.) 360.

thing should happen, he would see the premium paid, or that he would take it upon himself to keep the policies good. In another case an application for life insurance was made to an insurance company which it found satisfactory; and it wrote a policy based on the application and sent the policy to its agent, who offered the policy to the person making the application for inspection. The premium called for by the terms of the policy was not paid, and the policy was not delivered, and it was decided that an action could not be maintained against the company under any form of declaration.[18] And if a policy of insurance is sent to the assured, and he refuses to accept it and pay the premium according to its terms and his agreement, but holds it to look into the standing of the company while it is under advisement, without delivery, acceptance, and payment of the premium, the property is at risk of the assured, and he cannot recover in case of loss by fire. It is too late to accept the policy and tender the premium after the property is destroyed, where the policy requires prepayment and there has been no waiver.[19] Where a policy on mortgaged premises which the mortgagor has refused to accept is delivered to the mortgagee, who does not pay or agree to pay the premium, the policy does not become effective by reason of a clause therein that the mortgagee should pay the premium on demand if the mortgagor fails to do so.[20] And a worthless check does not constitute the payment of the first premium required as a condition precedent to the completion of the contract.[1] A premium is not overdue because not paid on the day of the date of the policy, even though the insurance is not to take effect unless the first premium is paid.[2]

§ 71. Actual prepayment of premium not in all cases essential to validity of contract.—This head-line statement is a general qualification of or exception to the rule first stated under the last preceding section and will, therefore, be only briefly instanced in this place as it embraces to a great extent what appears under other sections next following herein. The payment of the premium is not made a condition precedent to the taking effect of a contract of insurance by a writing following the proposals, but not made a part of the policy, either by recital or reference, stating that the applicant agrees "that the assurance hereby proposed shall not be binding on said company until the amount of premium as stated therein shall

[18] Markey v. Mutual Benefit Ins. Co. 126 Mass. 158. See also Home Ins. Co. v. Field, 42 Ill. App. 392.

[19] Millville Mutual Marine & Fire Ins. Co. v. Collerd, 38 N. J. L. 480.

[20] New v. Germania Fire Ins. Co. 171 Ind. 33, 131 Am. St. Rep. 245, 85 N. E. 703.

[1] Brady v. Northwestern Masonic Aid Assoc. 190 Pa. 595, 42 Atl. 962.

[2] Kennedy v. Metropolitan Life Ins. Co. 116 La. 66, 40 So. 533.

be received by said company or an accredited agent."[3] And in Stanley v. Northwestern Life Association[4] a member agreed in his application to pay "one assessment within thirty days after the date of such assessment" whenever made in accordance with the constitution and by-laws, which provided that every member failing to pay his assessment within thirty days from the date thereof should stand suspended, and the court decided that under the stipulations of the contract if one assessment was not paid within the time provided, the certificate would become null and void, but the payment of at least one assessment was not a condition precedent to recovery.[5]

§ 72. Prepayment of premium: oral agreement.—In the case of an oral contract of insurance or to insure, the prepayment of the premium is not necessary[6] until the policy issues, unless there is a special agreement to the contrary, but when the policy is tendered, the insured must pay the premium, unless credit is given or there is an express or implied waiver or some agreement obviating the necessity of prepayment.[7] If an oral agreement for insurance is made, and prepayment is not made a condition precedent, there is no obligation to pay the premium until the policy is ready for delivery.[8] And a promise to pay may be sufficient.[9] So also is a

[3] Sheldon v. Connecticut Mutual Life Ins. Co. 25 Conn. 207, 65 Am. Dec. 565.

[4] 36 Fed. 75.

[5] See note to 21 Am. St. Rep. 883. See sections next following.

[6] Western Assurance Co. v. McAlpin, 23 Ind. App. 220, 77 Am. St. Rep. 423, 55 N. E. 119.

Oral agreement—case where the agent received and remitted the premium: Ellis v. Albany City Ins. Co. 4 Lans. (N. Y.) 433, 50 N. Y. 402, 10 Am. Rep. 495.

On requisites of a present oral contract of insurance, see note in 5 L.R.A.(N.S.) 407.

[7] *United States.*—Kohne v. Insurance Co. of North America, 1 Wash. (U. S. C. C.) 93, Fed. Cas. No. 7920.

Illinois.—Continental Ins. Co. v. Roller, 101 Ill. App. 77.

Indiana.—New England Fire & M. Ins. Co. v. Robinson, 25 Ind. 536.

Iowa.—Davenport v. Peoria Marine & Fire Ins. Co. 17 Iowa, 276.

Maine.—Blanchard v. Waite, 28 Me. 51, 48 Am. Dec. 474; Loring v. Proctor, 26 Me. 18.

New York.—Ruggles v. American Central Ins. Co. 114 N. Y. 415, 11 Am. St. Rep. 674, 21 N. E. 1000; Audubon v. Excelsior Ins. Co. 27 N. Y. 216, 223, Denio, J.; Kelly v. Commonwealth Ins. Co. 10 Bosw. (N. Y.) 82. See § 38a herein.

North Carolina.—Perry v. Security Life & Annuity Ins. Co. 150 N. Car. 143, 63 S. E. 679, 38 Ins. L. J. 432.

Wisconsin.—John R. Davis Lumber Co. v. Scottish Union & National Ins. Co. 94 Wis. 472, 69 N. W. 156; Stehlick v. Milwaukee Mechanics' Ins. Co. 87 Wis. 379, 58 N. Y. 350.

As to oral contract: renewal: prepayment of premium, see fifth note, § 41 herein.

[8] Firemen's Ins. Co. v. Kuessner, 164 Ill. 275, 45 N. E. 540; Perry v. Security Life & Annuity Ins. Co. 150 N. Car. 143, 63 S. E. 679, 38 Ins. L. J. 432; Croft v. Hanover Fire Ins. Co. 40 W. Va. 508, 52 Am. St. Rep. 902, 21 S. E. 854.

promise to give a premium note.[10] But it is not essential to the existence of a binding contract to make insurance that the premium note should have been actually signed and delivered.[11]

§ 73. Prepayment of premium to agent or broker.—The payment of the premium to a company's authorized agent binds the company though the agent convert the money and a policy is never actually issued.[12] And where the insurer's agent retains the premium paid, beyond the time limited for payment or remittance to the company there is a sufficient payment.[13] So an insurance company will not be permitted to refuse a risk on the ground of a loss prior to the receipt of the premium if the premium was paid to an agent of the company prior to the loss and would have been received but for the delay of the agent.[14] And it is no defense, that the company never received the money from the agent who delivered the policy, he having authority to deliver it.[15] In a Pennsylvania case the policy provided for actual cash payment into the office before the policy should attach and payment was made to an insurance broker to whom the application was made, but the money was not paid into the office of the company. The court held that he was agent of the applicant, and that the company was not liable.[16] Again, if the premium is paid to the company's general agent, who transmits the application but not the premium paid, and the company delays formal acceptance until the agent remits the premium there is a completed contract.[17] Payment to an agent of a duly authorized

[9] Milwaukee Mechanic's Ins. Co. v. Graham, 181 Ill. 158, 54 N. E. 914, aff'g 80 Ill. App. 549.

[10] Commercial Mutual Ins. Co. v. Union Mutual Ins. Co. 19 How. (60 U. S.) 318, 15 L. ed. 636.

[11] Commercial Mutual Ins. Co. v. Union Mutual Ins. Co. 19 How. (60 U. S.) 318, 15 L. ed. 636, *cited* in Miller v. Brooklyn Life Ins. Co. 12 Wall. (79 U. S.) 285, 304, 20 L. ed. 398, 402; Belleville Mutual Ins. Co. v. Van Winkle, 12 N. J. Eq. 333, 340.

[12] Ide v. Phœnix Ins. Co. 2 Biss. (U. S. C. C.) 333, Fed. Cas. No. 7001. See Ferebee v. North Carolina Mutual Home Ins. Co. 68 N. C. 11. See New York Life Ins. Co. v. Greenlee, 42 Ind. App. 82, 84 N. E. 1101.

[13] Gaysville Manufacturing Co. v. Phœnix Mutual Fire Ins. Co. 67 N. H. 457, 36 Atl. 367. See also Pulaski Mutual Fire Ins. Co. v. Dawson, 87 Ill. App. 514.

[14] Perkins v. Washington Ins. Co. 4 Cow. (N. Y.) 645.

[15] Lebanon Mutual Ins. Co. v. Erb, 112 Pa. St. 149, 4 Atl. 8. See Shoemaker v. Commercial Union Assur. Co. 80 Neb. 637, 114 N. W. 1105.

[16] Pottsville Mutual Ins. Co. v. Minnequa Springs Improvement Co. 100 Pa. St. 137. See also Arthurholt v. Susquehanna Mutual Fire Ins. Co. 159 Pa. St. 1, 39 Am. St. Rep. 659, 28 Atl. 197.

On insurance broker as agent for insured as to payment, see note in 38 L.R.A.(N.S.) 616, on insurance agent as agent of assured as to payment, see note in 20 L.R.A. 286.

As to agent's powers, restrictions on authority, etc., *compare* §§ 424 et seq., 472 et seq., 512 et seq., 550 et seq. herein.

[17] Preferred Accident Ins. Co. v. Stone, 61 Kan. 48, 58 Pac. 986.

agent or to one without authority where it is received by the company or its authorized agent is sufficient.[18] It is held in Illinois that payment of the premium to the local agent and a return thereof to the general agent, by whom the amount is credited to the local agent on the books of the company, and an instruction afterward to the local agent to cancel the policy, is an admission that there was a policy capable of being canceled, and it is not for the company afterward to deny it.[19] But an agent authorized to deliver the policy and receive and transmit premiums, but not to issue policies, may not extend the time for payment.[20] If the assured pays the premium to an insurance broker and receives the policy, he does not lose the benefit thereof by reason of a course of dealing between the broker and the general agent of the company.[1] A policy was executed and attested as required by the act incorporating the company. It contained no stipulation making an actual payment of the premium a condition precedent, or that default in its payment should constitute a forfeiture. The policy was delivered without prepayment to an agent for the purpose of being delivered to the plaintiff. The plaintiff paid the premium to the agent and the stock insured was destroyed by fire. It was held that the company was liable.[2] When the policy provides that the insurance broker should be deemed the agent of the insured, the payment of the premium to him does not constitute a payment to the company.[3] So where a policy is delivered to an agent with authority to deliver it to the insured and receive the premium, and the agent delivers the policy and accepts a note for the premium, and discounts it on his own account, but does not pay the amount to the principal, the company is liable, although the policy provides that such agent shall be deemed the agent of the insured, and that the insurer shall not be liable until he actually receives the premium.[4] The decisions, however, are not unanimous upon the question whether the

[18] Weisman v. Commercial Fire Ins. Co. 3 Pennewill (Del.) 224, 50 Atl. 93.

[19] Ætna Ins. Co. v. Maguire, 51 Ill. 342.

[20] Critchett v. American Ins. Co. 53 Iowa, 405. See statutes of this state as to solicitor being insurer's agent. See § 512 herein.

[1] Pittsburgh Boat Yard Co. v. Western Assur. Co. 5 Pa. 119, 47 Am. Dec. 401.

[2] Pennsylvania Ins. Co. v. Carter, — Pa. —, 11 Atl. 102.

[3] Wilber v. Williamsburg City Fire Ins. Co. 122 N. Y. 439, 25 N. E. 926, 15 N. Y. 802; Rohrbach v. Germania Ins. Co. 62 N. Y. 47, 20 Am. Rep. 451. (See N. Y. statute as to solicitor being insurer's agent); Pottsville Mutual Ins. Co. v. Minnequa Springs Improvement Co. 100 Pa. St. 137.

[4] Carson v. Jersey City Fire Ins. Co. 43 N. J. L. 300, 39 Am. Rep. 584. See Alexander v. Germania Fire Ins. Co. 66 N. Y. 464, 23 Am. Rep. 76. See statutes of New Jersey and New York as to solicitor being agent of insurer.

agent or broker is agent of the insurer or insured in certain cases, although the statutes of a majority of the states make the soliciting agent the insurer's agent. This point, however, will be considered hereafter.[5]

§ 74. Effect of part payment.—Where prepayment is a condition precedent to the validity of the policy, a part payment of the premium, unless the balance is credited, is not sufficient to bind the company,[6] unless the company assents thereto and receives the part payment.[7] If payment is not required until the policy is delivered a partial payment to the agent, to whom the policy is sent for delivery to assured, is a waiver of complete payment.[8] So there may be a prepayment partly in cash and the balance by note.[9] Again, a presumption exists, if a policy is delivered upon a part payment of the premium that a credit was extended for the balance.[10] If an agent has full authority, to deliver policies, collect premiums and make rates and the policy is delivered, receipts the payment, and shows on its face that the premium was considered fully paid the insurer cannot call in question the acts of the agent in extending credit to insured for part of the premium, especially where the policy contains no condition that it shall not be effective unless the premium be paid in money.[11]

An agent may have the right to bind the insurer by accepting less than the amount of the initial fee, and if he does so and the policy is issued it is unimportant that assured knew that the sum paid was less than the regular fee.[12] And

[5] It is held in a case in Indiana that the broker is the agent of the one from whom he receives compensation, irrespective of who employs him: Indiana Ins. Co. v. Hartwell, 123 Ind. 177, 24 N. E. 100; see Mullin v. Vermont Mutual Fire Ins. Co. 58 Vt. 113, 4 Atl. 417.

In another case it is held that he is agent for both parties: Crousillat v. Ball, 3 Yeates (Pa.) 375; 4 Dall. (4 U. S.) 294, 2 Am. Dec. 375.

In another case it is decided that he is agent of the person employing him: Hamblett v. City Ins. Co. 36 Fed. 118.

In another case it is decided that he may be shown to be the company's agent: Newark Fire Ins. Co. v. Samons, 110 Ill. 166. See chapters on agents §§ 424 et seq., 472 et seq., 512 et seq., 550 et seq. herein.

[6] Barnes v. Piedmont & Arlington Life Ins. Co. 74 N. C. 22.

[7] Brown v. Massachusetts Mutual Life Ins. Co. 59 N. H. 298, 307, 47 Am. Rep. 205. See also Nebraska & Iowa Insurance Co. v. Christiensen, 29 Neb. 572, 26 Am. St. Rep. 407.

[8] New York Life Ins. Co. v. Greenlee, 42 Ind. App. 82, 84 N. E. 1101.

[9] Life Ins. Co. of Virginia v. Hairston, 108 Va. 832, 128 Am. St. Rep. 989, 62 S. E. 1057. See §§ 80, 81, 1202 herein.

[10] Northwestern Life Assur. Co. v. Schulz, 94 Ill. App. 156.

[11] Homestead Fire Ins. Co. v. Ison, 110 Va. 18, 3 Va. App. 485, 65 S. E. 463, 38 Ins. L. J. 1143.

[12] Triple Link Mutual Indemnity Assoc. v. Williams, 121 Ala. 138, 77 Am. St. Rep. 34, 26 So. 19, 28 Ins. L. J. 621.

where there is an application, or payment of a portion of the premium, and acceptance of the risk by the company, and nothing is required but the delivery of the policy and the payment of the balance of the premium, which latter is not required under the rules of the company until the contract is completed, a valid contract for a policy exists.[13] Again, an agreement between the general agent of a foreign insurance company and a person who takes a policy, by which the latter is given credit for a part of the first premium in ignorance of any stipulation contained in the policy thereafter issued, which denies the right of the agent to make such contract, estops the insurance company to deny the acts of the agent or to assert the invalidity of the agreement. And a provision of an insurance policy to the effect that "none of its terms can be modified nor any forfeiture under it waived save by an agreement in writing signed by the president or secretary of the company" never became binding or effective on the assured, who made his contract with the general agent and manager of the insurance company within the state before the policy was written, when he did not assent to this provision, had no knowledge of it, and was not informed that the policy to be issued would contain any such provision.[14] It is held, however, that part payment of the premium cannot be waived by a mutual insurance company's agent with authority to issue policies.[15]

§ 74a. Same subject: rebate: agent's commission released or property taken on credit therefor.—An insurance company is not charged with notice that payment of the first premium on a policy was effected in part by a release of the agent's commission to the applicant.[16] So the payment of the first premium required by an application for insurance, to be made before the policy will become binding, is not effected by the release to the applicant of the agent's commission and payment by the applicant of the balance, where the commission is not due until the premium has been paid in cash and the policy issued, and all moneys received by the agent are to be held in trust for the company, while the binding slip requires a return of the money acknowledged to have been received, upon rejection of the policy.[17] But it is also held that a person who, under

[13] Cooper v. Pacific Mutual Life Ins. Co. 7 Nev. 116, 8 Am. Rep. 705.

[14] Cole v. Union Central Life Ins. Co. 22 Wash. 26, 47 L.R.A. 201, 60 Pac. 68.

[15] Graham v. Mercantile Town Mutual Ins. Co. 110 Mo. App. 95, 84 S. W. 93.

[16] Union Central Life Ins. Co. v. Robinson, 148 Fed. 358, 78 C. C. A. 268, 8 L.R.A.(N.S.) 883, rev'g 144 Fed. 1005. As to rebate see §§ 447, 715, 1091, 1092, 1408 herein.

[17] Union Central Life Ins. Co. v. Robinson, 148 Fed. 358, 78 C. C. A. 268, 8 L.R.A.(N.S.) 883 (annotated on allowance to applicant of agent's Commission as payment of premium), 144 Fed. 1005.

a state statute is agent of the insurer, may accept part payment of the first premium in cash, and for that portion which amounts to his commission may take his pay in merchandise, or trust assured for such balance, even though the premium is required to be paid in cash.[18] But it is decided that an agent of a life insurance company has no implied authority to waive payment of premiums on an insurance policy in money and agree to take something in lieu thereof which is neither money nor an agreement to pay money, nor equivalent to money to the corporation when taken.[19] It is, however, also held that if an insurer gives its agent full power to collect a premium, and treats the premium as paid, such an agent may agree to take part payment in trade with insured.[20]

§ 74b. Part payment: good health.—If, owing to a mistake as to the amount, only part of the premium is paid to and received by the agent, and the actual delivery of the policy, which is also required as a condition precedent to complete the contract, is delayed, and the delivery by the agent is recalled before sickness of the applicant, no insurance is effected.[1] If part payment in cash is deferred until the applicant is suffering from his last sickness and shortly before his death no contract exists even though the solicitor orally agrees to a partial payment in cash.[2]

§ 75. Payment by third person.—Where a policy of life insurance provides that it shall not take effect until the payment of the advance premium has been made during the lifetime of the insured, a payment with the applicant's money made by a third party but without his knowledge, although during his lifetime, cannot be ratified by his administrator after his death, and is inoperative.[3]

[18] John Hancock Mutual Life Ins. Co. v. Schlink, 175 Ill. 284, 51 N. E. 795, 28 Ins. L. J. 132, aff'g 74 Ill. App. 181. See Winchell v. Iowa State Ins. Co. 103 Iowa, 189, 72 N. W. 503.

Brokers acting as insured's agents, not within statute N. Y. 1892, c. 641, sec. 1, which forbids agents, etc. of fire insurance company including as consideration for insurance any fee, compensation, etc. Tanenbaum v. Rosenthal, 60 N. Y. Supp. 494, 44 App. Div. 431.

[19] Tomsecek v. Travelers' Ins. Co. 113 Wis. 114, 90 Am. St. Rep. 846, 57 L.R.A. 455, 88 N. W. 1013.

On payment of insurance premium by cancelation of agent's indebtedness, see note in L.R.A.1915A, 686.

[20] Homestead Fire Ins. Co. v. Ison, 110 Va. 18, 3 Va. App. 485, 65 S. E. 463, 38 Ins. L. J. 1143. See § 83.

[1] Ray v. Security Trust & Life Ins. Co. 126 N. Car. 166, 35 S. E. 246, 29 Ins. L. J. 369.

[2] Harriman v. New York Life Ins. Co. 43 Wash. 398, 86 Pac. 656, 35 Ins. L. J. 852.

[3] Whiting v. Massachusetts Mutual Life Ins. Co. 129 Mass. 240, 37 Am. Rep. 317. See State Life Ins. Co. v. Harvey, 72 Ohio St. 174, 73 N. E. 1056. *Compare* Mississippi Valley Life Ins. Co. v. Neyland, 9 Bush (72 Ky.) 430.

See as to payment of premiums in marine insurance: Hurlburt v. Pacific Ins. Co. 2 Sum. (U. S. C. C.) 471, Fed. Cas. No. 6919; Patapsco

Where an applicant for life insurance had an interview with an agent of the company, who offered a policy to him and asked him to pay the premium, and he told the agent that if he would go to a third party that the latter would pay him, as an arrangement had been made with him to that effect, and the agent agreed to go, but never went, and retained the policy in his own hands: it was held that instructions were erroneous which permitted the jury to find that these facts were equivalent to a delivery of the policy and payment of the premium.[4] But a third person may by agreement between the assured and him made in the agent's presence agree to pay the premium and bind the company by a part payment.[5] And a person may obtain money from another to pay the premium on a policy which is taken out for the benefit of insured's estate, and the insurer issuing the policy cannot inquire into the terms of the contract under which the money was obtained, as it is immaterial to him.[6] But if an applicant for life insurance, after making his application, changes his mind and refuses to accept the policy when tendered, and neither he nor the beneficiary named therein pays any of the premiums nor authorizes their payment, there is no complete contract of insurance, though another person into whose possession the policy comes pays such premiums.[7] And a friend of the applicant cannot pay the premium, about the payment of which there was an unsettled dispute, an hour or two before the death of the applicant, to an agent ignorant of his hopeless illness, and thus secure a valid policy, not delivered until after his death.[8]

§ 76. Prepayment of premium may be waived.—It is well-settled law that the clause in a policy exempting the company from liability until actual payment of the premium may be waived by the

Ins. Co. v. Smith, 6 Har. & J. (Md.) 166, 14 Am. Dec. 268; Insurance Co. of Pennsylvania v. Smith, 3 Whart. (Pa.) 520.

[4] Hoyt v. Mutual Benefit Life Ins. Co. 98 Mass. 539.

[5] New York Life Ins. Co. v. Greenlee, 42 Ind. App. 82, 84 N. E. 1101.

[6] Merchants Life Assoc. of U. S. v. Oakum, 98 Fed. 251, 39 C. C. A. 56.

[7] Hogben v. Metropolitan Life Ins. Co. 69 Conn. 503, 61 Am. St. Rep. 53, 38 Atl. 214.

[8] Piedmont & Arlington Life Ins. Co. v. Ewing, 92 U. S. 377, 23 L. ed. 610, *cited* in Giddings v. Northwestern Mutual Life Ins. Co. 102 U. S. 108, 112, 26 L. ed. 92, 93; Cable v. United States Life Ins. Co. 111 Fed. 19, 29, 49 C. C. A. 216, 225; Equitable Life Assur. Soc. v. McElroy, 83 Fed. 631, 637, 28 C. C. A. 365, 371, 49 U. S. App. 548; Paine v. Pacific Mutual Life Ins. Co. 51 Fed. 689, 693, 2 C. C. A. 459, 463, 10 U. S. App. 256 (Kendalls Adm'r v. Same); Whiting v. Massachusetts Mutual Life Ins. Co. 129 Mass. 240, 241, 37 Am. Rep. 317; Societe Des Mines D'Argent et Fonderies De Bingham v. Mackintosh, 5 Utah 568, 577, 18 Pac. 363. *Distinguished* in Dove v. Royal Ins. Co. 98 Mich. 122, 125, 57 N. W. 30. See also Harriman v. New York Life Ins. Co. 43 Wash. 398, 86 Pac. 656, 35 Ins. L. J. 852.

company or its authorized agent, and the contract become binding without prepayment of the premium, such provisions being for the benefit of the company,[9] and prepayment of the premium may be waived though the policy provides that the premium must be prepaid either at the company's office or to an agent duly authorized in writing to receive it.[10] So a clause in a policy providing that it shall be void unless the premium is paid to the secretary, or an agent of the insurer duly appointed in writing, is waived by the insurer whenever, by his voluntary act, the policy leaves his office to be delivered to insured on payment of the premium, without regard to the fact that someone, having nominal connection with the insurer as agent, hands over the policy, receives the premium, and fails to pay it to the insurer.[11] And where the by-laws and conditions of a mutual insurance company provide that all general and local agents shall be appointed by the secretary and furnished with a certificate of appointment under seal setting forth their powers, and no insurance, whether original or continued, shall be considered binding unless the premium shall have been actually paid to some duly authorized and commissioned agent, such by-laws and conditions are solely for the benefit of the insurer and may be waived, and are waived, when an agent is authorized to deliver a policy and receive the premium though such agent has not been duly authorized and commissioned as provided in the by-laws. Such a course of dealing adopted between the insurer and his agent, though wholly inconsistent with the provisions of the policy cannot be set up to defeat a recovery.[12]

[9] Train v. Holland Purchase Ins. Co. 62 N. Y. 598, 602; Bodine v. Exchange Fire Ins. Co. 51 N. Y. 117; 10 Am. Rep. 566; Wood v. Poughkeepsie Ins. Co. 32 N. Y. 619; Trustees First Baptist Church v. Brooklyn Fire Ins. Co. 19 N. Y. 305.

See also the following cases:

California.—Griffith v. New York Life Ins. Co. 101 Cal. 627, 40 Am. St. Rep. 96, 36 Pac. 113.

Indiana.—New York Life Ins. Co. v. Greenlee, 42 Ind. App. 82, 84 N. E. 1101.

Nebraska.—Nebraska & Iowa Ins. Co. v. Christiensen, 29 Neb. 572, 26 Am. St. Rep. 407.

North Carolina.—Pender v. North State Mutual Life Ins. Co. 163 N. Car. 98, 79 S. E. 293.

Pennsylvania.—Susquehanna Mutual Fire Ins. Co. v. Elkins, 124 Pa. St. 484, 10 Am. St. Rep. 608, 17 Atl. 24.

Utah.—Thum v. Wolstenholme, 21 Utah 446, 61 Pac. 537, 29 Ins. L. J. 699.

As to premiums etc., excuses, waiver and estoppel, see also §§ 1345 et seq. herein.

[10] Susquehanna Mutual Fire Ins. Co. v. Elkins, 124 Pa. St. 484, 10 Am. St. Rep. 609, 17 Atl. 24; Universal Fire Ins. Co. v. Block, 109 Pa. St. 535.

[11] Arthurholt v. Susquehanna Mutual Fire Ins. Co. 159 Pa. St. 1, 39 Am. St. Rep. 659, 28 Atl. 197.

[12] Susquehanna Mut. Fire Ins. Co. v. Elkins, 124 Pa. St. 484, 10 Am. St. Rep. 608, 17 Atl. 24.

Again, a condition in a policy that it shall not be in force until the premium is paid is waived by neglect of the company to insist on such condition after the agent reports that a policy has been issued and that the premium thereon is unpaid.[13] It is held in Louisiana, that where an application for insurance is accepted, the policy made out in duplicate, and the name of the assured as such is entered on the company's books, the contract is complete, and unless the company has required payment of the premium at that time, or notified the applicant of a stipulation in the policy requiring payment of the premium as a condition precedent, the company will be deemed to have waived such condition.[14] Although a policy in a mutual insurance company stipulates that it shall be void if any assessment on the premium note shall not be paid within thirty days, yet it may lawfully impose a second assessment where the first one is not paid within the time limited.[15] But the acceptance of a note for the premium constitutes a waiver of a condition requiring prepayment, although the policy may be canceled after the maturity and nonpayment of the note if reasonable notice is given, and this may be done without either tendering or crediting that part of the premium which is unearned, as the credit may be adjusted, no matter into whose hands the note may fall.[16]

Such waiver may be established by evidence of a parol agreement to that effect,[17] or it may be inferred from circumstances showing that prepayment was not intended to be insisted upon,[18] and proof of such a waiver is no violation of the rule prohibiting parol evidence to vary or contradict a written contract.[19] So a statement that the payment of the money makes "no difference" is a waiver.[20] The mere fact, however, that the applicant goes to an insurance office to make payment of the first premium by note but is told that it can-

[13] German Ins. Co. v. Shader, 68 Neb. 1, 60 L.R.A. 918, 83 Am. St. Rep. 503, 93 N. W. 972.

[14] Pino v. Merchants' Mutual Ins. Co. 19 La. Ann. 214, 92 Am. Dec. 529.

[15] Columbia Ins. Co. v. Buckley, 83 Pa. St. 293, 24 Am. Rep. 172.

[16] Little v. Charter Oak Life Ins. Co. 38 Ohio St. 110. See Thum v. Wolstenholme, 21 Utah, 446, 61 Pac. 537, 29 Ins. L. J. 699.

As to notes for premiums, and premium etc. notes, see §§ 1202 et seq. herein.

[17] Bodine v. Exchange Fire Ins. Co. 51 N. Y. 117, 10 Am. Rep. 566; Goit v. National Protection Ins. Co. 25 Barb. (N. Y.) 189.

[18] Thompson v. St. Louis Mutual Life Ins. Co. 52 Mo. 469; Bodine v. Exchange Fire Ins. Co. 51 N. Y. 117, 10 Am. Rep. 566; Goit v. National Protection Ins. Co. 25 Barb. (N. Y.) 189; Whitwell v. Putnam Fire Ins. Co. 6 Lans. (N. Y.) 166, 168; Heaton v. Manhattan Fire Ins. Co. 7 R. I. 502; Equitable Ins. Co. v. McCrea, 76 Tenn. 541.

[19] Pino v. Merchants' Mutual Ins. Co. 19 La. Ann. 214, 92 Am. Dec. 529.

[20] Bragdon v. Appleton Mutual Ins. Co. 42 Me. 259.

not be paid until the agent with whom negotiations were pending consented and that he was not in, does not constitute a waiver.[1]

Where the premium was not paid at the time of application, but after the loss and on delivery of the policy, the insured not mentioning the loss, it was held that the question of waiver of immediate payment was one of fact for the jury.[2]

§ 77. Waiver of prepayment by agent.—A general agent of an insurance company who has authority to deliver policies and receive payment of the premium has power to waive prepayment of the premium although the policy contains a condition to the contrary.[3] So a general insurance agent, with authority to make terms for insurance countersign and deliver policies, and collect premiums, has power to waive a condition in the policy requiring payment of the premium in money.[4] Where the agent of the insurers was told that the money was ready for him in the bank, and the agent told assured to let it lie, and when he wanted it he would draw for it,

[1] Dennis v. Fidelity Mutual Life Ins. Co. 159 Mich. 594, 16 Det. L. N. 1065, 124 N. W. 575.

[2] Baldwin v. Chouteau Ins. Co. 56 Mo. 151, 17 Am. Rep. 671.

[3] *United States.*—Miller v. Brooklyn Life Ins. Co. 12 Wall. (79 U. S.) 285, 20 L. ed. 398; O'Brien v. Union Mutual Life Ins. Co. 22 Fed. 586. *Examine* Robinson v. Union Central Life Ins. Co. 144 Fed. 1005, rev'd 148 Fed. 358, 78 C. C. A. 268, 8 L.R.A.(N.S.) 883. See Ball & Sage Wagon Co. v. Aurora Fire & Marine Ins. Co. 20 Fed. 232.

California.—Berliner v. Travelers Ins. Co. 121 Cal. 451, 53 Pac. 922.

Illinois.—Mulligan v. Metropolitan Life Ins. Co. 149 Ill. App. 516.

Indiana.—Home Ins. Co. v. Gilman, 112 Ind. 7, 13 N. E. 118; New York Life Ins. Co. v. Greenlee, 42 Ind. App. 82, 84 N. E. 1101; Western Assur. Co. v. McAlpin, 23 Ind. App. 220, 77 Am. St. Rep. 423, 55 N. E. 119.

Iowa.—Critchett v. American Ins. Co. 53 Iowa 404, 407, 5 N. W. 543; Young v. Hartford Fire Ins. Co. 45 Iowa 377, 24 Am. Rep. 784.

Louisiana.—Pino v. Merchants' Mutual Ins. Co. 19 La. Ann. 214, 92 Am. Dec. 529.

Michigan.—Improved Match Co. v. Michigan Mutual Fire Ins. Co. 122 Mich. 256, 6 Det. L. N. 748, 80 N. W. 1088, 35 Ins. L. J. 53.

Minnesota.—Kilborn v. Prudential Ins. Co. 99 Minn. 176, 108 N. W. 861, 35 Ins. L. J. 840, Rev. Laws 1905, sec. 1716, Genl. L. 1895, c. 175, sec. 88, p. 437.

New York.—Bowman v. Agricultural Ins. Co. 59 N. Y. 521; Boehen v. Williamsburg City Ins. Co. 35 N. Y. 131, 90 Am. Dec. 787; Sheldon v. Atlantic Fire & Marine Ins. Co. 26 N. Y. 460, 84 Am. Dec. 213; Hotchkiss v. Germania Fire Ins. Co. 5 Hun (N. Y.) 91. But *compare* Russell v. Prudential Ins. Co. 176 N. Y. 178, 98 Am. St. Rep. 656, 68 N. E. 252.

Ohio.—Newark Machine Co. v. Kenton Ins. Co. 50 Ohio St. 549, 35 N. E. 1060, 31 Week. L. Bull. 51, 22 L.R.A. 768n.

Tennessee.—Southern Life Ins. Co. v. Booker, 9 Heisk. (Tenn.) 606, 24 Am. Rep. 344.

Virginia.—See Wytheville Ins. & Banking Co. v. Teiger, 90 Va. 277, 18 S. E. 195.

On effect of nonwaiver agreement on conditions existing at inception of insurance policy, see note in 13 L.R.A.(N.S.) 826.

[4] American Employers' Liability Ins. Co. v. Fordyce, 62 Ark. 562, 54 Am. St. Rep. 305, 36 S. W. 1051.

and he drew for it after the fire, this was held to constitute a sufficient waiver.[5] and a general agent may waive prepayment of the premium although the policy provides not only that the insurer shall "not be liable until actual payment of the premium," but also that no officer or agent shall "be held to have waived any of the terms and conditions of the policy unless such waiver be indorsed thereon in writing." [6] And an agent may waive prepayment although a receipt delivered to assured with the policy provides that "agents may not deliver policies until the premiums are received, as no policy is in force until paid for," and the policy also provides that the agent cannot change or waive its conditions.[7] It is held, however, in a Pennsylvania case, that an agent may not waive prepayment of premium if the application states that he has no power to do so.[8] And under a Missouri decision there can be no waiver by an agent of a mutual company.[9] It is also declared in a Connecticut case that the agent has no power to waive such prepayment if the policy states that it shall not be valid till the premium is paid.[10] And if an agent exceeds his actual authority, and the applicant has notice of the fact, the company is not bound as in a case where a local agent assumed to waive a provision that "no insurance would be binding until actual payment of the premium," and the policy contained a provision that none of its terms could be waived by any one except the secretary of the company.[11] Nor can a mere local agent waive a condition in the policy that the premium shall be paid in money.[12] If, however, a local agent has power to receive proposals, countersign and deliver policies within his territory he is presumed to have power within such territory to waive immediate payment of premiums.[13] But it is not a waiver of prepayment where the agent tells the applicant that he may pay the dues on application or when the policy should be delivered.[14] It is said by the court in an Iowa case that "the authorities all agree that a mere

[5] New York Central Ins. Co. v. National Protection Ins. Co. 20 Barb. (N. Y.) 468.

[6] Young v. Hartford Fire Ins. Co. 45 Iowa 377, 24 Am. Rep. 784.

[7] Miller v. Brooklyn Life Ins. Co. 12 Wall. (79 U. S.) 285, 20 L. ed. 398.

[8] Greene v. Lycoming Fire Ins. Co. 91 Pa. St. 387.

[9] Graham v. Mercantile Town Mutual Ins. Co. 110 Mo. App. 95, 84 S. W. 93.

[10] Bouton v. American Mutual Life Ins. Co. 25 Conn. 542.

[11] Wilkins v. State Ins. Co. 43 Minn. 177, 45 N. W. 1.

[12] Willcuts v. Northwestern Mutual Life Ins. Co. 81 Ind. 300, 309. But see Provident Savings Life Assur. Soc. v. Oliver, 22 Tex. Civ. App. 8, 53 S. W. 594.

[13] Farnum v. Phœnix Ins. Co. 83 Cal. 246, 17 Am. St. Rep. 233, 23 Pac. 869.

[14] Ormond v. Fidelity Life Assn. 96 N. C. 158; 1 S. E. 796.

agreement to waive prepayment will not put a policy in force where it is not delivered. It is, therefore, the delivery which constitutes the ground of waiver." [15]

§ 78. Renewal: waiver of prepayment of premium.—It is equally well settled that it is competent for the company to disregard the condition relative to prepayment of the premium, and upon any renewal to waive by parol the payment in cash of any premium, and this waiver can be shown by proof that credit was given or can be inferred from circumstances, and the waiver can be made by the company or any of its duly authorized agents.[16] So where the company accepted an application, issued the renewal, and forwarded it to the agent, stating to him that they would hold him responsible for the premium, it was decided that this amounted to a contract between the company and the applicant to insure his property according to the terms and stipulations of the renewal.[17] A provision in a policy already executed that no insurance, whether original or continued, should be binding until the actual payment of the premium, and the written acknowledgment thereof does not invalidate a subsequent contract by parol to renew such insurance for a premium not paid at the time the risk attaches but postponed to a future day,[18] and where an insurance company agreed that a policy for one year should be a permanent risk, and that its officers should call for the premiums as they became due, and leave the certificates of payment and renewal, and the assured relied upon this arrangement, but before any of the officers called for the renewal premium, the property was destroyed by fire, it was decided that the company was liable for the loss.[19] But an agent who has no power to make a contract of insurance cannot bind the company by a contract to indefinitely postpone the payment of a renewal premium and keep the policy in force in contravention of its provisions.[20] If an insurance company mails to an insured a renewal fire policy, which he returns, refusing to accept it, and the company then leaves the policy with a mortgage clause attached with the mortgagee's agents, who place it with the mortgage papers, where it remains, and subsequently the company presents a bill for the

[15] Critchett v. American Ins. Co. 53 Iowa, 404, 407, 5 N. W. 543.

[16] Bodine v. Exchange Fire Ins. Co. 51 N. Y. 117, 10 Am. Rep. 566; Fireman's Fund Ins. Co. v. Pekor, 106 Ga. 1, 31 S. E. 779; Continental Casualty Co. v. Bridges, — Tex. Civ. App. —, 114 S. W. 170. See Doherty v. Millers & Manufacturers Ins. Co. 4 Ont. L. Rep. 303.

[17] Planters' Ins. Co. v. Ray, 52 Miss. 325.

[18] Trustees First Baptist Church v. Brooklyn Fire Ins. Co. 19 N. Y. 305.

[19] Trustees First Baptist Church v. Brooklyn Fire Ins. 18 Barb. (N. Y.) 69.

[20] Critchett v. American Ins. Co. 53 Iowa, 404, 5 N. W. 543.

premiums to these agents, who, requesting time to communicate with the owner, then write to him stating that if he does not pay the premium they will, and charge the amount to him, and the owner does not answer the letter, but writes his agent directing him to pay the premium at once, but tender of payment is delayed until after the destruction of the property by fire, when it is refused, the policy does not become effective so as to bind the company.[1]

Again, prepayment of the premium for the renewal term is not necessary to make a valid preliminary contract with an insurance agent for renewal.[2]

Where insured had an agreement by which his insurance was to be kept up to a specified amount by new policies or renewals, and it was the agent's custom to charge premiums as policies were renewed or issued, and to have settlements periodically with insured, when premiums would be paid, it may be implied that credit for the premium so charged was granted to the next period of settlement.[3]

§ 79. Prepayment of premium: effect of delivery of policy.—Where the contract is otherwise complete, an unconditional delivery of the policy operates as a waiver of the prepayment of the premium, notwithstanding an express provision therein that the company shall not be liable until the premium is actually paid,[4] and

[1] New v. Germania Fire Ins. Co. 171 Ind. 33, 131 Am. St. Rep. 245, 85 N. E. 703.

[2] McCabe v. Ætna Ins. Co. 9 N. Dak. 19, 47 L.R.A. 641, 81 N. W. 426, 29 Ins. L. J. 138.

[3] Newark Machine Co. v. Kenton Ins. Co. 50 Ohio St. 549, 22 L.R.A. 768 and note, 35 N. E. 1063.

[4] *United States.*—Miller v. Life Ins. Co. 12 Wall. (79 U. S.) 285, 20 L. ed. 398.

Arkansas.—American Employers Liability Ins. Co. v. Fordyce, 62 Ark. 562, 570, 54 Am. St. Rep. 305, 36 S. W. 1051.

California.—Griffith v. New York Life Ins. Co. 101 Cal. 627, 40 Am. St. Rep. 96, 36 Pac. 113; Farnum v. Phœnix Ins. Co. 83 Cal. 246, 17 Am. St. Rep. 233, 23 Pac. 869.

Illinois.—People v. Commercial Life Ins. Co. 247 Ill. 92, 93 N. E. 90.

Louisiana.—Latoix v. Germania Ins. Co. 27 La. Ann. 113.

Massachusetts.—Jones v. New York Life Ins. Co. 168 Mass. 245, 248, 47 N. E. 92, 26 Ins. L. J. 1009.

Minnesota.—Kollitz v. Equitable Mutual Fire Ins. Co. 92 Minn. 234, 99 N. W. 892.

Nebraska.—German Ins. Co. v. Shader, 68 Neb. 1, 60 L.R.A. 918, 93 N. W. 972.

New York.—Boehen v. Williamsburg Ins. Co. 35 N. Y. 131, 90 Am. Dec. 787; Washoe Tool Mfg. Co. v. Hibernia Fire Ins. Co. 7 Hun (N. Y.) 74, 66 N. Y. 613.

North Carolina.—Rayburn v. Pennsylvania Casualty Co. 138 N. Car. 379, 50 S. E. 262.

South Carolina.—Cauthen v. Hartford Life Ins. Co. 80 S. Car. 264, 61 S. E. 428.

Tennessee.—Southern Life Ins. Co. v. Booker, 9 Heisk. (Tenn.) 606, 24 Am. Rep. 344; Equitable Ins. Co. v. McCrea, 8 Lea (Tenn.) 541.

Virginia.—Wytheville Insurance &

the company cannot, under such circumstances, cancel the policy for nonpayment without first putting the insured in default by some act, such as a new demand.[5] But the mere nonpayment of the premium on demand, does not of itself destroy the policy where the company fails to give notice of its election to rescind the contract.[6] Again a local insurance agent who has power to extend credit upon the premium, and who represents the full power of the company to make binding contracts of insurance by countersigning and delivering policies, and who countersigns and delivers a policy unconditionally as a completed contract under a specific agreement for the payment of the premium at a future date thereby waives, to the full extent to which the company could then have waived, the actual payment of the premium as a condition precedent to its liability on the policy.[7] A certificate of life insurance is also presumed to have been delivered on the day of its date, although this presumption may be overcome, and even though the application provides for prepayment of the first premium such provision can be waived and this is so even if the certificate so provides and the delivery of the certificate without prepayment may constitute a waiver, or raise the presumption of a waiver or that credit was given.[8] Again, a provision in a policy of insurance stipulating that the policy shall be void unless payment of the premium shall be made to the secretary, or an agent of the insurer duly appointed as such in writing, is intended to protect the insurer against default on the part of mere solicitors for insurance from the insured, but not to make the latter answerable for the default of the insurer's agents; and if the insurer, either expressly or by acts warranting the implication, in fact appoints an agent to deliver a policy and collect the premium, the receipt of the money by such agent is the receipt by the insurer, and, operates as a waiver of such condition in the policy, although the insurer does not in fact receive the premium.[9] It is held that the delivery of a policy does not operate as a waiver of prepayment where the policy provides that it shall not

Banking Co. v. Teiger, 90 Va. 277, 18 S. E. 195.

West Virginia.—Eagan v. Ætna Fire & Marine Ins. Co. 10 W. Va. 583.

As to effect of delivery of policy before payment of first premium contrary to conditions, see note 20 L. ed. 398. See also note 107 Am. St. Rep. 136, 137.

[5] Latoix v. Germania Ins. Co. 27 La. Ann. 113.

[6] Washoe Tool Manufacturing Co. v. Hibernia Fire Ins. Co. 7 Hun (N. Y.) 74.

[7] Farnum v. Phœnix Ins. Co. 83 Cal. 246, 17 Am. St. Rep. 233, 23 Pac. 869. See Slobodisky v. Phenix Ins. Co. 53 Neb. 816, 74 N. W. 270.

[8] Hoover v. Bankers Life Assoc. 155 Iowa, 322, 136 N. W. 117.

[9] Arthurholt v. Susquehanna Mutual Fire Ins. Co. 159 Pa. St. 1, 39 Am. St. Rep. 659, 28 Atl. 197.

be binding until the premium is paid, and that waiver must be in writing. In such case the agent cannot waive such condition precedent,[10] and although a condition as to prepayment of premium may be waived by the general agent, by delivering the policy without exacting payment, there is no such waiver when the agent merely leaves the policy for examination and requires the party, if he concludes to accept it, to prepay the premium, in accordance with the condition.[11] It is also held that when an application for life insurance, signed by the applicant, provides that the policy shall not take effect until the first premium is paid in full, and the policy, as issued, declares that no agent has power to extend the time for paying the premium or to waive any forfeitures, and that these powers can be exercised only by the president or secretary or one of the vice-presidents and will not be delegated, and that no provision in the policy can be waived or modified except by such officers by indorsement on the policy, a general agent whose appointment specifies that he has no authority to make, alter, or destroy any contract, to waive any forfeiture or to receive any moneys except on policies or renewals signed by the president, secretary, or manager of the ordinary branch, has no power to waive the payment of the first premium, and the delivery of a policy by him without such payment is ineffective.[12]

§ 80. Prepayment: credit may be given.—An insurance may be binding without actual prepayment of the premium by an agreement by the company to give credit therefor;[13] and it is held that if the charter of an insurance company be wholly silent as to the power of the corporation to give credit for premiums and to take notes in payment, such a power necessarily results from its power to make insurances and to enable it to advantageously conduct its business.[14] If a policy is delivered on an agreement for future payment of the premium it becomes effective immediately, although the premium is not paid.[15] And credit will be presumed to have been given if the policy is delivered without prepayment,[16] since an unconditional delivery in such case raises a presumption that

[10] Pottsville Mutual Fire Ins. Co. v. Minnequa Springs Improvement Co. 100 Pa. St. 137.

[11] Wood v. Poughkeepsie Mutual Ins. Co. 32 N. Y. 619.

[12] Russell v. Prudential Ins. Co. 176 N. Y. 178, 98 Am. St. Rep. 656, 68 N. E. 252.

[13] Franklin Fire Ins. Co. v. Colt, 20 Wall. (87 U. S.) 560, 22 L. ed. 423; Mississippi Valley Ins. Co. v. Dunklee, 16 Kan. 158.

[14] McIntyre v. Preston, 5 Gilm. (Ill.) 48.

[15] Dailey v. Preferred Masonic Mutual Accident Assoc. 102 Mich. 289, 26 L.R.A. 171, 57 N. W. 184, 60 N. W. 694.

[16] Kollitz v. Equitable Mutual Fire Ins. Co. 92 Minn. 234, 99 N. W. 892.

credit was given.[17] So there may be a presumption that credit was given for the difference between the cash payment and the full amount of the premium.[18]

An agent authorized to insure may give credit,[19] where it is not a condition precedent that the first premium should be paid at the time the policy is delivered,[20] although a general agent, even though in violation of the rules and regulations of his principal, may give credit for premiums.[1] And an agent authorized to make fire insurance contracts and issue policies, has authority to waive cash payment of premiums and give credit, or time, for their payment, unless the insured has notice of restrictions upon his authority, and such waiver may be express or implied.[2] So an agent may give credit where the policy provides that the insurance shall not be binding until the actual payment of the premium.[3] And insured is not bound to take notice of conditions in the policy, that the premium must be actually paid, nor that the waiver of condition must be indorsed in writing on the policy, when it is executed and delivered to him as a valid and completed contract by an agent having authority to countersign it, and who, before or at the time of delivery of it, has given the insured a credit upon the premium upon parol. If a loss occurs, in such case, before the credit expires,

[17] Washburn v. United States Casualty Co. 108 Me. 429, 81 Atl. 575.

[18] Northwestern Life Assur. Co. v. Schulz, 94 Ill. App. 156.

[19] *United States.*—Franklin Fire Ins. Co. v. Colt, 20 Wall. (87 U. S.) 560, 22 L. ed. 423. (Agent with authority to take and approve risks and to insure): Ball & Sage Wagon Co. v. Aurora Fire & Marine Ins. Co. 20 Fed. 232. (Agent had "full power to receive proposals for insurance, to receive moneys, and to countersign, issue, and renew policies of insurance of the company, subject to such rules and regulations as are or may be adopted by the company, and such instructions as may from time to time be given by the manager of the company at Cincinnati.")

Idaho.—Marysville Mercantile Co. Ltd. v. Home Fire Ins. Co. 21 Idaho, 377, 121 Pac. 376.

Minnesota.—Kilborn v. Prudential Ins. Co. 99 Minn. 176, 108 N. W. 861.

Nebraska.—Union Life Ins. Co. v. Haman, 54 Neb. 599, 74 N. W. 1090.

North Carolina.—Pender v. North State Mutual Life Ins. Co. 163 N. Car. 98, 79 S. E. 293.

South Carolina.—Cauthen v. Hartford Life Ins. Co. 80 S. Car. 264, 61 S. E. 428.

Tennessee.—Gordon v. United States Casualty Co. — Tenn. Ch. App. —, 54 S. W. 98.

[20] Marysville Mercantile Co. Ltd. v. Home Fire Ins. Co. 21 Idaho, 377, 121 Pac. 376. See §§ 70, 71, 76 et seq. herein.

[1] State Mutual Fire Ins. Co. v. Taylor (1913) — Tex. Civ. App. —, 157 S. W. 950.

[2] Newark Machine Co. v. Kenton Ins. Co. 50 Ohio St. 549, 22 L.R.A. 768n, 35 N. E. 1060.

[3] O'Brien v. Union Mutual Ins. Co. 22 Fed. 566 (general agent); Dayton Ins. Co. v. Kelly, 24 Ohio St. 345, 15 Am. Rep. 612. See Hewitt v. American Union Life Ins. Co. 34 Misc. 738, 70 N. Y. Supp. 1012, rev'd 75 N. Y. Supp. 105, 66 App. Div. 80.

the company is bound, notwithstanding the agreement for credit was not indorsed upon the policy. The limitation upon the power of the agent to waive such condition applies only after the policy has been delivered as an executed contract.[4] Again, provisions in a policy of insurance that the risk shall not attach unless the premium has been actually paid are waived where the policy is delivered on an agreement to extend credit, and the insurer does not take advantage of such provisions, but treats the policy as in force.[5] The agent may agree to be himself responsible for the premium.[6] In a Louisiana case the agent was requested to send the bill for the premium to the treasurer of the insured society for payment and he replied, "That's all right," and called several times, but did not find the party, and the contract was held to be complete.[7] If an agent with no authority to give credit delivers a policy before the premium is paid, but accounts therefor to the company, it is bound.[8] And an agreement to pay the premium is sufficient although the property is destroyed before the delivery of the policy.[9]

Credit may be given for a portion of the premium,[10] and the giving of any credit on the payment of premium by an authorized agent of the company is a waiver of actual payment as a condition precedent to its liability; and the only remedy of the company after the term of credit has expired, is to rescind or cancel the policy for nonpayment within the term, upon personal notice to the insured.[11] Again, insurer's agent may accept payment of the premium in instalments.[12]

§ 80a. Same subject: promissory notes, checks, and drafts.—Insurer's agent may accept the promissory notes of the applicant.[13] And, although one of the conditions of an insurance policy is that it "shall not be valid or binding until the first premium is paid,"

[4] Farnum v. Phœnix Ins. Co. 83 Cal. 246, 17 Am. St. Rep. 233.

[5] German Ins. Co. v. Shader, 68 Neb. 1, 60 L.R.A. 918, 93 N. W. 972.

[6] Mississippi Valley Life Ins. Co. v. Neyland, 9 Bush (Ky.) 430. See Sheldon v. Connecticut Mutual Life Ins. Co. 25 Conn. 207, 65 Am. Dec. 565 (*noted* under § 80a herein).

[7] La Societe v. Morris, 24 La. Ann. 347.

[8] Agricultural Ins. Co. v. Montague, 38 Mich. 548, 31 Am. Rep. 326.

[9] Fitton v. Fire Ins. Assn. 20 Fed. 766.

[10] Trustees First Baptist Church v. Brooklyn Ins. Co. 28 N. Y. 153. See § 74 herein.

[11] Farnum v. Phœnix Ins. Co. 83 Cal. 246, 17 Am. St. Rep. 233.

[12] Mulligan v. Metropolitan Life Ins. Co. 149 Ill. App. 516.

[13] Mississippi Valley Life Ins. Co. v. Neyland, 9 Bush (Ky.) 430. General agent with power to solicit applications and receive first premiums: Kelly v. St. Louis Mutual Life Ins. Co. 3 Mo. App. 554. See §§ 1202 et seq. herein.

See also the following cases:

United States.—Commercial Mutual Marine Ins. Co. v. Union Mut. Ins. Co. 19 How. (60 U. S.) 318, 15 L. ed. 636; Hodgson v. Marine Ins. Co. 5 Cranch (9 U. S.) 100, 3 L. ed. 48; Robinson v. Union Cent. Life Ins. Co. 144 Fed. 1005, rev'd 8 L.R.A.

if it is silent as to the mode of payment, promissory notes received by the company, even in the absence of any express agreement, must be deemed to have been accepted as payment of the premium. The policy is binding and is a valid consideration for the notes.[14] So the agent may agree to hold himself accountable to the company for the cash payment, and that a note should be given by the applicant for the balance of the premium at some future time, and that the insurance should take effect when the proposals were accepted.[15] And payment may be made partly in cash and partly in notes, as where a life insurance policy was issued to plaintiff's decedent expressed to be made in consideration of a premium already

(N.S.) 883, 148 Fed. 358, 78 C. C. A. 268. *Compare* Pennsylvania Casualty Co. v. Bacon, 133 Fed. 907, 67 C. C. A. 497; Miller v. Northwestern Mutual Life Ins. Co. 111 Fed. 465, 49 C. C. A. 330; Mutual Life Ins. Co. v. Logan, 87 Fed. 637, 57 U. S. App. 18, 31 C. C. A. 172.

Alabama.—Lehman v. Gunn, 124 Ala. 213, 82 Am. St. Rep. 59, 51 L.R.A. 112, 27 So. 475. *Compare* Batson v. Fidelity Mutual Life Ins. Co. 155 Ala. 265, 130 Am. St. Rep. 21, 46 So. 578.

California.—Griffith v. New York Life Ins. Co. 101 Cal. 627; 40 Am. St. Rep. 96, 36 Pac. 113.

Colorado.—Rosenberg v. Johnson, 45 Colo. 53, 99 Pac. 315.

Georgia.—Hipp v. Fidelity Mutual Life Ins. Co. 128 Ga. 491, 12 L.R.A.(N.S.) 319, 57 S. E. 892.

Illinois.—Devine v. Federal Life Ins. Co. 250 Ill. 203, 95 N. E. 174, 40 Ins. L. J. 1513; Mutual Life Ins. Co. v. Allen, 113 Ill. App. 89, aff'd 212 Ill. 134, 72 N. E. 200.

Iowa.—Kimbro v. New York Life Ins. Co. 134 Iowa, 84, 12 L.R.A. (N.S.) 421, 108 N. W. 1025.

Kentucky.—National Life Ins. Co. v. Tweddell, 22 Ky. L. R. 881, 58 S. W. 699.

Minnesota.—Kilborn v. Prudential Ins. Co. 99 Minn. 176, 108 N. W. 861.

Missouri.—Jacobs v. Omaha Life Assoc. 146 Mo. 523, 48 S. W. 462, 142 Mo. 49, 43 S. W. 375. See Mooney v. Home Ins. Co. 80 Mo. App. 192, 2 Mo. App. Rep. 524.

New York.—Buckley v. Citizens Ins. Co. 188 N. Y. 399, 13 L.R.A. (N.S.) 889, 81 N. E. 165; Stewart v. Union Mutual Life Ins. Co. 155 N. Y. 257, 42 L.R.A. 147, 49 N. E. 876; McGee v. Felter, 135 N. Y. Supp. 267, 75 Misc. 349; Tooker v. Security Trust Co. 49 N. Y. Supp. 814, 26 App. Div. 372.

Oklahoma.—Arkansas Ins. Co. v. Cox, 21 Okla. 873, 20 L.R.A. (N.S.) 421, 129 Am. St. Rep. 808, 98 Pac. 552.

South Dakota.—Noble v. Kansas City Life Ins. Co. 33 S. Dak. 458, 146 S. W. 606.

Texas.—Provident Savings Life Assur. Soc. v. Oliver, 22 Tex. Civ. App. 8, 53 S. W. 594. See Hudson v. Compere, 94 Tex. 449, 61 S. W. 389.

Utah.—Thum v. Wolstenholme, 21 Utah, 446, 61 Pac. 537, 29 Ins. L. J. 669.

Vermont.—Porter v. Mutual Life Ins. Co. 70 Vt. 504, 41 Atl. 970.

On promissory note as payment of insurance premium, see note in 5 B. R. C. 365. On commercial paper as such payment, see note in 35 L.R.A. (N.S.) 84.

[14] Union Central Life Ins. Co. v. Taggart, 55 Minn. 95, 43 Am. St. Rep. 474, 56 N. W. 579. But *compare* Dunham v. Morse, 158 Mass. 132, 35 Am. St. Rep. 473, 32 N. E. 1116.

[15] Sheldon v. Connecticut Mutual Life Ins. Co. 25 Conn. 207, 65 Am. Dec. 565.

paid, and of a like sum to be annually paid during the continuance of the policy, and providing that the policy should not take effect until the premium was paid, and that the policy should be forfeited "in case any premium due upon this policy shall not be paid at the day when payable." The first premium was paid partly in cash and partly in promissory notes, but the notes were not paid and the insured died. It was held that the policy had taken effect and that the nonpayment of notes did not bar plaintiff's recovery, because the "forfeiture" clause referred to premiums after the first.[16] So payment in cash may be waived and a promissory note or other evidence of indebtedness may be accepted in lieu thereof and a promissory note, payable to his own order, given by an applicant together with cash for the first premium to an agent of the company is sufficient, even though non-negotiable under the statute, such instruments being enforceable in the hands of a purchaser or assignee.[17] Again, where the agents of an insurance company, acting for themselves, advance the money for the premium to the company, and take the note of the insured for the amount as their own and negotiate it, the company cannot dispute its liability on the ground that the premium has not been actually paid.[18] And credit for the first premium may be given by the soliciting agent by taking a note therefor, according to the usual method of transacting business, and indorsing it over to the general state agent instructing him to charge the net sum due the company from such premiums to such soliciting agent's account, the latter being thereby still liable to the company for the net premium.[19]

A check may also be given and accepted as payment, as where insurer's agent instructs the applicant to send him "his check for the premium and the business is concluded" and it is sent.[20] If credit

[16] McAllister v. New England Mutual Ins. Co. 101 Mass. 558, 3 Am. Rep. 404.

[17] Unterharnscheidt v. Missouri State Life Ins. Co. 160 Iowa, 223, 45 L.R.A.(N.S.) 743, 138 N. W. 459.

[18] Home Ins. Co. v. Curtis, 32 Mich. 402.

On giving of note as a transaction with the agent personally, see note in 5 B. R. C. 436.

[19] Mutual Life Ins. Co. v. Reid, 21 Colo. App. 143, 121 Pac. 132.

[20] Tayloe v. Merchants' Fire Ins. Co. 9 How. (50 U. S.) 390, 13 L. ed. 187.

Cited in *United States.*—Paine v. Pacific Mutual Life Ins. Co. 51 Fed. 689, 691, 2 C. C. A. 459, 461; Kendalls Admr. v. Pacific Mutual Life Ins. Co. 51 Fed. 689, 691, 2 C. C. A. 459, 461, 10 U. S. App. 256.

Alabama.—Home Protection v. Avery, 85 Ala. 348, 351, 7 Am. St. Rep. 54, 5 So. 143.

Indiana.—Home Ins. Co. v. Gilman, 112 Ind. 7, 13, 13 N. E. 118.

Louisiana.—Trager v. Louisiana Equitable L. Ins. Co. 31 La. Ann. 239.

Maryland.—Mallette v. British American Assur. Co. 91 Md. 471, 483, 46 Atl. 1005.

Massachusetts.—White v. Connecticut Fire Ins. Co. 120 Mass. 333.

North Carolina.—Hollowell v. Life Ins. Co. 126 N. Car. 398, 404, 35 S.

is given and a draft is drawn by the insurer and accepted by insured, but, at the time the property was destroyed by fire, it was unpaid, such non-payment constitutes no defense even though the application stipulated that "if the premium is not paid as herein agreed the insurance shall be void until such settlement is made."[1]

It may be a question for the jury whether the general agent has waived the cash payment of the premium;[2] also whether or not credit has been given and accepted,[3] or whether an agent had authority to give credit and waive a cash payment.[4] And whether credit has been given may be shown by direct proof or inferred from surrounding circumstances, as by the production of the policy at the trial;[5] and the agent's authority may be evidenced by issuing a policy upon an application which recites that the agent has been paid the premium.[6]

§ 81. Prepayment: mutual credits: application on agent's debt.—Where there are mutual credits between the parties, and an authorized agent of the company is indebted to the applicant, the parties may agree that the amount of the premium may be charged or credited, as the case may be, subject to settlement of accounts, and this will constitute a valid prepayment of the premium and be binding upon the company.[7]

§ 82. Where there are mutual credits.—Where the insurer and insured had mutual credits and struck a balance monthly, this is in effect a payment,[8] and where an application had been sent by plaintiff's agent to defendant's agent, who agreed to take two thirds the risk, and the amount, duration, and premium were agreed upon, and the two agents had running accounts with each other and

E. 616. See Miller v. Northwestern Mutual Life Ins. Co. 111 Fed. 465, 49 C. C. A. 330, where check was given but held that no contract was made under the circumstances.

On check or draft as payment of insurance premium, see note in L.R.A.1916A, 674.

[1] Bell v. Hudson Bay Ins. Co. 44 Can. Sup. Ct. 419, 21 Am. & Eng. Ann. Cas. 788. *Compare* London & Lancashire Life Assur. Co. v. Fleming, App. Cas. [1897] Law Rep. 499.

[2] Canthen v. Hartford Life Ins. Co. 80 S. Car. 264, 61 S. E. 428.

[3] Unterharnscheidt v. Missouri State Life Ins. Co. 160 Iowa, 223, 45 L.R.A.(N.S.) 743, 138 N. W. 459; Slobodisky v. Phenix Ins. Co. 53 Neb. 816, 74 N. W. 270; Manson v. Metropolitan Surety Co. 112 N. Y. Supp. 886, 128 App. Div. 577; Cross v. Surety Trust & Life Ins. Co. 69 N. Y. Supp. 189, 58 App. Div. 602.

[4] Slobodisky v. Phenix Ins. Co. 53 Neb. 816, 74 N. W. 270.

[5] Pender v. North State Mutual Life Ins. Co. 163 N. Car. 98, 79 S. E. 293.

[6] Porter v. Mutual Life Ins. Co. 70 Vt. 504, 41 Atl. 970.

[7] Marsh v. Northwestern National Ins. Co. 3 Biss. (U. S. C. C.) 351, Fed. Cas. No. 9118. See cases in following sections.

Charging premium to agent personally by company, and agent credits insured as payment: Wytheville Insurance & Banking Co. v. Teiger, 90 Va. 277, 18 S. E. 195.

[8] Marsh v. Northwestern National Ins. Co. 3 Biss. (U. S. C. C.) 351, Fed. Cas. No. 9118.

settled monthly, the court held that there was evidence for the jury of a contract of insurance, which began immediately;[9] and where the parties had mutual accounts and their course of dealing was to give credit for premiums due to each, and to give receipts as for cash and to balance accounts from time to time, and the plaintiff was given a receipt for his premium, such premium is paid when the receipts are given.[10]

§ 83. Crediting premium on agent's indebtedness to applicant.—When an insurance agent, who has authority to issue policies of insurance, issues and delivers a policy upon a building therein described, and agrees with the assured to deduct the premium out of money then in his possession belonging to the assured, and apply it on the payment of the premium, such an agreement is a receipt of the premium, and the company issuing the policy will be bound thereby;[11] but if the agent has money of the assured in his possession and has agreed to pay the premium out of the same, and the company has no knowledge thereof, it may upon nonpayment of the premium, and upon due notice, cancel the policy.[12] Where an insurance agent enters into a contract to insure property, crediting the premium on an account which the agent owed the insured, the contract is binding on the company;[13] and where money is advanced by a subagent to the general agent to be debited against premiums collected by the former, and he applies for insurance, the advancement to the general agent will be considered a payment of the premium.[14] And if the agent pays the insurer each month settling with it for the amount due on premiums collected, it is immaterial that insured settled with the agent by crediting him with the amount of the premium on an account due assured from such agent.[15] In Wooddy v. Old Dominion Insurance Company[16] an

[9] Sanborn v. Firemen's Ins. Co. 16 Gray (82 Mass.) 448, 77 Am. Dec. 419.

[10] Prince of Wales Life Assur. Co. v. Harding, El. B. & E. 183, 4 Jur. (N.S.) 851, 27 L. J. Q. B. 297.

On payment of insurance premium by cancelation of agent's indebtedness, see note in L.R.A.1915A, 686.

[11] Phœnix Ins. Co. Meier, 28 Neb. 124, 44 N. W. 97.

[12] Merchants & Manufacturers Mutual Ins. Co. v. Baker, 4 Neb. 384, 94 N. W. 627.

[13] Western Assur. Co. v. McAlpin, 23 Ind. App. 220, 77 Am. St. Rep. 423, 55 N. E. 119. But *compare* Gazzam v. German Union Fire Ins. Co. 155 N. Car. 330, Ann. Cas. 1912C 362, 71 S. E. 434, 40 Ins. L. J. 1586.

On whether existence of indebtedness from insurer to insured in an amount sufficient to pay premium or assessment will prevent forfeiture of policy for nonpayment of premium, see note in 23 L.R.A.(N.S.) 304.

[14] Thompson v. American Tontine Life & Sav. Ins. Co. 46 N. Y. 647, 674.

[15] Herring v. American Ins. Co. 123 Iowa 533, 99 N. W. 139, 33 Ins. L. J. 558. The court said: "While it is true as a general proposition, that an agent may not accept property in lieu of cash for the premium, without express authority to do so, it is equally as true that, when he actually pays the premium in cash to

agent authorized to fill up and deliver policies entered into an agreement for insurance with an applicant who tendered the premium to the agent; but the latter, who resided in the house insured, and who owed the former for rent, said he would apply the premium toward the rent, and this was held a valid payment of the premium. But in the absence of an actual or apparent right of an agent to contract for livery service in lieu of cash for the premium the insurer is not estopped to claim its nonapproval of the application, by reason of the nonpayment by the agent for such livery hire.[17] Again, a policy delivered by an agent without exacting payment of the premium under an agreement between him and the assured that the agent would accept as payment his own indebtedness for meat, and take meat for the balance, is void, where the policy contains a condition requiring all premiums to be paid at the home office, but provides that payments will be accepted if paid to the agent in exchange for a receipt signed by the president or secretary and countersigned by the agent and that the policy shall not take effect unless the first premium is paid while the assured is in good health.[18]

§ 84. Prepayment: course of dealings: allowing credit.—Stipulations making a prepayment of the premium a condition precedent to the attachment of the risk are in some cases governed by the usual course of dealing between the parties to the contract, or between the principal and agent or insurance broker. So an agent authorized to take risks and insure may be also authorized by general usage to give credit.[19] And evidence that an insurance company sued has often extended time to others and to the insured for

the insurer, it ends the matter so far as the insurer is concerned."

[16] 31 Gratt. (Va.) 362, 31 Am. Rep. 732.

[17] Winchell v. Iowa State Ins. Co. 103 Iowa 189, 72 N. W. 503.

[18] Tomsecek v. Travelers' Ins. Co. 113 Wis. 114, 90 Am. St. Rep. 846, 57 L.R.A. 455, 88 N. W. 1013.

[19] *United States.*—Franklin Fire Ins. Co. v. Colt, 20 Wall. (87 U. S.) 560, 22 L. ed. 423.

New York.—Boice v. Thames, & Mersey Marine Ins. Co. 38 Hun (N. Y.) 246.

North Dakota.—McCabe v. Ætna Ins. Co. 9 N. Dak. 19, 47 L.R.A. 641, 81 N. W. 426, 29 Ins. L. J. 138.

Ohio.—Newark Machine Co. v. Kenton Ins. Co. 50 Ohio St. 549, 22 L.R.A. 768, 35 N. E. 1060; Manchester Fire Ins. Co. v. Plato, 22 Ohio Cir. Ct. Rep. 35.

Texas.—Provident Savings Life Assur. Soc. v. Oliver, 22 Tex. Civ. App. 8, 53 S. W. 594.

Vermont.—Porter v. Mutual Life Ins. Co. 70 Vt. 504, 41 Atl. 570.

Virginia.—Life Ins. Co. of Va. v. Hairston, 108 Va. 832, 128 Am. St. Rep. 989, 62 S. E. 1057.

Franklin Fire Ins. Co. v. Colt (above *cited*) is *cited* in:

United States.—Nord-Deutscher Lloyd v. Ins. Co. of North America, 110 Fed. 420, 429, 49 C. C. A. 1, 10; Jones v. Ætna Ins. Co. 7 Rep. 645, 8 Ins. L. J. 416, Fed. Cas. No. 7453, 19 Alb. L. J. 522.

Arkansas.—American Employers' Liability Ins. Co. v. Fordyce, 62 Ark.

the payment of premiums on other policies, that the policy in suit was delivered without payment of premium or subsequent demand therefor, and that the company accepted part of the premium due when tendered, is sufficient to prove a waiver of a condition in the policy exempting the company from liability unless the premium is actually paid; and it cannot, after loss, urge as a defense that the premium was not all paid.[20] So the fact that the rate of premium has not been paid or fixed will not prevent the commencement of a valid contract of insurance where there is a generally understood rate on that class of risks and the usual course of business between the parties has been for the agent to collect the premiums at his convenience after the issuance of the policies.[1] In a Pennsylvania case [2] the company issued and forwarded a policy to its agents after notification given the plaintiff that a policy which was about to terminate would be renewed unless he gave notice to the contrary. It was a custom between the agent and the insured to give the latter a credit for thirty days, and the premium in this instance was charged to him by such agents, and a credit of thirty days given. Before the expiration of that period, but after a fire, the insured gave his check for the premium, which was retained for two weeks without objection. In an action on the policy it was held to be a question for the jury whether a contract existed. In Lungstrass v. German Insurance Company,[3] the agent was accustomed to forward his remittances to the company at the end of each month. He applied for insurance on his goods, and upon receipt of the policy he made an entry of the amount chargeable against him for the premium in a book in which his accounts with the company were regularly kept, and it was decided that he was not obliged to forward the premium before the accustomed time, and that the company

562, 570, 54 Am. St. Rep. 305, 36 S. W. 1051.

Indiana.—Home Ins. Co. v. Gilman, 112 Ind. 7, 14, 13 N. E. 118; Prudential Ins. Co. v. Sullivan, 27 Ind. App. 30, 36, 59 N. E. 873; Western Assur. Co. v. McAlpin, 23 Ind. App. 220, 227, 77 Am. St. Rep. 423, 55 N. E. 119.

Kansas.—Phœnix Ins. Co. v. Munger, 49 Kan. 178, 196, 33 Am. St. Rep. 360, 30 Pac. 120; German Ins. Co. v. Amsbaugh, 8 Kan. App. 197, 201, 55 Pac. 481.

Maryland.—Mailette v. British American Ins. Co. 91 Md. 471, 483, 46 Atl. 1005.

Nebraska.—Western Home Ins. Co. v. Richardson, 40 Neb. 1, 8, 58 N. W. 597.

New York.—Merseran v. Phœnix Mutual Life Ins. Co. 66 N. Y. 274, 278; Shear v. Phœnix Mutual Life Ins. Co. 4 Hun (N. Y.) 801.

West Virginia.—Croft v. Hanover Fire Ins. Co. 40 W. Va. 508, 517, 52 Am. St. Rep. 902, 21 S. E. 854.

[20] Nebraska & Iowa Ins. Co. v. Christiensen, 29 Neb. 572, 26 Am. St. Rep. 407, 45 N. W. 924.

[1] Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co. 92 Mich. 482, 20 L.R.A. 277, 52 N. W. 1070.

[2] Long v. North British & Mercantile Ins. Co. 137 Pa. St. 335, 21 Am. St. Rep. 879, 20 Atl. 1014.

[3] 48 Mo. 201, 8 Am. Rep. 100.

was liable. So in another case it was determined that the company might waive a condition providing that the premium should be actually paid before the policy should attach, and if the course of business between the company and one of its agents tended to show that the company was accustomed to substitute the personal liability of the agent for premiums received in the place of the security which the suspension clause in the policy afforded, a nonsuit should not be ordered, but the case should be submitted to the jury,[4] and the contract may be complete without prepayment where it is the custom of the company to give the broker credit until the end of the month.[5] So the first premium on a policy of insurance will, as between insurer and insured, be deemed to have been paid at the time the general agents of the insurer extended credit therefor to the insured, where such premium was charged to the agents in their account with the insurer pursuant to the general course of dealings between them, which disregarded any arrangements the agents might make with insured as to credit, notwithstanding that a note covering the premium in question, given by the insured to the agents did not mature until after an attempt had been made to cancel the policy, nor until after the destruction of the property, and that, upon maturity, it was taken up by the agents from the bank by which it had been discounted, and was still held by them at the time of the action on the policy, they having been credited in the meantime in their account with the company with the amount of premium unearned at the time of the attempted cancelation.[6] In Lebanon Mutual Insurance Company v. Hoover[7] it appeared that by the usual and established course of business between an agent and the company the former was charged for the premiums received by him on all policies and renewal certificates obtained through him, whether the insured paid the agent or not, and that he was expected to render regular monthly statements and settle with the company, and the assured was not expected to pay the agent in advance, but only on demand about a month after effecting insurance. It was held that a failure to pay the premium would not prevent a recovery on the policy for a loss. And where insurance brokers, on delivery to them of a policy, are with their knowledge charged in a general account with the premium due on the policy, and they make no objection, the company is liable for the insurance money,

[4] Elkins v. Susquehanna Mutual Fire Ins. Co. 113 Pa. St. 386, 6 Atl. 222.

[5] Ruggles v. American Central Ins. Co. 114 N. Y. 418, 11 Am. St. Rep. 674.

[6] Buckley v. Citizens Ins. Co. 188 N. Y. 399, 13 L.R.A.(N.S.) 889, 81 N. E. 165.

[7] 113 Pa. St. 591; 8 Atl. 163.

notwithstanding the policy provides in terms that the insurance company shall not be liable until the premium shall be actually paid, and that no such provision shall be construed as waived except by some distinct act, such as a clear express agreement indorsed on the policy.[8] And although agents are forbidden by a life insurance company to take notes for first premiums, the taking of a note will constitute a payment of the premium, where the custom is for the agent to take the note in his own name and charge it to himself in his account with the company, being responsible for its collection.[9] But it is held in New Hampshire that the custom of the company to charge the advance premium to the agent on issuing a policy is not a payment unless so understood between the agent and the insured.[10] So it may be shown that by usage in case of a parol agreement to insure, the premium is not due till delivery of the policy.[11] But it is held, however, in a New York case that evidence that the agent of an insurance company frequently waived the condition of prepayment is not admissible to raise an inference of waiver in the absence of other proof tending to establish it.[12] This decision does not, perhaps, conflict with the general rule that, notwithstanding there may be a condition that the policy shall not attach till the premium is actually paid, nevertheless the insurer cannot successfully set up nonpayment, where the authorized agent of the company, by his accustomed and usual course of dealing with the assured, induces him to rely upon the belief that the condition of prepayment is waived.[13] In Dinning v. Phoenix Insurance Company [14] an alleged general custom among agents and brokers to give credit for premiums was set up, but the court

[8] Bang v. Farmville Ins. & Banking Co. 1 Hughes (U. S. C. C.) 290, Fed. Cas. No. 838.

[9] Kimbro v. New York Life Ins. Co. 134 Iowa, 84, 12 L.R.A.(N.S.) 421, 108 N. W. 1025.

[10] Brown v. Massachusetts Mutual Life Ins. Co. 59 N. H. 298, 47 Am. Rep. 205.

In England, the negotiations are generally carried on through a broker, and the premium is due from assured to the broker and from him to the company: 1 Phillips on Ins. (3d ed.) 274, sec. 507, *citing* Fouke v. Pensack, 2 Lev. 153, and other cases; Grove v. Dubois, 1 Term Rep. 112; Edgar v. Fowler, 3 East, 222; De Gaminde v. Pigou, 4 Taunt. 246; Parker v. Smith, 16 East, 382, and several other cases. See also 1 Marshall on Ins. (ed. 1810) *292 et seq., where it is said that the rule that the underwriters give credit to the broker depends upon usage.

[11] Baxter v. Massasoit Ins. Co. 13 Allen (95 Mass.) 320.

[12] Wood v. Poughkeepsie Mutual Ins. Co. 32 N. Y. 619.

[13] See Tenant v. Travelers' Ins. Co. 31 Fed. 322; Yonge v. Equitable Life Ins. Co. 30 Fed. 902; Frankle v. Pennsylvania Fire Ins. Co. 9 Fed. 706, 12 Ins. L. J. 614; Home Life Ins. Co. v. Pierce, 75 Ill. 426; Newark Machine Co. v. Kenton Ins. Co. 50 Ohio St. 549, 22 L.R.A. 768n, 35 N. E. 1063 (*considered* under § 78 herein); Helme v. Philadelphia Life Ins. Co. 61 Pa. St. 107, 100 Am. Dec. 621.

[14] 68 Ill. 414, 3 Ins. L. J. 677.

found that there was nothing in the course of dealings between the parties to sustain such a claim or warrant any implied waiver of prepayment, and this is on a line with the decision in the New York case above noted.[15] And in connection with these cases we do not believe that a mere custom to give credit to others will be sufficient to hold the company in the absence of other proof, such as a custom to give the applicant credit.[16]

§ 85. Prepayment of premium: evidence of waiver.—Delivery of the policy without prepayment of the premium is prima facie evidence of waiver,[17] and such waiver may be shown by parol.[18] So parol evidence is admissible to show that the agent verbally agreed that a policy of insurance should take effect immediately upon the approval of the application, and that the premium note might be made and the cash premium paid at some future time, at the convenience of the parties; provided that such agreement was made known to and acquiesced in by the defendants.[19] Although evidence is admissible to prove whether the delivery was conditional or absolute, yet when a husband, acting as agent for his wife, procures a policy of insurance on his own life in the name and for the benefit of the wife, his subsequent declarations that the policy was delivered conditionally are not admissible as against the wife.[20]

[15] Wood v. Poughkeepsie Mutual Ins. Co. 32 N. Y. 619.

[16] See 1 Wood on Fire Ins. (2d ed.) 68, who says: "But so far as evidence of the practice of the agent to give credit to others is concerned, it is hardly believed that evidence thereof can establish a waiver, and that it is inadmissible to establish a waiver unless connected with other proof to establish it." *Citing* the following cases:

United States.—Marsh v. Northwestern National Ins. Co. 3 Biss. (U. S. C. C.) 351, Fed. Cas. No. 9118.

Illinois.—Teutonia Ins. Co. v. Anderson, 77 Ill. 382; Teutonia Ins. Co. v. Mueller, 77 Ill. 22; Provident Life Ins. Co. v. Fennell, 49 Ill. 180; Illinois Cent. Ins. Co. v. Wolf, 37 Ill. 354, 87 Am. Dec. 251.

Louisiana.—Michael v. Mutual Ins. Co. 10 La. Ann. 737.

Massachusetts.—Hemmingway v. Bradford, 14 Mass. 121.

New York.—Baker v. Union Mutual Life Ins. Co. 43 N. Y. 283; Sheldon v. Atlantic Fire Ins. Co. 26 N. Y. 460, 84 Am. Dec. 231; New York Cent. Ins. Co. v. National Prot. Ins. Co. 20 Barb. (N. Y.) 468; Barnum v. Childs, 1 Sand. (N. Y.) 52; Goit v. National Protection Ins. Co. 25 Barb. (N. Y.) 189.

Ohio.—Madison Ins. Co. v. Fellowes, 1 Disn. (Ohio) 217.

Wisconsin.—Troy Fire Ins. Co. v. Carpenter, 4 Wis. 20.

[17] Wood v. Poughkeepsie Ins. Co. 32 N. Y. 619. See Washoe Tool Manufacturing Co. v. Hibernia Fire Ins. Co. 66 N. Y. 613; Church v. Lafayette Fire Ins. Co. 66 N. Y. 222. *Examine* § 75 herein.

[18] Pino v. Merchants' Ins. Co. 19 La. Ann. 214, 92 Am. Dec. 529.

On the parol evidence rule as to varying or contradicting written contracts as affected by the doctrine of waiver or estoppel as applied to policies of insurance, see note in 16 L.R.A.(N.S.) 1165.

[19] Sheldon v. Connecticut Mutual Life Ins. Co. 25 Conn. 207, 65 Am. Dec. 565.

[20] Southern Life Ins. Co. v. Booker, 9 Heisk. (Tenn.) 606, 24 Am. Rep. 344. Emerigon (Emerigon

§ 86. Effect of receipt in policy for premium.—In this country the effect of an acknowledgment of the receipt of the premium in a policy of insurance which has been delivered to the assured has been the subject of much discussion. It is held in an Indiana case that if an agent delivers a policy which acknowledges that the premium has been paid, this concludes the company, in the absence of fraud or mistake, from subsequently assailing the policy on account of failure to pay the premium.[1] In a New York case the fact that the assured had possession of the policy which provided for payment of a specified sum in advance as a part of the consideration, was held no evidence of payment of the first premium.[2] Under another decision in that state, if a policy acknowledges receipt of the first premium which had not been paid, said first payment being the consideration, and the circumstances disclose no promise to pay, no obligation or liability on the part of the insurer or insured exists.[3] Under an Iowa decision when a fire insurance policy acknowledges the receipt of the payment of a premium which in fact has not been paid, the fact that the policy is made out and sent to the insured on his express promise to remit the premium does not estop the insurer from denying its validity for nonpayment of the premium, as against a mortgagee of the assured to whom the loss is made payable, although he received the policy from the assured without notice of the nonpayment of such premium.[4] But under a later decision in that state, where there was a recital of the payment

on Ins. [Meredith's ed.] 1850, c. iii., sec. 6, p. 69), says: "If the policy imports that the premium has been received, there is novation, though the payment has not been effective, and the sum was passed into account current. It becomes, then, an ordinary and purely chirographic debt." "Novation" defined in note f, id. p. 68. He then notes an old custom whereby the clause, "received the premium," was withdrawn from the policy; the brokers held themselves as debtors to the insurer and creditors of the assured for the amount of the premium. This species of transfer worked a novation. The premium ceased to be due as premium. It was due as money advanced or to be advanced by the broker. In England, in case of marine policies negotiated through a broker, the cases evidence a custom for the underwriter to credit the broker with the premium, and the premium becomes due from the latter to the former. The broker generally credits the assured with the premium; therefore, the acknowledgment of its receipt in the policy in England stands on a different basis than in the United States, where the liability, as a rule, is from the assured to the underwriter. In England, the assured is estopped by the receipt: See chapter on Agency.

[1] Home Ins. Co. v. Gilman, 112 Ind. 7, 13 N. E. 118.

[2] Quinby v. New York Life Ins. Co. 71 Hun (N. Y.) 104, 24 N. Y. S. 593, 54 N. Y. St. Rep. 82.

[3] Priddy v. Baum, 140 N. Y. Supp. 481, 79 Misc. 607.

[4] Union Building Assn. v. Rockford Ins. Co. 83 Iowa 647, 32 Am. St. Rep. 323, 14 L.R.A. 248, 49 N. W. 1032.

of an admission fee in the certificate or policy, evidence of the soliciting agent tending to show that said fee had never been paid was offered as was also evidence by others of statements contra by the agent after insured's death, but the evidence of such statements was rejected and it was held that the rights of the designated beneficiaries became fixed by insured's death.[5] In California, it is held that if an insurance policy contains a formal receipt of the premium, its unconditional delivery is conclusive evidence of payment so as to estop the company from denying the validity of the policy, notwithstanding the declaration in it that it shall not be binding until the premium is actually paid; that the same result follows where the policy is delivered as a valid and completed contract upon a consideration expressed therein, the receipt of which is impliedly acknowledged.[6] And under the civil code of that state an acknowledgment in a policy of the receipt of the premium is conclusive evidence of its payment, so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid, and this applies to a recital in the policy of the consideration paid where there is also a provision against liability while any note for the premium is due and unpaid and the note for said consideration remains due and unpaid.[7] In an Illinois case [8] the court declares that an insurance company will be estopped on the grounds of public policy to dispute its receipt for the purpose of avoiding the policy.[9] The same ruling obtains in Tennessee,[10] but it is held in the same case that the company may show nonpayment in an action to collect the premium, or in deducting it from the amount sought to be recovered. So in Maryland [11] it is declared that an insurance company will not be permitted to allege a want of consideration for its promise by disputing its acknowledgment of the receipt of the premium when sued on the policy after a loss has happened. In South Dakota, where the statute provides that an acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment, so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually

[5] Schoep v. Bankers Alliance Ins. Co. 104 Iowa 354, 73 N. W. 825.

[6] Farnum v. Phœnix Ins. Co. 83 Cal. 246, 17 Am. St. Rep. 233.

[7] Palmer v. Continental Ins. Co. 132 Cal. 68, 64 Pac. 97, 61 Pac. 784; Civ. Code, sec. 2598. *Compare* Mooney v. Home Ins. Co. 80 Mo. App. 192, 2 Mo. App. Rep. 524.

[8] Teutonia Life Ins. Co. v. Anderson, 77 Ill. 384; Teutonia Life Ins. Co. v. Mueller, 77 Ill. 22.

[9] Same in Union Life Ins. Co. v. Winn, 87 Ill. App. 257.

[10] Southern Life Ins. Co. v. Booker, 9 Heisk. (Tenn.) 606, 24 Am. Rep. 344.

[11] Consolidated Real Estate & Fire Ins. Co. v. Cashow, 41 Md. 59.

paid, and the policy does not contain in express terms the words "receipt of which is hereby acknowledged" prescribed for the standard forms, but recites "in further consideration of the annual premium" and that "this policy will be continued upon the further payment of a like amount . . . each year," the word "continued" implies the existence of a policy, and the words "further payment" clearly imply if they do not expressly acknowledge a preceding payment, so a receipt for the first premium is clearly acknowledged so far as the binding effect of the policy is concerned.[12]

In a New Jersey case[13] the policy was executed by the president and secretary of the company, and contained a formal acknowledgment of the payment of the premium, and it was decided that this prevented the company from averring or showing nonpayment for the purpose of proving that the contract had no legal existence, and that it conclusively admitted payment of the premium so far as was necessary to give validity to the contract, and it was said by Beasley, J., that the usual legal rule that a receipt was only prima facie evidence of payment, and might be explained, did not apply "where the question involved is not only as to the fact of payment, but as to the existence of rights springing out of the contract," and that "with a view of defeating such rights the party giving the receipt cannot contradict it," and he adds "an acknowledgment of an act done contained in a written contract, and which act is requisite to put it in force, is as conclusive against the party making it as any other part of the contract, and cannot be contradicted or varied by parol." Mr. Wood[14] cites this case somewhat at length as an authority; another writer, however,[15] dissents therefrom. Mr. May[16] states that such recital in the policy is only prima facie evidence of payment. Mr. Marshall[17] asserts that the payment or nonpayment of the premium can have no effect on the validity of the contract, as an action will lie to recover the premium "notwithstanding the formal acknowledgment of it in the policy, which is not inserted there as conclusive evidence of the actual payment of the premium, but to preclude the necessity of proving it in case of

[12] Noble v. Kansas City Life Ins. Co. 33 S. Dak. 458, 146 N. W. 606; S. Dak. Civ. Code, sec. 1849; Laws 1909, c. 58. See also Power Mercantile Co. v. State Mutual Fire Assoc. 23 S. Dak. 1, 119 N. W. 1008.

[13] Basch v. Humboldt Mutual Fire & Marine Ins. Co. 35 N. J. L. 429, 5 Bennett's Fire Ins. Cases, 421.

[14] 1 Wood on Fire Ins. (2d ed.) 69.

[15] Ostrander on Fire Ins. sec. 95, p. 220.

[16] 1 May on Ins. (3d ed.) sec. 359, *citing* United States, Indiana, Louisiana, Massachusetts, New Hampshire, New York and Texas cases. See also Troy Fire Ins. Co. v. Carpenter, 4 Wis. 32, and cases cited.

[17] 1 Marshall on Ins. 335.

loss," and Mr. Phillips [18] states that the acknowledgment is, according to general practice, "substantially true," but is nevertheless only prima facie evidence which may be rebutted. It is also held in North Carolina that parol evidence is admissible to explain a receipt given by the agent of a fire insurance company for the premium on the policy,[19] and in Ormond v. Fidelity Mutual Life Association [20] the insured agreed to pay the dues to the agent upon delivery of the policy. Attached to the policy was a receipt for the dues, providing that when payment was made to an agent such agent must countersign it at the date of payment. The policy was sent to the insured without the receipt being countersigned by the agent. It was decided that this amounted to a declaration that the required payment had not been made, and must be made before the policy could become binding. Under a later decision in that state the acknowledgment in a policy of insurance of the receipt of a premium estops the insurer to test the validity of the policy on the ground of nonpayment of the premium.[1] But in so far as a recital in an insurance policy of the payment of premium is a part of the contract of insurance, it cannot be contradicted by parol to invalidate the contract, in the absence of fraud in procuring the delivery of the policy. In so far, however, as a recital in an insurance policy of the payment of premium is a mere receipt for money, it is only prima facie like other receipts, and will not prevent an action to recover the money if not in truth paid.[2] In Nebraska the delivery of a life policy to insured and its possession by the beneficiary after its death are prima facie evidence of the payment of the cash consideration recited therein.[3] So in South Carolina, such a receipt in the policy is only prima facie evidence, although it is also held that the delivery of such a policy without exacting payment creates a presumption that credit was given.[4] Under a Massachusetts decision if the insurer delivers to a broker for the assured a policy containing an acknowledgment of the receipt of the premium, they cannot insist, as a condition precedent, on their actual receipt of

[18] 1 Phillips on Ins. (3d ed.) secs. 275–78, 512–15.

[19] Ferebee v. North Carolina Mutual Home Ins. Co. 68 N. C. 11.

[20] 96 N. C. 158, 1 S. E. 796.

[1] Grier v. Mutual Life Ins. Co. 132 N. Car. 542, 44 S. E. 25; Kendrick v. Mutual Benefit Life Ins. Co. 124 N. Car. 315, 70 Am. St. Rep. 592, 32 S. E. 728.

[2] Kendrick v. Mutual Benefit Life Ins. Co. 124 N. C. 315, 70 Am. St. Rep. 592, 32 S. E. 728.

[3] Union Life Ins. Co. v. Parker, 66 Neb. 395, 103 Am. St. Rep. 714, 62 L.R.A. 390, 92 N. W. 604. See also Cauthen v. Hartford Life Ins. Co. 80 S. Car. 264, 61 S. E. 428. *Examine* Hewitt v. American Union Life Ins. Co. 34 Misc. 738, 70 N. Y. Supp. 1012, revd. 73 N. Y. Supp. 105, 66 App. Div. 80.

[4] Cauthen v. Hartford Life Ins. Co. 80 S. Car. 264, 61 S. E. 428.

the premium note which was delivered by the assured to the broker at the time of receiving the policy, and afterward delivered to the underwriters,[5] and a suit lies at the instance of a policy holder to recover a portion of the unearned premium notwithstanding that a promissory note which has been given for the premium has not been paid.[6] Other cases hold that the delivery of the receipt for payment of premium is not conclusive, and that where the policy provides for payment in the lifetime of assured of an advance premium it must be done.[7] And the burden is upon the insurance company to prove nonpayment of the premium note, in order to avoid a policy of insurance made and accepted on condition that it should cease and determine upon failure by the assured to pay a premium note when due given by him to the insurers.[8]

The cases are numerous, however, which hold that where a policy duly executed and delivered acknowledges the payment of the premium, such receipt, in the absence of fraud, duress, or mistake estops the company from denying the same, and is conclusive evidence of payment;[9] while other courts qualify, this rule by holding that it is evidence of payment to the extent, at least, that such payment is necessary to give validity to the contract.[10]

[5] Mayo v. Pew, 101 Mass. 555.

[6] Hemingway v. Bradford, 14 Mass. 121.

[7] Davis v. Massachusetts Life Ins. Co. 13 Blatchf. (U. S. C. C.) 462, Fed. Cas. No. 3642; Brown v. Massachusetts Mutual Life Ins. Co. 59 N. H. 298, 47 Am. Rep. 205; Ormond v. Fidelity Life Assoc. 96 N. C. 158, 1 S. E. 796. See Troy Fire Ins. Co. v. Carpenter, 4 Wis. 20. See also 1 May on Ins. (Parsons) sec. 359, and cases cited.

[8] Hodsdon v. Guardian Life Ins. Co. 97 Mass. 144, 93 Am. Dec. 73; Cauthen v. Hartford Life Ins. Co. 80 S. Car. 264, 61 S. E. 428.

[9] *Illinois.*—Teutonia Life Ins. Co. v. Anderson, 77 Ill. 384; Provident Life Ins. Co. v. Fennell, 49 Ill. 180; Illinois Cent. Ins. Co. v. Wolf, 37 Ill. 354, 87 Am. Dec. 251.

Indiana.—Home Ins. Co. v. Gilman, 112 Ind. 7, 13 N. E. 118, 17 Ins. L. J. 12; Kline v. National Ben. Assn. 111 Ind. 462, 11 N. E. 620, 60 Am. Rep. 703.

Louisiana.—Michael v. Mutual Ins. Co. 10 La. Ann. 737.

Maryland. — Consolidated Real Estate & Fire Ins. Co. v. Cashow, 41 Md. 59.

Montana.—Savage v. Phœnix Ins. Co. 12 Mont. 258, 33 Am. St. Rep. 591, 31 Pac. 66, 21 Ins. L. J. 967.

New York.—Goit v. National Protection Ins. Co. 25 Barb. (N. Y.) 189.

Ohio.—Madison Ins. Co. v. Fellows, 1 Disn. (Ohio) 217, Id. 2 Disn. (Ohio) 128.

England.—Roberts v. Security Co. (C. A.) [1897] 1 Q. B. 111, 66 L. J. Q. B. (N. S.) 119, 75 Law T. Rep. 53 (even while the policy remains in the company's possession); Dalzell v. Mair, 1 Camp. 532; Cumming v. Forrester, 1 Maule & S. 498, 499; De Gaminde v. Pigou, 4 Taunt. 246; Anderson v. Thornton, 8 Exch. 425.

[10] Insurance Co. of Pennsylvania, In re, 22 Fed. 109. See other cases and citations throughout this section.

It is certainly true that the insurer can waive prepayment of the premium, and if the policy be delivered without exacting such prepayment its validity is established, provided always that the contract of assurance is otherwise binding. It is also true that if the contract be completed and is valid and the risk has attached, that the insurer has an action for the premium earned, and the insured either a suit for specific performance, or an action for indemnity [11] may be compelled in equity. Certain rights have attached and the insured may, with the knowledge and acquiescence of the insurer, have rested to his prejudice upon those rights. The contract has been completed and the policy has become valid and binding.[12] At exactly what point, then, does the flaw exist which will enable the insurer to aver or prove that the premium has not been paid for the purpose of escaping liability on a contract which the assured, resting his belief upon the precedent established by the adjudicated cases, has the right to consider completed and binding? In view, therefore, of the weight of authority, such receipt is conclusive evidence of payment, so far as the validity of the policy rests thereon, and the assured is estopped to deny such acknowledgment for the purpose of escaping liability on the contract, unless fraud, duress, or mistake be shown. But where payment of the premium is sought to be enforced, the receipt should be only prima facie evidence of payment.[13]

[11] Dinning v. Phœnix Ins. Co. 68 Ill. 414; Phœnix Ins. Co. v. Ryland, 69 Ind. 437, 1 L.R.A. 548, 16 Atl. 109; New England Fire & Marine Ins. Co. v. Robinson, 25 Ind. 536; Gerrish v. German Ins. Co. 55 N. H. 355.

It is held in Carpenter v. Mutual Safety Ins. Co. 4 Sand. Ch. (N. Y.) 408, that an agreement to insure, evidenced by the receipt for the premium, may be specifically enforced, and if a loss has happened, payment may be compelled in equity. As to life policies, where the premium is paid in advance, the contract is held not to bind the insured to pay, the forfeiture of the policy being the result of nonpayment when due, although it is held a contract obligation on the part of a member of a co-operative assessment company may exist and be enforced at law to pay bimonthly a specified sum: Smith v. Bown, 58 N. Y. St. Rep. 605, 27 N. Y. Supp. 11, 75 Hun, 231.

[12] Even though the premium be never paid, decides the court in Miller v. Life Ins. Co. 12 Wall. (79 U. S.) 285, 20 L. ed. 398; Farnum v. Phœnix Ins. Co. 83 Cal. 246, 17 Am. St. Rep. 233.

[13] Norton v. Phœnix Life Ins. Co. 36 Conn. 503, 4 Am. Rep. 98. See Pitt v. Berkshire Life Ins. Co. 100 Mass. 500; Ryan v. Rand, 26 N. H. 12; Southern Life Ins. Co. v. Booker, 9 Heisk. (Tenn.) 606, 24 Am. Rep. 344; Life Ins. Co. v. Davidge, 51 Tex. 244. See Mooney v. Home Ins. Co. 80 Mo. App. 192, 2 Mo. App. Rep. 524.

Subdiv. IV. Completion of Contract—Delivery of Policy—Knowledge of Loss.

§ 90. Delivery of policy not necessary to complete contract.
§ 90a. Same subject: date.
§ 91. Actual or manual delivery of policy not necessary to complete contract.
§ 92. Agreement to deliver policy: demand is unnecessary.
§ 93. There may be a constructive delivery.
§ 94. Delivery: possession of policy by assured.
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§ 96. Conditional delivery.
§ 97. Parol evidence admissible to show conditional delivery.
§ 97a. Condition precedent: delivery or prepayment of premium during lifetime or good health, etc., of assured.
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§ 97c. Change in health of assured: date of contract.
§ 98. When actual delivery of the policy necessary.
§ 99. Delivery: misrepresentation or fraud.
§ 100. Delivery: notice to assured of execution of policy.
§ 101. Delivery to agent of insured or to third person.
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§ 103. Delivery: agreement completed before loss: mortal illness or accident.
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§ 105. Loss before date of contract: policy retroactive.
§ 106. Where both parties know of loss when contract is made or executed.
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§ 108. Assured not obligated to notify company of loss before delivery of policy when risk has attached.
§ 108a. Mutual benefit societies or associations: issuance of certificate.
§ 108b. Mutual benefit societies or associations: actual delivery of certificate unnecessary, unless.
§ 108c. Mutual benefit societies or associations: initiation as prerequisite to delivery.
§ 108d. Delivery of certificate to subordinate lodge, local camp, etc.
§ 108e. Mutual benefit societies or associations: delay in executing and delivering certificate: retention of certificate.
§ 108f. Where officer of society acts as custodian of certificate.
§ 108g. Mutual benefit societies or associations: delivery of certificate or prepayment of dues during life or good health.

§ 90. Delivery of policy not necessary to complete contract.—A promise to insure is generally performed by issuing a policy or procuring one to be issued,[14] and if the insurer delivers the policy and receives the premium, he is estopped from denying the fact that a contract of insurance was made,[15] and delivery of a policy is conclusive proof of the completion of the contract, in the absence of fraud.[16] But a contract to issue an insurance policy, the agreement being otherwise complete, is equivalent to the actual issuance of the policy so far as the binding force of the contract is concerned;[17] since if a sufficient contract has been made neither a policy nor a certificate is necessary to make the company liable.[18]

So in mutual benefit societies, if the insured has complied with all the other requirements of the society, the fact that he has not taken out a certificate or that one has not been delivered to him does not prevent a recovery,[19] and such recovery may be had without producing such certificate.[20]

[14] Scranton Steel Co. v. Ward's Detroit & Lake Superior Line, 40 Fed. 866; Fire Association of Phila. v. Bynum, — Tex. Civ. App. —, 44 S. W. 579.

When Policy is "issued:" meaning of term, see Stringham v. Mutual Life Ins. Co. 44 Oreg. 447, 75 Pac. 822, 33 Ins. L. J. 463; Homestead Fire Ins. Co. v. Ison, 110 Va. 18, 3 Va. App. 485, 65 S. E. 483, 40 Ins. L. J. 1143.

[15] State of Pennsylvania Ins. Co. In re, 22 Fed. 109; Traveler's Ins. Co. v. Jones, 32 Tex. Civ. App. 146, 73 S. W. 978. See Keen v. Mutual Life Ins. Co. 131 Fed. 559, 33 Ins. L. J. 916, rev'd 135 Fed. 677, 68 C. C. A. 315 (case of provisional and permanent policy).

[16] Rayburn v. Pennsylvania Casualty Co. 138 N. Car. 379, 50 S. E. 762.

[17] Springer v. Anglo-Nevada Ins. Corp. 33 N. Y. St. Rep. 543, 11 N. Y. Supp. 533.

[18] Blake v. Hamburg-Bremen Fire Ins. Co. 67 Tex. 160, 60 Am. Rep. 15; Western Assur. Co. v. McAlpin, 23 Ind. App. 228, 77 Am. St. Rep. 423, 55 N. E. 119; House v. Security Fire Ins. Co. 145 Iowa, 462, 121 N. W. 509, 38 Ins. L. J. 875 (the court, per Deemer, J., said: "The rule of this court is that, if no policy is in fact issued, the case will be treated and considered as if a policy in the usual form issued by the company had in fact been issued"); Herring v. American Ins. Co. 123 Iowa, 533, 99 N. W. 130, 33 Ins. L. J. 588. See Newark Machine Co. v. Kenton Ins. Co. 50 Ohio St. 549, 22 L.R.A. 768, 35 N. E. 1060, 31 Week. L. Bull. 51.

It is a general rule that when a parol contract of insurance has been entered into the delivery of the policy is not essential to its validity or enforceability unless a stipulation of the contract be that it shall not theretofore take effect. International Ferry Co. v. American Fidelity Co. 207 N. Y. 350, 353, 101 N. E. 160, per Collin, J. (marine vessel liability insurance); Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co. 92 Mich. 482, 491, 20 L.R.A. 277, 52 N. W. 1070; King v. Phoenix Ins. Co. 195 Mo. 290, 113 Am. St. Rep. 678, 6 Amer. & Eng. Ann. Cas. 618, 92 S. W. 892.

[19] Bishop v. Grand Lodge of Empire Order of Mut. Aid, 112 N. Y. 627, 20 N. E. 562; Lorscher v. Supreme Lodge Knights of Honor, 72

§ 90a. Same subject: date.—Where an application was made to an agent and the agent agreed to issue and send the applicant a policy on a certain day, and the policy was in fact issued on and bore date of that day, but was not delivered nor the premium paid for several days thereafter, it was held that the policy became operative and binding from the day it was issued though not delivered.[1] But the date of delivery will be the date of the issuance of the policy, which does not mean the date of the policy, when the time of its delivery and acceptance is the first time the minds of the parties meet upon all the essentials of the contract.[2] A policy does not take effect from the date of its delivery where it expressly declares that it is to be effectual upon payment of the initial premium for one year from its date which is much earlier than the date of delivery.[3] If the application asks for insurance from "the ——— day of ———" for one year "to the ——— day of ———" the inference is that the insurance if granted will take effect from the date and delivery of the policy, especially so if the agent had no authority to make a contract until the application was approved, and such want of authority was known to the applicant.[4] The exact date of delivery is immaterial if the jury finds that it was actually delivered the question being whether there was an actual delivery.[5]

§ 91. Actual or manual delivery of policy not necessary to complete contract.—If the contract of insurance is otherwise complete, and the parties intend that it shall be effectual without the policy being actually delivered, an actual or manual delivery is unnecessary.[6] This rule not only applies to a fire policy, since the insurer

Mich. 316, 2 L.R.A. 206, 40 N. W. 545. See §§ 108a–108g herein.

[20] Lorscher v. Supreme Lodge Knights of Honor, 72 Mich. 316, 2 L.R.A. 206, 40 N. W. 545.

[1] Hubbard v. Hartford Fire Ins. Co. 33 Iowa, 325, 11 Am. Rep. 125. See § 1441 herein.

[2] Homestead Fire Ins. Co. v. Ison, 110 Va. 18, 3 Va. App. 485, 65 S. E. 463, 38 Ins. L. J. 1143.

[3] Mercer v. South Atlantic Life Ins. Co. 111 Va. 699, 69 S. E. 961, 40 Ins. L. J. 426.

[4] Fireman's Fund Ins. Co. v. Rogers, 108 Ga. 191, 33 S. E. 954, 28 Ins. L. J. 1025.

[5] Pender v. North State Mutual Life Ins. Co. 163 N. Car. 98, 79 S. E. 293.

[6] *United States.*—Franklin Fire Ins. Co. v. Colt, 20 Wall. (87 U. S.) 560, 22 L. ed. 423 (*cited* in Phœnix Ins. Co. v. Meier, 28 Neb. 132, 44 N. W. 97); Fisher v. London & Lancashire Fire Ins. Co. 83 Fed. 807, 27 Ins. L. J. 417, aff'd 92 Fed. 500, 34 C. C. A. 503 (neither actual delivery nor manual possession of policy necessary).

Alabama.—Stephenson v. Allison, 165 Ala. 238, 138 Am. St. Rep. 26 and note, 51 So. 622; Phœnix Ins. Co. v. McArthur, 116 Ala. 659, 22 So. 903.

Georgia.—Fireman's Fund Ins. Co. v. Pekor, 106 Ga. 1, 31 S. E. 779; New York Life Ins. Co. v. Babcock, 104 Ga. 67, 69 Am. St. Rep. 134, 42

may be considered as holding it for insurer's benefit,[7] but also to life insurance contracts unless actual delivery is made essential to their validity,[8] and although delivery may be essential in order to complete a contract of life insurance, such delivery may be waived;[9] and although it is intended to issue the policy, yet if the terms have been agreed upon and acts have been done which would entitle the applicant to a policy, or if by custom or by rules of the company, or by agreement or otherwise, the policy is not required to be immediately delivered, the contract may be complete for the reception of the policy is not a prerequisite to a contract of insurance.[10] So the assured need not formally accept nor take away a policy to complete the delivery,[11] and where a policy of life insurance was delivered to the broker to whom the application was made but the applicant died without having received the policy, it was held that the contract was complete.[12]

L.R.A. 88, 30 S. E. 273, 27 Ins. L. J. 649.

Idaho.—Marysville Mercantile Co. Ltd. v. Home Fire Ins. Co. 21 Idaho, 377, 121 Pac. 1026.

Illinois.—Rose v. Mutual Life Ins. Co. 240 Ill. 45, 88 N. E. 204.

Maine.—Loring v. Proctor, 26 Me. 18.

North Carolina.—Roberta Manufacturing Co. v. Royal Exchange Assur. Co. 161 N. Car. 88, 76 S. E. 865; Hardy v. Aetna Life Ins. Co. 154 N. C. 430, 70 S. E. 828, 40 Ins. L. J. 1148; Powell v. North State Mutual Life Ins. Co. 153 N. Car. 124, 69 S. E. 12; Waters v. Security Life & Annuity Co. 144 N. Car. 663, 54 S. E. 437, 36 Ins. L. J. 673, 13 L.R.A.(N.S.) 805 (annotated on cancelation of insurance contract by return of policy).

Ohio.—Hartford Fire Ins. Co. v. Whitman, 75 Ohio St. 312, 79 N. E. 450, 36 Ins. L. J. 19; Manchester Fire Ins. Co. v. Plato, 23 Ohio Cir. Ct. Rep. 35.

[7] Stephenson v. Allison, 165 Ala. 238, 138 Am. St. Rep. 26 and note, 51 So. 622.

[8] New York Life Ins. Co. v. Babcock, 104 Ga. 67, 69 Am. St. Rep. 134, 42 L.R.A. 88, 30 S. E. 273, 27 Ins. L. J. 649.

Unless made so by the terms of the application, actual delivery of a life policy to the insured is not essential to the validity of the contract. Devine v. Federal Life Ins. Co. 250 Ill. 203, 95 N. E. 174, 40 Ins. L. J. 1513.

[9] Rhodus v. Kansas City Life Ins. Co. 156 Mo. App. 281, 137 S. W. 907.

Where a policy provides that it shall not be effective until delivery such provision may be waived. Pierce v. New York Life Ins. Co. 174 Mo. App. 383, 160 S. W. 40.

[10] Yonge v. Equitable Life Assur. Soc. 30 Fed. 902, 1 Corp. L. J. 531; Sheldon v. Connecticut Mutual Life Ins. Co. 25 Conn. 207, 65 Am. Dec. 565; Blanchard v. Waite, 28 Me. 51, 48 Am. Dec. 474; Warren v. Ocean Ins. Co. 16 Me. 439, 451, 33 Am. Dec. 674; Alabama Gold Life Ins. Co. v. Herron, 56 Miss. 643.

[11] Xenos v. Wickham, 2 L. R. Eng. & Irish App. 296, 16 L. T. N. S. 800, 16 Week. Rep. 38, 36 L. J. Com. P. 313, 13 Eng. Rul. Cas. 422; Stringham v. Mutual Life Ins. Co. 44 Oreg. 447, 75 Pac. 822, 33 Ins. L. J. 463.

[12] Mutual Life Ins. Co. v. Thomson, 94 Ky. 253, 22 S. W. 87, 22 Ins. L. J. 481.

§ 92. Agreement to deliver policy: demand is unnecessary where an insurance policy is agreed to be delivered within a certain time.[13]

§ 93. There may be a constructive delivery.—That there may be a constructive delivery of the policy is undoubted.[14] In the following cases, however, the circumstances were held not sufficient to justify finding such constructive delivery. Thus, in Herman v. Phoenix Mutual Life Insurance Company [15] the company executed and forwarded a policy to its agent to be delivered to the applicant H. on receipt of the premium. The agent took the policy to H.'s place of business, but he was temporarily absent from the state and the policy was exhibited to the son, who was informed by the agent that the first premium was payable in cash and a note. The son did not pay the cash, but gave his father's note as required, and the agent accepted the same and took it away with the policy, stating that he would keep the policy good till the father's return. The father died while so absent, and the court decided that there was no actual or constructive delivery of the policy.[16] So where there was no payment of the premium due upon a life policy, and payment of only one-half of the premium due had been waived, it was held that a letter by the agent to the applicant stating that "your policy" has arrived did not amount to a constructive delivery.[17]

§ 94. Delivery: possession of policy by assured.—Possession of the policy by the assured is only prima facie evidence of its delivery, as where it appears that it was delivered subject to examination by the assured.[18] So mere possession by the assignee of the assured

[13] Western Mass. Ins. Co. v. Duffey, 2 Kan. 347. See Waters v. Security Life & Annuity Co. 144 N. Car. 663, 13 L.R.A.(N.S.) 805 note, 54 S. E. 437, 36 Ins. L. J. 673.

[14] McLachlan v. Ætna Ins. Co. 4 Allen (N. B.) 173; Home Ins. Co. v. Curtis, 32 Mich. 402, 5 Ins. L. J. 120. See New York Life Ins. Co. v. Babcock, 104 Ga. 67, 69 Am. St. Rep. 134, 42 L.R.A. 88, 30 S. E. 273, 27 Ins. L. J. 649; Waters v. Security Life & Annuity Co. 144 N. Car. 663, 54 S. E. 437, 36 Ins. L. J. 673, 13 L.R.A.(N.S.) 805 note; American Home Life Ins. Co. v. Melton, — Tex. Civ. App. —, 144 S. W. 362. See § 102 herein.

[15] 17 Minn. 153, 10 Am. Rep. 154.

[16] See also Markey v. Mutual Benefit Life Ins. Co. 103 Mass. 78, 118 Mass. 178, 126 Mass. 158.

[17] Union Central Life Ins. Co. v. Panley, 8 Ind. App. 85, 35 N. E. 190.

[18] *United States.*—Davis v. Massachusetts Mutual Life Ins. Co. 13 Blatchf. (U. S. C. C.) 462, Fed. Cas. No. 3,642.

Illinois.—Richardson v. Northwestern Mutual Life Ins. Co. 143 Ill. App. 279.

Massachusetts.—Markey v. Mutual Benefit Life Ins. Co. 103 Mass. 78, 118 Mass. 178, 126 Mass. 158.

New York.—Prall v. Mutual Protection Life Assur. Soc. 5 Daly (N. Y.) 298 aff'd 63 N. Y. 608.

North Carolina.—Waters v. Security Life & Annuity Co. 144 N. Car.

of a life policy which recites on its face that it is to take effect only when countersigned by the agent, and which is not so countersigned, is no evidence that the policy was ever delivered to the assured.[19] But delivery of a life policy to insured and its possession after his death by the beneficiary are prima facie evidence that its recital of a cash payment is correct.[20]

§ 95. Neglect of assurer to deliver policy.—Nondelivery by reason of negligence of the company or its agents does not relieve the insurer of liability where the contract between the parties is complete, as where the application has been accepted and the terms concluded, and the premium has been tendered, or the applicant has agreed to pay the first premium on delivery of the policy,[1] since a corporation which is bound in good faith to execute and deliver a policy in the usual form, and thereby consummate the contract, cannot escape liability by neglecting so to do.[2]

§ 96. Conditional delivery.—A policy may be conditionally delivered, and in such case the contract is not complete until the condition be complied with,[3] as where the delivery was conditioned upon the agent obtaining the surrender value or paid-up policies in place of certain other policies of the applicant left with him for that purpose, and the agent did not succeed in so doing.[4] So, a policy may be sent to assured for his acceptance or rejection and upon payment of the premium the contract to be completed, in which case the prerequisite conditions must be complied with.[5] And a life insurance company may show that the manual delivery of the policy was conditional, for this goes to the execution of the contract.[6] Again, where a policy of insurance is written at the

663, 54 S. E. 437, 36 Ins. L. J. 673, 13 L.R.A.(N.S.) 805 note. Examine Pennsburg Manufacturing Co. v. Pennsylvania Fire Ins. Co. 16 Pa. Super. Ct. 91.

[19] Prall v. Mutual Protection Life Assur. Soc. 5 Daly (N. Y.) 298 aff'd 63 N. Y. 608.

[20] Union Life Ins. Co. v. Parker, 66 Neb. 395, 103 Am. St. Rep. 714, 62 L.R.A. 390, 92 N. W. 604; Thum v. Wolstenholme, 21 Utah, 446, 61 Pac. 537, 29 Ins. L. J. 699. See §§ 76, 86 herein.

[1] Yonge v. Equitable Life Assur. Soc. 30 Fed. 902, 1 Corp. L. J. 531; New York Life Ins. Co. v. Babcock, 104 Ga. 67, 69 Am. St. Rep. 134, 42 L.R.A. 88, 30 S. E. 273, 27 Ins. L. J. 649, 656.

[2] Bradley v. Nashville Ins. Co. 3 La. Ann. 708, 48 Am. Dec. 465.

[3] Le Roy v. Park Ins. Co. 39 N. Y. 56; Rogers v. Charter Oak Life Ins. Co. 41 Conn. 97; Benton v. Martin, 52 N. Y. 570. See also Moore v. Farmer's Mutual Ins. Assoc. 107 Ga. 199, 32 N. E. 49; Commercial Mutual Accident Co. v. Bates, 176 Ill. 194, 52 N. E. 49; Blue Grass Ins. Co. v. Cobb, 24 Ky. L. Rep. 2132, 72 S. W. 1099.

[4] Harneckell v. New York Life Ins. Co. 40 Hun (N. Y.) 558, aff'd 111 N. Y. 390, 2 L.R.A. 150, 18 N. E. 632.

[5] Blue Grass Ins. Co. v. Cobb, 24 Ky. L. Rep. 2132, 72 S. W. 1099.

[6] Gardner v. North State Mutual

request of a broker, and delivered to him by the agent of the company on his promise not to regard it as binding until the company shall have inspected and accepted the risk, the policy being subject to immediate cancelation; and the company thereafter promptly inspects and rejects the risk; and the agent of the company so notifies the broker, who thereupon agrees to return the policy; and no premium is charged or paid as between the broker and agent,—there is no final and absolute delivery of the policy, but the delivery is conditional only.[7]

§ 97. Parol evidence admissible to show conditional delivery.—Parol evidence is admissible to show a conditional delivery. So in a case where the policy was expressed to have been executed and delivered, parol evidence was held admissible that it was agreed that a previous policy should be surrendered and a new policy issued as a substitute therefore, which agreement was not performed, but the prior policy enforced and the amount thereof paid.[8] Again, after a written contract of life insurance is made its terms may not be contradicted so as to affect its continued validity or to avoid the insurance, but the company can show that the manual delivery of the policy was conditional, as this goes to the execution of the contract, or it may prove fraud or other equitable matter in the same way for the purpose of showing it never took effect as a contract, so it may be shown that the delivery of the policy was made upon false representations in the application as to the health of insured, and as to his not having been exposed to certain contagious diseases, and where a "binding receipt" is given, and the application is thereafter accepted and delivered the insurance relates back to the date of the receipt.[9]

§ 97a. Condition precedent: delivery or prepayment of premium during lifetime or good health, etc., of assured.—Whether or not the applicant is in an insurable condition, is an insurable risk, at the time of the delivery of a life or accident policy is an important factor, and, therefore, where it is stipulated that the insurance shall not be binding unless delivery is made and the first premium paid during the lifetime of the applicant or while he is in sound or good health, or some like provision is made a condition precedent.

[7] Hartford Fire Ins. Co. v. Wilson, 187 U. S. 467, 23 Sup. Ct. 189, 47 L. ed. 261, *cited* in Coffin v. New York Life Ins. Co. 127 Fed. 556, 62 C. C. A. 416. *Distinguished* in Bieber v. v. Gans, 24 App. D. C. 517, 521.

[8] Fannee v. State Mutual Life Assur. Co. 101 Mass. 279.

[9] Gardner v. North State Mutual Life Ins. Co. 163 N. Car. 367, 79 S. E. 806, 48 L.R.A.(N.S.) 714 note.

it must be complied with to render the company liable,[10] unless

[10] *United States.*—Amos-Richia v. Northwestern Mutual Life Ins. Co. (U. S. C. C.) 152 Fed. 192, 36 Ins. L. J. 549 (same case noted below under Michigan); Cable v. United States Life Ins. Co. 111 Fed. 19, 49 C. C. A. 216, (case rev'd 191 U. S. 288, 48 L. ed. 188, 24 Sup. Ct. 74, points decided in Supreme Court were: The power of States to control and regulate foreign corporations; jurisdiction in equity, and renewal of causes; case below of bill to have policy delivered up for cancelation on ground that it was procured by fraud of deceased's agents; decree that it be delivered up and canceled affirmed in circuit court of appeals; certiorari granted and decree reversed; case remanded with order to dismiss without prejudice); Manhattan Life Ins. Co. v. Carder, 82 Fed. 986, 27 C. C. A. 344 (insured held to have been in "good health" when policy delivered).

Alabama.—Powell v. Prudential Ins. Co. 153 Ala. 611, 45 So. 208 (policy delivered to father after applicant's death of which insurer was ignorant and latter was mortally ill at time of payment of premium).

Georgia.—Brown v. Mutual Benefit Life Ins. Co. 131 Ga. 38, 61 S. E. 1122 (policy required first premium to be paid during life time of assured); Clark v. Mutual Life Ins. Co. 129 Ga. 571, 59 S. E. 283 (premium acquired to be paid during good health of applicant; non-suit granted).

Indiana.—Michigan Mutual Life Ins. Co. v. Thompson, 44 Ind. App. 180, 86 N. E. 502 (policy received by company's agent when applicant mortally ill); Reserve Loan Life Ins. Co. v. Hockett, 35 Ind. App. 89, 73 N. E. 842 (policy not delivered until after applicant's death, although premium paid).

Kentucky.—Provident Savings Life Assur. Soc. v. Elliott's Extr. 29 Ky. L. Rep. 552, 93 S. W. 659, 35 Ins. L. J. 713 (applicant died before policy reached agent); Torpey v. National Life Ins. Co. 29 Ky. L. Rep. 371, 92 S. W. 982 (applicant died before policy issued and before application or medical examination received). Hill's Admr. v. Penn Mutual Life Ins. Co. 28 Ky. L. Rep. 790, 90 S. W. 544 (policy received by agent of insured during applicant's last sickness: note given for premium).

Michigan.—Bowen v. Prudential Ins. Co. 178 Mich. 63, 51 L.R.A. (N.S.) 587, 144 N. W. 543; Amos-Richia v. Northwestern Mutual Life Ins. Co. 143 Mich. 684, 107 N. W. 707, s. c. (U. S. C. C.) 152 Fed. 192, 36 Ins. L. J. 549 (requirement that premium be actually paid etc. while insured in good health; policy was found by beneficiary among insured's papers after his death; held that policy never delivered. There was involved the point of cancelation of stamps under the "war revenue act" of 1898).

Missouri.—Rhodes v. Kansas City Life Ins. Co. 156 Mo. App. 281, 137 S. W. 907 (condition must be complied with); Kilcullen v. Metropolitan Life Ins. Co. 108 Mo. App. 61, 82 S. W. 966 (policy sent to agent; insured died before it was delivered or premium paid in full; no contract).

Nebraska.—Anders v. Life Ins. Clearing Co. 62 Neb. 585, 87 N. W. 331, 31 Ins. L. J. 224 (condition must be complied with).

New York.—Poste v. American Union Life Ins. Co. 52 N. Y. Supp. 910, 32 App. Div. 189, aff'd (mem.) 165 N. Y. 631, 59 N. E. 1129 (company not liable where no actual prepayment during lifetime even though policy delivered and reported in return to insurance department), *cited* in Hewitt v. American Union Life Ins. Co. 70 N. Y. Supp. 1012, 1013, 34 Misc. 738, rev'd 73 N. Y. Supp. 105, 106, 108, 66 App. Div. 80.

such condition is waived or there is an estoppel.[11]

North Carolina.—Hardy v. Aetna Life Ins. Co. 154 N. Car. 430, 70 S. E. 828, 40 Ins. L. J. 1148 (first premium to be paid during good health etc., evidence of delivery for jury); Perry v. Security Life & Annuity Ins. Co. 150 N. Car. 143, 63 S. E. 679, 38 Ins. L. J. 432 (policy delivered conditionally; not accepted for purpose of taking effect; upon election to accept, notice should have been given and premium paid or tendered during good health).

Oregon.—Francis v. Mutual Life Ins. Co. 55 Oreg. 280, 106 Pac. 523.

Pennsylvania.—Gordon v. Prudential Ins. Co. of America, 231 Pa. 404, 80 Atl. 882, 40 Ins. L. J. 1838 (premium paid while applicant suffering from sickness which proved fatal; policy delivered for inspection only; no recovery. But compare Barnes v. Fidelity Mutual Life Ins. Co. 191 Pa. 618, 45 L.R.A. 264, 43 Atl. 341).

Rhode Island.—Mohr v. Prudential Ins. Co. of America, 32 R. I. 177, 78 Atl. 554 (a condition precedent to liability).

Texas.—Aetna Life Ins. Co. v. Hocker, 39 Tex. Civ. App. 330, 89 S. W. 26 (policy sent to agent for conditional delivery; agent sent it to bank for delivery without mentioning conditions; insured was killed before actual delivery; held no contract although bank held note in escrow for premium).

Virginia.—Oliver v. Mutual Life Ins. Co. 97 Va. 134, 1 Va. S. C. Rep. 29, 33 S. E. 536 (condition precedent to liability).

Effect of stipulation in application or policy of life insurance that it shall not become binding unless delivered to assured while in good health.—See notes 17 L.R.A.(N.S.) 1144, 43 L.R.A.(N.S.) 725, L.R.A. 1916F, 171, as follows:

1. Effect of assured's ill health at time of application. a. Good health. 2. Effect of incontestable clause. 3. Effect of cancellation. 4. Effect of delivery to agent as delivery to assured. 5. Effect of refusal to deliver because of illness or death of assured. 6. Effect of assured's knowledge of his condition. 7. Effect of statutes relieving policyholders from representations and warranties. 8. Waiver, a. Who may waive, b. Effect of provision that only certain officers may waive, c. Effect of delivery while assured is ill, d. Effect of delivery after death of assured, e. Delivery for examination, f. Effect of acceptance of first premium while assured is ill, g. Effect of acceptance of first premium after assured's death, h. Effect of acknowledgment of payment of premium, i. Acceptance of subsequent premiums, j. Effect of approval of application after breach, k. Effect of giving option to accept policy, l. Effect of giving time to pay premium, m. Effect of retention of first premium, n. Effect of delay in issuing, o. Effect of initiation, p. Agreement by agent to deliver policy when issued, q. Acceptance of note, or something other than money, in payment of the first premium.

[11] *Alabama.*—Powell v. Prudential Ins. Co. 153 Ala. 611, 45 So. 208 (no waiver).

California.—Berliner v. Travelers Ins. Co. 121 Cal. 451, 53 Pac. 922, 27 Ins. L. J. 847 (accident policy; insured killed while traveling; delivery valid, and payment premium waived).

Georgia.—Brown v. Mutual Benefit Life Ins. Co. 131 Ga. 38, 61 So. 1122 (policy precluded waiver by agent; non-suit granted); Reese v. Fidelity Mutual Life Assoc. 111 Ga. 482, 36 S. E. 637 (held that no agent could waive such condition precedent).

Illinois.—John Hancock Mutual Life Ins. Co. v. Schlink, 175 Ill. 284, 51 N. E. 795, aff'g 74 Ill. App. 181 (prepayment of premium during lifetime etc. of assured held waived notwithstanding policy pro-

§ 97b. Same subject.—An actual or constructive delivery is essential especially where the application expressly provides that the policy shall be actually delivered to or accepted by the applicant while he is in good health.[12] But where a policy of insurance is delivered, such delivery, in the absence of fraud, is conclusive that the contract is completed, and is an acknowledgment that the premium was paid during the good health of the insured.[13] So in the absence of fraud the delivery of an accident insurance policy is conclusive proof that the contract is completed and an acknowledgment that the premium was properly paid during good health.[14] And if insured is in good health at the time the policy is mailed to him, such a condition is complied with.[15] So where insured is in good health when a policy is received by insurer's agent to be unconditionally delivered there is a sufficient delivery even though

vision prohibiting waiver except by certain officers).

Kentucky.—Natural Life Ins. Co. v. Twiddell, 22 Ky. L. Rep. 881, 58 S. W. 699 (policy delivered after applicant had fatal disease; company estopped); Connecticut Indemnity Assoc. v. Grogans Admr. 21 Ky. L. Rep. 717, 52 S. W. 959, 28 Ins. L. J. 1031 (prepayment of premium when insured in good health; waived by agent).

Louisiana.—Kennedy v. Metropolitan Life Ins. Co. 116 La. 66, 40 So. 533 (non-waiver).

Michigan.—Dennis v. Fidelity Mutual Life Ins. Co. 159 Mich. 594, 16 Det. Leg. N. 1065, 124 N. W. 575 (policy delivered and first premium paid shortly after death; insurer sent letter denying any liability; no waiver).

Minnesota.—Murphy v. Metropolitan Life Ins. Co. 106 Minn. 112, 118 N. W. 355 ("no obligation is assumed by the company prior to the date hereof, nor unless on said date the assured is alive and in sound health." When policy issued assured had cancer; defense of unsound health not waived. Minn. Rev. Laws 1905, sec. 1695 construed).

New York.—Ames v. Manhattan Life Ins. Co. 58 N. Y. Supp. 244, 40 App. Div. 465, 52 N. Y. Supp. 759, 31 App. Div. 180, aff'd 167 N. Y. 584, 60 N. E. 1106 (waived by delivery and acceptance of premium during insured's illness). *Cited* in Genung v. Metropolitan Life Ins. Co. 69 N. Y. Supp. 1041, 1045, 60 App. Div. 424.

North Carolina.—Hardy v. Aetna Life Ins. Co. 154 N. Car. 430, 70 S. E. 828, 40 Ins. L. J. 1148 (condition waived).

Oregon.—Stringham v. Mutual Life Ins. Co. 44 Oreg. 447, 75 Pac. 822, 33 Ins. L. J. 463 (policy issued but not delivered before illness and death; note given thereafter to agent who had no knowledge thereof; no waiver).

Rhode Island.—Mohr v. Prudential Ins. Co. of America, 32 R. I. 177, 78 Atl. 554 (condition precedent unless waived).

Texas.—Provident Savings Life Assur. Soc. v. Oliver, 22 Tex. Civ. App. 8, 53 S. W. 594 (condition waived).

[12] American Home Life Ins. Co. v. Melton (1912) — Tex. Civ. App. —, 144 S. W. 362.

[13] Grier v. Mutual Life Ins. Co. 132 N. Car. 542, 44 S. E. 25.

[14] Rayburn v. Pennsylvania Casualty Co. 138 N. Car. 379, 107 Am. St. Rep. 548, 50 S. E. 762.

[15] Mutual Reserve Fund Life Assoc. v. Farmer, 65 Ark. 581, 47 S. W. 850.

the agent retains possession of the policy.[16] And a premium is paid during insured's lifetime where, without concealment or fraud, it is paid on the same day that insured dies.[17] If a policy contains the condition that it "does not take effect until the first premium shall have been actually paid during the lifetime of the insured" another condition requiring payment of said premium while insured is in good health cannot be incorporated in the contract, so that if the policy is sent to the insurer's agent for delivery and said agent is absent at the time it is received, but thereafter a tender of the premium is made while the insured is fatally ill and such tender is refused a motion for a nonsuit is properly denied.[18]

A condition precedent requiring delivery to the applicant while in good health is waived by the company's collecting from its agent, after the applicant's death and with knowledge thereof the premium paid by the latter to the agent.[19] And if a health certificate is also required the furnishing thereof may be waived.[20]

Whether such a condition has been complied with may be a question for the jury,[1] or there may not, however, be such a vital conflict of evidence upon the question of delivery of the policy as to warrant submission of the case to the jury.[2] So the insurer may insist that the fact that the condition was complied with, be shown by a preponderance of evidence before it is rendered liable, unless there is a waiver of the condition.[3] When a life insurance policy states that it is "based upon the payment of premiums in advance," and there is evidence tending to show that by the rules and regulations of the company, a new examination of assured is required if it is not delivered within a specified time; that the premium must be paid on its delivery, and that it cannot be delivered unless the

[16] New York Life Ins. Co. v. Babcock, 104 Ga. 67, 42 L.R.A. 88, 30 S. E. 273, 27 Ins. L. J. 649. See also New York Life Ins. Co. v. Pike, 51 Colo. 238, 117 Pac. 899, 40 Ins. L. J. 2079.

[17] Kendrick v. Mutual Benefit Life Ins. Co. 124 N. Car. 315, 32 S. E. 728, 70 Am. St. Rep. 592.

[18] Going v. Mutual Benefit Life Ins. Co. 58 S. Car. 201, 36 S. E. 556, 29 Ins. L. J. 801.

[19] Rhodus v. Kansas City Life Ins. Co. 156 Mo. App. 281, 137 S. W. 907.

[20] Life Insurance Clearing Co. v. Altschuler, 55 Neb. 341, 75 N. W. 862, s. c. 53 Neb. 481, 73 N. W. 942, 27 Ins. L. J. 262.

[1] United States Life Ins. Co. v. Ross, 102 Fed. 722, 42 C. C. A. 601 (Petition for certiorari denied [mem.] 179 U. S. 683, 45 L. ed. 385, 21 Sup. Ct. 916); Lee v. Prudential Life Ins. Co. 203 Mass. 299, 89 N. E. 529, 17 Am. & Eng. Ann. Cas. 236; Genung v. Metropolitan Life Ins. Co. 69 N. Y. Supp. 1041, 60 App. Div. 424; Baldi v. Metropolitan Ins. Co. 18 Pa. Super. Ct. 599; Going v. Mutual Benefit Life Ins. Co. 58 S. Car. 201, 36 S. E. 556, 29 Ins. L. J. 801.

[2] Amos-Richia v. Northwestern Mutual Life Ins. Co. (U. S. C. C.) 152 Fed. 192, 36 Ins. L. J. 549, s. c. 143 Mich. 684, 107 N. W. 707.

[3] Mohr v. Prudential Ins. Co. of America, 32 R. I. 177, 78 Atl. 554.

applicant is in good health; that none of these requirements were complied with and the policy was delivered when insured was sick, only a few days before his death, it is sufficient upon the issue whether there had been a valid delivery of the policy sued on.[4]

Again, the question of waiver of such a condition may be properly one for the jury,[5] and such waiver must be specially pleaded and proven,[6] and while evidence tending to establish waiver is slight yet it may be sufficient to require its submission to the jury; but if waiver is not pleaded there is no issue to submit and the jury may be instructed to find for the insurer.[7] The applicant's condition of health at the time the policy is mailed from the home office to a bank to be delivered cannot, in the absence of fraud, be availed of where the statute provides that where an applicant submits to a medical examination by the company's physician and is pronounced a fit subject of insurance, such company, in the absence of fraud, shall be estopped from pleading that the insured person "was not in the condition of good health required by the policy at the time of the issuance or delivery thereof." [8]

§ 97c. Change in health of assured: date of contract.—Where a policy of life insurance is delivered it is based on the status of the insured at the time of the application and the company assumes the risk of subsequent ill health of the insured.[9] So where an application expressly provides that upon payment of the first premium and upon delivery to and receipt by the applicant of the policy during his lifetime the policy should relate back to and take effect as of the date of the application, and the policy also so expressly provides, the terms of the contract and the intention of the parties are both established and a change in the health of insured, in the absence of any proviso in the policy, or in the application, that such change would avoid the policy cannot vitiate it nor divest the beneficiary of his rights thereunder, the first premium having been paid. And the doctrine of continuing representations is eliminated by the above provisos.[10] In case.

[4] Powell v. North State Mutual Life Ins. Co. 153 N. Car. 124, 69 S. E. 12.

[5] Life Insurance Clearing Co. v. Altschuler 53 Neb. 481, 73 N. W. 942, 27 Ins. L. J. 262, s. c. 55 Neb. 341, 75 N. W. 862.

[6] Anders v. Life Ins. Clearing Co. 62 Neb. 585, 87 N. W. 331, 31 Ins. L. J. 224.

[7] Anders v. Life Ins. Clearing Co. 62 Neb. 585, 87 N. W. 331, 31 Ins. L. J. 224.

[8] Unterharnscheidt v. Missouri State Life Ins. Co. 160 Iowa, 223, 45 L.R.A.(N.S.) 743, 138 N. W. 459.

[9] Grier v. Mutual Life Ins. Co. 132 N. Car. 542, 44 S. E. 28. *Examine* Gardner v. North State Mutual Life Ins. Co. 163 N. Car. 367, 48 L.R.A. (N.S.) 714, 79 S. E. 806.

[10] New York Life Ins. Co. v. Moats, 207 Fed. 481, — C. C. A. —. The

however, of a material change in the applicant's health prior to the consummation of the contract the insurer should be informed thereof otherwise a fraud might be perpetrated upon insurer.[11]

§ 98. When actual delivery of the policy necessary.—If there be a provision or an agreement that the policy shall not be in force until actual delivery to the insured, the contract is not consummated nor the company bound in the absence of such delivery;[12] and if an intent that there should be such actual or manual delivery is evidenced by the terms of the application or contract, such requirement must be complied with;[13] and this has been so held even though the application makes the policy for the benefit of the applicant's wife, and although there was a day's delay in passing on said application, when otherwise it might have reached the applicant before his death.[14] Again if the application for life insurance stipulates that the insured incurs no liability until the policy is issued and delivered, there can be no recovery in the absence of such issuing and delivery, though the first premium is paid, and the agent who solicited the insurance assured the applicant that it would go into effect at once.[15] And where the application for a life insurance policy contains no agreement as to the time of taking effect together with an agreement that a note taken in payment of the first premium shall not be negotiated until the delivery of the policy, the insurance does not take effect until the issuance and delivery of the policy.[16] So the legal delivery of a

Court, per Morrow, Cir. J., distinguishes, as to continuing representations: Cable v. United States Life Ins. Co. 111 Fed. 19, 49 C. C. A. 216; Equitable Life Assur. Co. v. McElroy, 83 Fed. 631, 28 C. C. A. 365, and also considers Mutual Benefit Life Ins. Co. v. Higginbotham, 95 U. S. 380, 383, 24 L. ed. 499. *Compare* cases *considered* near end of § 53b herein.

[11] Gordon v. Prudential Ins. Co. of America, 231 Pa. 404, 80 Atl. 882, 40 Ins. L. J. 1838.

[12] Misselhorn v. Mutual Reserve Fund Life Assn. 30 Fed. 545; Kohen v. Mutual Reserve Fund Life Assn. 28 Fed. 705. See also Moore v. Farmers Mutual Ins. Assoc. 107 Ga. 199, 33 S. E. 65; New York Life Ins. Co. v. Babcock, 104 Ga. 67, 42 L.R.A. 88, 69 Am. St. Rep. 134, 30 S. E. 273, 27 Ins. L. J. 649, 655; Commercial Mutual Accident Co. v. Bates, 176 Ill. 194, 52 N. E. 49; Bowen v. Prudential Ins. Co. of America, 178 Mich. 63, 144 N. W. 543. Holding that if the application requires actual delivery there must be actual delivery, and it was declared by the court, per Steere, J., that such an application is initiative of the proposed contract, becomes a part of it when consummated, is binding on the applicant, and fixes the time when his policy will become operative and his insurance begin.

[13] Powell v. North State Mutual Life Ins. Co. 153 N. Car. 124, 69 S. E. 12, 48 L.R.A.(N.S.) 714 note.

[14] Kohen v. Mutual Reserve Fund Life Assoc. 28 Fed. 705.

[15] Chamberlain v. Prudential Ins. Co. 109 Wis. 4, 83 Am. St. Rep. 851, 85 N. W. 128.

[16] Summers v. Mutual Life Ins. Co. 12 Wyo. 369, 109 Am. St. Rep. 992, 66 L.R.A. 812, 75 Pac. 937.

policy of fire insurance is essential to its existence as an enforceable contract.[17]

Where a policy upon the life of A payable to B was conditioned not to be binding until delivered to A in good health, it was held that a delivery to B after the death of A was not binding upon the insurer.[18] The rule above stated is, however, subject to certain qualifications, as will be noted elsewhere, as in cases of waiver or delivery to an agent, etc.

§ 99. Delivery: misrepresentation or fraud.—If the delivery be obtained by misrepresentation or fraud, it can have no effect as a binding contract, as in case the assured has knowledge of the loss at the time the application is made and conceals the fact.[19] So fraud or other equitable matter may be proven to show that the policy never took effect as a contract.[20]

§ 100. Delivery: notice to assured of execution of policy.—An actual delivery of the policy is not essential to the completion of the contract where an application has been made, accepted, and the terms agreed upon, and the policy executed and notice thereof given to the assured.[1] And whether or not an insurance policy has been delivered after its issuance does not depend upon its manual possession by the assured, but upon the intention of the parties as manifested by their acts or agreement, and where the contract of insurance is completed and put in writing, and the insured is notified by the insurance agent that this has been done, and that the policy is in his possession for the insured, this must be deemed a sufficient delivery of the policy to render it valid and binding.[2]

[17] Morriss v. Home Ins. Co. 139 N. Y. Supp. 674, 78 Misc. 303, *citing* Walrath v. Hanover Fire Ins. Co. 124 N. Y. Supp. 54, 139 App. Div. 407. See also Ikeller v. Hartford Fire Ins. Co. 53 N. Y. Supp. 323, 24 Misc. 136.

Actual or constructive delivery is essential to validity. American Home Life Ins. Co. v. Melton, — Tex. Civ. App. —, 144 S. W. 362.

[18] McClave v. Mutual Reserve Fund Life Assn. 55 N. J. L. 187, 26 Atl. 78.

[19] Piedmont & Arlington Life Ins. Co. v. Ewing, 92 U. S. 377, 23 L. ed. 610; Wales v. New York Bowery Fire Ins. Co. 37 Minn. 106, 33 N. W. 322; Gardner v. North State Mutual Life Ins. Co. 163 N. Car. 367, 48 L.R.A.(N.S.) 714 note, 79 S. E. 806 (*considered* under § 97 herein); Whitley v. Piedmont & Arlington Life Ins. Co. 71 N. C. 480; Fitzherbert v. Mather, 1 Term Rep. 12; Edwards v. Footner, 1 Camp. 530. *Examine* Commercial Mutual Ins. Co. v. Bates, 176 Ill. 194, 52 N. E. 49.

[20] Gardner v. North State Mutual Life Ins. Co. 163 N. Car. 367, 48 L.R.A.(N.S.) 714 note, 79 S. E. 806.

[1] Bragdon v. Appleton Mutual Fire Ins. Co. 42 Me. 259; Sheldon v. Connecticut Mutual Life Ins. Co. 25 Conn. 207, 65 Am. Dec. 565. See § 55c herein.

[2] Phœnix Assur. Co. v. McAuthor, 116 Ala. 659, 67 Am. St. Rep. 154, 22 So. 903; Fischer v. London & Lancashire Fire Ins. Co. 83 Fed. 807, 27 Ins. L. J. 417, aff'd 92 Fed. 500, 34 C. C. A. 503.

Again, notification to the applicant of the arrival of a life-insurance policy, by the local agent who receives the application and to whom the policy is forwarded for delivery, completes the contract, which the insurer cannot deny after loss, although the insurer in fact issues a different form of policy from that applied for, and notifies the agent to secure an amendment to the application requesting the policy issued, which he fails to do.[3] But it is held that until delivery of a policy or payment of premium there is no contract of insurance, in the absence of any oral agreement for insurance prior to the policy, although the insured, who had previously made an application, has been notified by the insurance agent that a policy is ready for him.[4] In Myers v. Liverpool & London & Globe Insurance Company [5] application was made to an agent for a fire policy; thereafter the applicant was notified by the agent that the policy was ready, and he was requested to call for it, which he did several times, but did not find the agent in. The policy was finally canceled by the agent and soon after the premises were destroyed by fire, and it was held that no action could be maintained on the contract.

§ 101. Delivery to agent of insured or to third person.—The delivery need not be made personally to the insured but may be to a third person for him, or to the order and control of a third person, or to the agent of the insured, so the delivery is effectual to bind the contract where the company's agent under an agreement with the assured holds the policy subject to the order and control of a third person, whose mortgage interest is covered by it, though such third person does not call for or receive it.[6] So a delivery to insurance brokers who are agents of the insured and the former's admission that they handed the policy to insured constitutes a good delivery by the insurer with an intent to be bound by its terms and conditions and obligating insured,[7] but where the delivery is to a third party, until it can be learned whether the company will accept the risk, and it is understood that if the company refuses to insure, the applicant will try to obtain insurance in another company, and a loss occurs before the agent learns whether

[3] Kimbro v. New York Life Ins. Co. 134 Iowa, 84, 12 L.R.A.(N.S.) 421, 108 N. W. 1025.

Annotated on effect of general notification by agent of arrival of policy where the company has substituted another form of policy for that applied for.

[4] Wainer v. Milford Mutual Fire Ins. Co. 153 Mass. 335, 11 L.R.A. 598, 26 N. E. 877.

[5] 121 Mass. 338.

[6] Home Ins. Co. v. Curtis, 32 Mich. 402.

[7] Singer v. National Fire Ins. Co. 139 N. Y. Supp. 375, 154 App. Div. 783. Delivery to insured's authorized agent is sufficient. American Fire Ins. Co. v. Minsker Realty Co. 83 Misc. 1, 144 N. Y. Supp. 305; Holmes v. Thomason, 25 Tex. Civ. App. 389, 61 S. W. 504.

the risk has been accepted or not, no contract is consummated, although the applicant has paid the premium.[8] If the policy, however, is handed to a messenger of the assured, his acts and declarations are inadmissible to bind the assured in the absence of proof of his authority.[9]

But the delivery is sufficient to complete the contract where it is delivered to the company's agent under a stipulation in a proposal for insurance that such agent shall act for both parties.[10] In an Iowa case it appeared that the insured had experienced some trouble in keeping his property insured and made arrangements with an insurance agent to reinsure upon the expiration of policies, and, in the event of the cancelation of any policy, to insure in another company. A policy having been canceled the agent arranged with an agent of several companies to issue a policy on one of them, this having been done and the policy handed to the first it was held that there was a good and sufficient delivery, and that there was nothing incompatible in the acts of the agent, in his employments and the performance of his duties as to the cancelation and procuring another policy.[11] But it is held in a New York case that a contention that a delivery of a policy to an agent of insured employed to procure insurance, is a valid delivery to insured is untenable, where the latter never paid the premium and never had the policy physically delivered to him, nor is such a contention aided by the claim that the agent had a credit with the insurer, irrespective of any agreements between the agent and assured.[12]

§ 102. Delivery by and to agent; policy held by agent.—A delivery of a policy by an authorized agent is effectual to bind the principals although it be delivered by him to another agent from whom the application was received, and to whom the premium is charged, it being delivered by the latter to the assured.[13] But the rule is otherwise where the policy is intended as a substitute for an existing policy in another company, but is not delivered, and the insured has no knowledge thereof until after the loss. So the company will be bound by a delivery by its agent where the premium has been paid, notwithstanding the actual knowledge of the

[8] Brown v. American Central Ins. Co. 70 Iowa, 390, 30 N. W. 647. See Nutting v. Minnesota Fire Ins. Co. 98 Wis. 26, 73 N. W. 432.

[9] Williams v. Niagara Fire Ins. Co. 50 Iowa, 561.

[10] Alabama Gold Life Ins. Co. v. Herron, 56 Miss. 643.

[11] Warren v. Franklin Fire Ins. Co. 161 Iowa, 440, 143 N. W. 554. See also Wilson v. German-American Ins. Co. 90 Kan. 355, 133 Pac. 715; Aetna Ins. Co. v. Renno, 96 Miss. 172, 50 So. 563, 37 Ins. L. J. 795. *Compare* Hartford Fire Ins. Co. v. McKenzie, 70 Ill. App. 615. See § 661 herein.

[12] Morriss v. Home Ins. Co. 139 N. Y. Supp. 674, 78 Misc. 303.

[13] Stebbins v. Lancashire Ins. Co. 60 N. H. 65.

assured that the company intended to revoke the agent's authority, where the delivery takes place before such revocation and the agent has no knowledge of the company's purpose.[14] If a local agent of a fire insurance company has power to write, issue, and sign policies, and is furnished with forms of policies to be written, issued and delivered by him after being signed by him, a policy becomes effective upon the writing and delivery by such agent, unless the company cancels the policies and where an agent has authority to issue and deliver policies, his clerk acting under his instructions may do the same.[15] And a person who makes a proposal for insurance may by the company's acts be made its agent to deliver the policy and so complete the contract.[16] Where it is claimed that the insured was the agent of the company at the time the policy was issued, and that it was delivered to him as such agent, to be held for delivery until he had paid the first premium and the evidence is conflicting, a charge to the jury is correct, that, if the jury found that insured received the policy from the company, not as agent or manager, but as an ordinary applicant only, and that he was trusted by the company to pay the first premium, instead of paying it in advance, they should answer the issue for the plaintiff, or "yes;" but otherwise if insured was to hold the policy as agent until he as an ordinary applicant, or individually should pay the premium.[17]

Again where the authorized agent delivers the policy to another to deliver to the assured, this is a delivery by the company.[18] And where an agent has authority to issue and deliver policies, and it is issued and left with a bank, of which the agent is cashier, for safekeeping, in accordance with an agreement with insured, the contract of insurance becomes complete and effective, as there is a sufficient delivery, the possession of the bank being equivalent to possession by insured.[19] If a policy is sent to a bank at insured's residence to be delivered to him when the premium is paid, and insured dies, it is a good delivery. And mailing of the policy from the home office constitutes delivery and instructions to the bank cannot affect a contract already made.[20] And where the policy when issued was sent to insurer's agent, in conformity with the terms of the application, and was by the agent sent to a mortgagee, upon notice to assured and without objection by him, the policy

[14] Lightbody v. North America Ins. Co. 23 Wend. (N. Y.) 18.

[15] Marysville Mercantile Co. Ltd. v. Home Fire Ins. Co. 21 Idaho, 377, 121 Pac. 1026.

[16] National Mutual Church Ins. Co. v. Trustees Methodist Episcopal Church, 105 Ill. App. 143.

[17] Pender v. North State Mutual Life Ins. Co. 163 N. Car. 98, 79 S. E. 293. See § 660 herein.

[18] Kelly v. Commonwealth Ins. Co. 10 Bosw. (N. Y.) 82, 95.

[19] Marysville Mercantile Co. Ltd. v. Home Fire Ins. Co. 21 Idaho, 377, 121 Pac. 1026.

[20] New York Life Ins. Co. v. Pike, 51 Colo. 238, 117 Pac. 899.

was held effective, at least from the time the application was accepted, even though assured never saw the policy.[1]

Again, the delivery may bind the company where the policy is retained by its agent,[2] although only part of the premium has been paid by the assured.[3] So in determining whether there has been a delivery of a policy the intention of the parties will be given effect and where the assured has unconditionally accepted the terms of an executed policy, and it has subsequently been treated by the parties as in force, its delivery will be regarded as complete, though it remains in the hands of the insurer's agent.[4] And where it is expressly agreed that the policy shall be held by the agent in his safe for the assured, this is a sufficient delivery, and the assured's right is perfected.[5] So where an agent of the defendant company was also agent of another company, and he had charge of B's insurance, selecting the companies and receiving his policies, and a policy having been canceled he insured the property in the defendant company, notifying both parties thereof, charging the premium to the assured in their private account, and the policy was placed by him in his safe, it was held that this completed the contract and bound defendant.[6]

As a rule, an unconditional delivery of the policy to the agent for delivery to the insured binds the company, and the agent may not refuse to deliver upon tender of the premium, although the insured may be seriously sick.[7]

[1] House v. Security Fire Ins. Co. 145 Iowa, 462, 121 N. W. 509, 38 Ins. L. J. 875.

[2] *United States.*—See Fischer v. London & Lancashire Fire Ins. Co. 83 Fed. 807, 27 Ins. L. J. 417, aff'd 92 Fed. 500, 34 C. C. A. 503.

Alabama.—Stephenson v. Allison, 165 Ala. 238, 138 Am. St. Rep. 26, 51 So. 622; Phœnix Ins. Co. v. McAuthor, 116 Ala. 650, 22 So. 903.

Indiana.—New York Life Ins. Co. v. Greenlee, 42 Ind. App. 82, 84 N. E. 1101.

Massachusetts.—Wheeler v. Watertown Fire Ins. Co. 131 Mass. 1.

Missouri.—Cassville Roller Mill Co. v. Ætna Ins. Co. 105 Mo. App. 146, 79 S. W. 720.

South Dakota.—Wheaton v. Liverpool & London & Globe Ins. Co. 20 S. Dak. 62, 140 N. W. 850.

Vermont.—Porter v. Mutual Life Ins. Co. 70 Vt. 504, 41 Atl. 970.

Wisconsin.—*Compare* Nutting v. Minnesota Fire Ins. Co. 98 Wis. 26, 73 N. W. 432.

[3] Wheeler v. Watertown Fire Ins. Co. 131 Mass. 1.

[4] Newark Machine Co. v. Kenton Ins. Co. 50 Ohio St. 549, 22 L.R.A. 768 and note, 35 N. E. 1063.

[5] Franklin Fire Insurance Co. v. Colt, 20 Wall. (87 U. S.) 560, 22 L. ed. 423. *Cited* in Phœnix Ins. Co. v. Meier, 28 Neb. 132, 44 N. W. 97.

[6] Dibble v. Northern Assur. Co. of London, 70 Mich. 1, 14 Am. St. Rep. 470, 37 N. W. 704.

[7] Schwartz v. Germania Life Ins. Co. 21 Minn. 215; Yonge v. Equitable Life Assur. Soc. 30 Fed. 902. See §§ 103, 104 herein.

On effect of delivery to agent as delivery to assured of policy containing stipulation that it shall not become binding unless delivered to assured, see notes in 17 L.R.A.(N.S.) 1145, 43 L.R.A.(N.S.) 725, L.R.A. 1916F, 171.

It constitutes a sufficient delivery of a fidelity bond, where the company's agent delivers it to the employee whose fidelity is guaranteed, at the place where he is employed, the purpose and intent of the company's agent being to deliver it to assured and to pass it into his custody.[8]

§ 103. Delivery: agreement completed before loss: mortal illness or accident.—Where the contract is completed and the risk commenced, but the loss or death, or a dangerous sickness or accident occurs thereafter and before delivery of the policy or certificate, the company is liable, even though the premium has not been paid, provided there be no fraud or concealment by the insured.[9] So

See also the following cases supporting the rule as to unconditional delivery to agent.

United States.—Union Central Life Ins. Co. v. Phillips, 102 Fed. 19, 41 C. C. A. 263; Fischer v. London & Lancashire Fire Ins. Co. 83 Fed. 807, 27 Ins. L. J. 417, aff'd 92 Fed. 500, 34 C. C. A. 503.

Alabama.—Stephenson v. Allison, 165 Ala. 238, 138 Am. St. Rep. 26, 51 So. 622.

Georgia.—New York Life Ins. Co. v. Babcock, 104 Ga. 67, 42 L.R.A. 88, 30 S. E. 273, 27 Ins. L. J. 649. (So even though delivery to insured is made essential to validity.)

Illinois.—Devine v. Federal Life Ins. Co. 250 Ill. 203, 95 N. E. 174, 40 Ins. L. J. 1513; Mulligan v. Metropolitan Life Ins. Co. 149 Ill. App. 516.

Indiana.—New York Life Ins. Co. v. Greenlee, 42 Ind. App. 82, 84 N. E. 1101. (Even though delivery to applicant made essential.)

Iowa.—Unterharnscheidt v. Missouri State Life Ins. Co. 160 Iowa, 223, 45 L.R.A.(N.S.) 743, 138 N. W. 459 (even though agent absent when policy sent); Kimbro v. New York Life Ins. Co. 134 Iowa, 84, 12 L.R.A. (N.S.) 421, 108 N. W. 1025, 35 Ins. L. J. 57; Mederis v. Anchor Mutual Fire Ins. Co. 104 Iowa, 88, 65 Am. St. Rep. 428, 73 N. W. 495.

Minnesota.—Kilborn v. Prudential Ins. Co. 99 Minn. 176, 108 N. W. 861, 35 Ins. L. J. 840.

Mississippi.—New York Life Ins. Co. v. McIntosh (1906) — Miss. —, 41 So. 381, 35 Ins. L. J. 857. See 86 Miss. 236, 38 So. 775.

New Hampshire.—Busher v. New York Life Ins. Co. 72 N. H. 551, 58 Atl. 41, 33 Ins. L. J. 761.

New York.—Singer v. National Fire Ins. Co. 139 N. Y. Supp. 375, 154 App. Div. 783; Gallagher v. Metropolitan Life Ins. Co. 67 Misc. 115, 121 N. Y. Supp. 638, 39 Ins. L. J. 570.

Oregon.—Francis v. Mutual Life Ins. Co. 55 Or. 280, 106 Pac. 523.

Virginia.—Equitable Life Assur. Soc. of U. S. v. Kitts Admr. 109 Va. 105, 63 S. W. 455.

Vermont.—Porter v. Mutual Life Ins. Co. 70 Vt. 504, 41 Atl. 970. (Even though insured does not know of its receipt by the agent.)

[8] Prosser Power Co. v. United States Fidelity & Guaranty Co. 73 Wash. 304, 132 Pac. 48.

[9] *United States.*—Union Central Life Ins. Co. v. Phillips, 102 Fed. 19, 41 C. C. A. 263, rev'g 101 Fed. 33; Kohne v. Insurance Co. of North America, 1 Wash. (U. S. C. C.) 93, Fed. Cas. No. 7920.

Alabama.—Triple Link Ins. Co. v. Williams, 121 Ala. 138, 77 Am. St. Rep. 34, 26 So. 19.

Arkansas.—Travelers Fire Ins. Co. v. Globe Soap Co. 85 Ark. 169, 122 Am. St. Rep. 22, 107 S. W. 326.

Georgia.—Fireman's Fund Ins. Co. v. Pekor, 106 Ga. 1, 31 S. E. 779; Southern Life Ins. Co. v. Kempton, 56 Ga. 339.

where an application was made for life insurance and the sum of fifty dollars was paid to be applied on the first year's premium, and the policy was forwarded to the agent for delivery, and the insured died and the agent refused to deliver it, although the balance of the premium was offered, the policy was held to have attached.[10] So where the premium is to be paid on delivery of the policy, and a loss by fire occurs before delivery, the company is liable.[11] In Fried v. Royal Insurance Company [12] the plaintiff made a proposal for insurance on the life of her husband, and advanced the usual premium for one year, and received therefor a receipt, providing substantially that the policy was to be forwarded to the head office at Liverpool, and if accepted a policy was to be issued; if rejected, the premium was to be returned; if the husband died before decision should be received the sum insured was to be paid. The proposal was accepted and the policy returned to be executed by the agent and delivered. The agent executed but refused to deliver it, on account of an alleged unfavorable change in the husband's health. The husband died soon after and the defendant refused

Illinois.—National Mutual Church Ins. Co. v. Trustees M. E. Church, 105 Ill. App. 143.

Iowa.—Unterharnscheidt v. Missouri State Life Ins. Co. 160 Iowa, 223, 45 L.R.A.(N.S.) 743, 138 N. W. 459; Kimbro v. New York Life Ins. Co. 134 Iowa, 84, 12 L.R.A.(N.S.) 421, 108 N. W. 1025, 35 Ins. L. J. 57; City of Davenport v. Peoria Marine Fire Ins. Co. 17 Iowa, 276.

Kentucky.—Lee v. Union Central Life Ins. Co. 19 Ky. L. Rep. 608, 41 S. W. 319.

Maine.—Walker v. Metropolitan Ins. Co. 56 Me. 371. (In this case the policy was not issued nor the premium paid.)

Michigan.—Dailey v. Preferred Masonic Mutual Accdt. Assoc. 102 Mich. 289, 26 L.R.A. 171, 57 N. W. 184, 60 N. W. 694. See Shields v. Equitable Life Assur. Soc. 121 Mich. 690; 80 N. W. 793, 29 Ins. L. J. 122.

Minnesota.—Ganser v. Firemen's Fund Ins. Co. 38 Minn. 74, 35 N. W. 584.

Mississippi.—New York Life Ins. Co. v. McIntosh, — Miss. —, 41 So. 381, 35 Ins. L. J. 857, 86 Miss. 236, 38 So. 775, 34 Ins. L. J. 1054.

New Jersey.—Commercial Ins. Co. v. Hallock, 27 N. J. L. 645, 72 Am. Dec. 379.

New York.—Gallagher v. Metropolitan Life Ins. Co. 67 Misc. 115, 121 N. Y. Supp. 638, 39 Ins. L. J. 570; Ellis v. Albany City Ins. Co. 50 N. Y. 402, 10 Am. Rep. 495. See Loomis v. Jefferson County Patrons' Fire Relief Assoc. 87 N. Y. Supp. 5, 92 App. Div. 601.

Pennsylvania.—Standard Wheel Co. v. Phœnix Ins. Co. 29 Pa. Co. Ct. Rep. 367.

Tennessee.—Gordon v. United States Casualty Co. (1899) — Tenn. Ch. App. —, 54 S. W. 98; Whitman v. American Central Ins. Co. 14 Lea (Tenn.) 327 (case of substituted policy).

Texas.—Home Forum Benefit Order v. Jones, 20 Tex. Civ. App. 68, 48 S. W. 219.

Virginia.—Equitable Life Assur. Soc. of U. S. v. Kitts' Admr. 109 Va. 105, 63 S. E. 455.

[10] Cooper v. Pacific Mutual Ins. Co. 7 Nev. 116, 8 Am. Rep. 705.

[11] Angell v. Hartford Fire Ins. Co. 59 N. Y. 171, 17 Am. Dec. 322.

[12] 50 N. Y. 243.

payment, claiming that the contract was never consummated, and that the acceptance must be qualified by the company's standing instructions to the agent not to deliver a policy if a change had taken place in the health of the assured. The court, however, decided that the acceptance was absolute and unqualified, and could not be limited by private instructions to the agent of which the plaintiff had no notice, and if the contract was in violation of the instructions or inconsistent therewith, the defendant ratified the same; that it was competent for the defendant to contract in entire disregard of instructions to its agent; that they were chargeable with knowledge that the contract was inconsistent with the agent's alleged instructions, and with that knowledge had assented to it, and that a recovery could be had by the plaintiff. And where the agreement is completed before loss, the assured has the right to receive a policy although he knows that the company intended to revoke the agent's authority, but had not actually done so when the agent tendered the policy.[13] Again an application to an insurance agent representing several companies for a certain amount of insurance on specified property, the agent to select the companies and distribute the risk, and his agreement so to do and give the insurance, constitute a valid contract of insurance with each company as soon as its policy is signed, although the policies are not delivered until after the property is destroyed by fire, since in distributing the risk the agent acts for the assured.[14]

§ 104. Delivery: agreement incomplete at time of loss: mortal illness, or accident.—If the contract is not completed, and a loss occurs or the insured dies, or is dangerously ill or is accidentally injured, the company may refuse to deliver the policy or receive the premium, or otherwise consummate the contract,[15] as where the

[13] Lightbody v. North America Ins. Co. 23 Wend. (N. Y.) 18.

[14] Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co. 92 Mich. 482, 20 L.R.A. 277, 52 N. W. 1070.

[15] *United States.*—Mohrstadt v. Mutual Life Ins. Co. 115 Fed. 81, 52 C. C. A. 675; Steinle v. New York Life Ins. Co. 81 Fed. 489, 52 U. S. App. 235, 26 C. C. A. 481, 27 Ins. L. J. 174. *Examine* Keen v. Mutual Life Ins. Co. 131 Fed. 559, 33 Ins. L. J. 916, rev'd 135 Fed. 677, 68 C. C. A. 315.

Georgia.—Firemen's Fund Ins. Co. v. Rogers, 108 Ga. 191, 33 S. E. 954, 28 Ins. L. J. 1025 (sec. 2095 Ga. Civ. Code not applicable); W. P. Harper & Co. v. Ginners Mutual Ins. Co. 6 Ga. App. 139, 64 S. E. 567.

Indiana.—New v. Germania Fire Ins. Co. 171 Ind. 33, 131 Am. St. Rep. 245, 85 N. E. 703; Reserve Loan Life Ins. Co. v. Hockett, 35 Ind. App. 842, 73 N. E. 843.

Kentucky.—Claypool v. Continental Casualty Co. 129 Ky. 682, 112 S. W. 835; New York Life Ins. Co. v. Levy's Adm'r 122 Ky. 457, 21 Ky. L. Rep. 21, 5 L.R.A.(N.S.) 739n, 92 S. W. 325, 35 Ins. L. J. 455; Blue Grass Ins. Co. v. Cobb, 24 Ky. L. Rep. 2132, 72 S. W. 1099 (Ky. St. sec. 702); Dickenson v. Provident

policy was withheld until payment of the premium, which had not been made when assured died.[16] In a Pennsylvania case the application was made to a mutual company and the agreement was that the premium should be paid on delivery of the policy. The policy was drawn without the applicant's signature, but he was enrolled on the company's books as a member. A fire occurred and delivery of the policy was refused, although the premium was tendered, and it was held that the applicant's liability to contribute to losses was not fixed, that the contract was not completed, and therefore no action could be maintained for a policy.[17] So where a policy provides that under no circumstances shall it be enforced until the premium is paid, if the assured dies before such payment and before delivery of the policy, the policy is inoperative, notwithstanding the company's agent has told the assured that he could pay when the policy was delivered.[18] And where a policy was assigned and left with the company to be approved, and such approval was delayed until assured should give a premium note, and a loss occurred before the note was given, it was held that the company could not collect his assessment for the loss, as no contract of insurance existed.[19] And where in an action upon a fire policy

Sav. Life Assur. Soc. 21 Ky. L. Rep. 611, 52 S. W. 825.

Massachusetts.—Cunningham v. Connecticut Fire Ins. Co. 200 Mass. 333, 86 N. E. 787, 38 Ins. L. J. 315 (cause of action on contract. Case up on appeal on agreed facts with stipulation that court might draw inferences of fact).

Nebraska.—Lowe v. St. Paul Fire & Marine Ins. Co. 80 Neb. 499, 114 S. W. 536.

New Hampshire.—Busher v. New York Life Ins. Co. 72 N. H. 551, 58 Atl. 41, 33 Ins. L. J. 761.

New Jersey.—Consumers Match Co. v. German Ins. Co. 70 N. J. L. 226, 57 Atl. 440, 33 Ins. L. J. 525.

Oregon.—Lathrop v. Modern Woodmen of America, 56 Oreg. 440, 106 Pac. 328, 109 Pac. 81.

Pennsylvania.—Collins v. Insurance Co. 7 Phila. (Pa.) 201.

Texas.—Dickey v. Continental Casualty Co. 40 Tex. Civ. App. 199, 89 S. W. 436 (case where countersignature of policy-writer a prerequisite, and counter-signed in ignorance of death).

Virginia.—Oliver v. Mutual Life Ins. Co. 97 Va. 134, 1 Va. S. C. Rep. 29, 33 S. E. 536, 28 Ins. L. J. 710. See Mutual Life Ins. Co. v. Oliver, 95 Va. 445, 28 S. E. 594, 28 Ins. L. J. 710.

Washington.—Harriman v. New York Life Ins. Co. 43 Wash. 398, 86 Pac. 656, 35 Ins. L. J. 852; Starr v. Mutual Life Ins. Co. 41 Wash. 228, 83 Pac. 116, 35 Ins. L. J. 137.

Wisconsin.—Costello v. Grant County Mutual Fire & Lightning Ins. Co. 133 Wis. 361, 113 N. W. 639. See Nutting v. Minnesota Fire Ins. Co. 98 Wis. 26, 73 N. W. 432.

[16] Collins v. Insurance Co. 7 Phila. (Pa.) 201. See Merchants & Manufacturers Mutual Ins. Co. v. Baker, 4 Neb. (Unof.) 384, 94 N. W. 627.

[17] Schaffer v. Lehigh Mut. Fire Ins. Co. 89 Pa. St. 296.

[18] Ormond v. Fidelity Life Assn. 96 N. C. 158, 1 S. E. 796.

[19] Cranberry Mutual Fire Ins. Co.

it appeared that the agent of the insurer, after writing the policy, forwarded it to one S., with instructions to tender it to the plaintiff in renewal of an expired policy, but before it was so tendered, the property was destroyed and S. received instructions by wire not to deliver the policy, and he told the plaintiff of the receipt of the policy by him and his instructions not to deliver it, and upon the following day the plaintiff wired S. to hold the policy, which had, however, been returned to the agent of whom a demand therefor was made and the premium tendered, it was held that the contract was not complete.[20] So where an agent represented several companies and an application was made to him for insurance, and part of the premium paid, and after a loss the balance was paid and a policy demanded, it was held that no action could be maintained to compel delivery of a policy in the absence of evidence that a contract of insurance had been completed with some particular company.[1] So the company may refuse to deliver a life policy although it is made out and mailed to the agent to be countersigned and delivered, it being provided that it shall take effect only when countersigned by the agent, and the party dies before the policy reaches the agent;[2] and where a life policy was not to be in force until "signed by the officers of the association and delivered to the applicant," and was not made out until after the death of the applicant and in ignorance of it, and was then delivered at the proper place, it was declared void.[3] Nor is the company liable in a case where an applicant for life insurance dies before the application is forwarded to the company, although the applicant has given his note for the amount of the first premium.[4]

§ 104a. Same subject.—Where the property is burned while the risk is being considered and the application then rejected there is no binding contract, although the agent gives a receipt for the first premium where said receipt provides that the premium should be returned if no policy was issued.[5] And the indorsement by the clerk of an insurance company of a slip of paper notifying the company of a shipment to be covered by an open marine policy in the usual way with the amount of the premium and the check mark indicating its readiness for entry in the books, will not show an ac-

v. Hawk (1888) — N. J. Eq. —, 14 Atl. 745.

On liability of insurance company for negligent delay in passing upon or issuing policy until after loss, see note in 40 L.R.A.(N.S.) 152.

[20] New York Lumber & Wood-Working Co. v. People's Fire Ins. Co. 96 Mich. 20, 55 N. W. 434.

[1] New Orleans Ins. Assn. v. Boniel, 20 Fla. 815.

[2] Noyes v. Phœnix Mutual Life Ins. Co. 1 Mo. App. 584.

[3] Misselhorn v. Mutual Reserve Fund Assoc. 30 Fed. 545.

[4] Covenant Mutual Benefit Assn. v. Conway, 10 Ill. App. 348.

[5] Shawnee Mut. Fire Ins. Co. v. McClure, 39 Okla. 535, 49 L.R.A. (N.S.) 1054, 135 Pac. 1150.

ceptance of the risk in the face of its positive rejection by the officers of the company as soon as they learned that it was on property already lost, of which the assured is notified without delay.[6] A person cannot refuse to accept a policy, repudiate the contract and then, after loss, accept the policy, pay the premium, give notice of loss, and sustain a claim that the contract was completed, even though the company returns the policy with a letter requesting acceptance, and after the contract is again repudiated again returns the policy with a request by letter that it be accepted and the premium paid, said letter being received after the loss, it appearing that the company at the time of the receipt of the premium was ignorant of the loss.[7] Again, a binding contract by an insurance company, insuring its agent's property, is not made by his writing the policy, entering it on his register, and making out a report of it to the company, if the property is destroyed before the company receives the report, which it refuses to approve.[8]

An accident insurance company may reject an application when it learns of an accident to the applicant, even though it had intended to accept the application, and had made some minutes upon it, but had never communicated such intention to the applicant.[9] And an accident insurance policy is not in force where a renewal receipt is mailed by the agent, held by the insured a couple of weeks, and returned with a notice to discontinue, although the agents do not accept the discontinuance, but write assured that they will hold the receipt for him and give him credit for the premium, where he dies before the letter reaches him; and it is immaterial that both parties think that the policy is in force until the discontinuance is accepted.[10]

§ 105. Loss before date of contract: policy retroactive.—An insurance policy may be retroactive, and so provide for indemnity for a loss which happened anterior to the date of the policy. In marine insurance a policy can be lawfully effected upon property "lost or not lost;" but this phrase so used has reference to cases where the property has started upon its voyage and the parties to the insurance have no knowledge whether it has been lost or not. In such cases the insurance is against an unknown event, and the

[6] Delaware Ins. Co. v. S. S. White Dental Mfg. Co. 48 C. C. A. 382, 109 Fed. 334, 65 L.R.A. 387, writ of certiorari denied (mem.) 183 U. S. 700, 46 L. ed. 396, 22 Sup. Ct. 937.

[7] Nordness v. Mutual Cash Guaranty Fire Ins. Co. 22 S. Dak. 1, 114 S. W. 1092.

[8] Zimmerman v. Dwelling House Ins. Co. 110 Mich. 399, 33 L.R.A. 698, 68 N. W. 215.

[9] Allen v. Massachusetts Mutual Accident Assoc. 167 Mass. 18, 44 N. E. 1053, 26 Ins. L. J. 316.

[10] Richmond v. Travelers Ins. Co. 123 Tenn. 307, 30 L.R.A.(N.S.) 954, 130 S. W. 790.

underwriter takes the risk of the arrival of the property at its destination, and thus there is something to insure.[11] So a policy may contain the words "lost or not lost," and cover a cargo on board a ship then on a whaling voyage, beginning the adventure on said cargo as aforesaid,[12] and the property may be covered, although it was lost eight hours before the policy was effected.[13] So an insurance will be valid where there is no fraud in the case, although made after a loss and before notice thereof, and notwithstanding the vessel was cast away and lost about ninety miles from the port of destination, where some of the partners who procured the insurance resided.[14] And a policy will be upheld although the owners went to the company's office late in the evening and obtained insurance on a vessel which was past due and lost, and news of such loss had reached the city, although it was not proven to have reached the owners;[15] and a policy may be retroactive where, in the absence of fraud, concealment, or misrepresentation, it is signed after a loss has occurred for a risk taken to commence before its date, though there be no clause equivalent to "lost or not lost;"[16] for the policy need not contain the words "lost or not lost" to cover losses prior to its date. It is sufficient that it appear that the insurance was intended to cover prior losses.[17] And a retrospective fire insurance contract made when the thing insured is distant and its status unknown to either party will bind the insurer for a loss occurring before the date of the agreement, if such appear either from the policy or from circumstances to have been the intention of parties;[18] and extrinsic evidence is admissible to prove that a policy, dated on the same day on which an embargo was laid, was made

[11] People v. Dimick, 107 N. Y. 13, 29, per Earle, J.; Gauntlett v. Sea Ins. Co. 127 Mich. 504, 86 N. W. 1047, 30 Ins. L. J. 986, 991.

[12] Paddock v. Franklin Ins. Co. 11 Pick. (28 Mass.) 227.

[13] Blackhurst v. Cockell, 3 Term. Rep. 360. See also Clement v. Phœnix Ins. Co. 6 Blatchf. (U. S. C. C.) 481, Fed. Cas. 2881; Merchants' Ins. Co. v. Paige, 60 Ill. 448; Schroeder v. Stock and Mutual Ins. Co. 46 Mo. 174; Sutherland v. Pratt, 11 Mees. & W. 296.

[14] Andrews v. Marine Ins. Co. 9 Johns. (N. Y.) 32.

[15] Horter v. Merchants' Mutual Ins. Co. 28 La. Ann. 730.

[16] Hallock v. Commercial Ins. Co. 26 N. J. L. 268; Commercial Ins. Co. v. Hallock, 27 N. J. L. 645, 72 Am. Dec. 379; Mercantile Mutual Ins. Co. v. Folsom, 18 Wall. (85 U. S.) 237, 21 L. ed. 827.

[17] Mercantile Mutual Ins. Co. v. Folsom, 18 Wall. (85 U. S.) 237, 21 L. ed. 827, affirming 8 Blatchf. (U. S. C. C.) 170, Fed. Cas. No. 4902, 9 Blatchf. (U. S. C. C.) 201, Fed. Cas. No. 4903; Hammond v. Allen, 2 Sum. (U. S. C. C.) 396; Hooper v. Robinson, 98 U. S. 528, 537, 25 L. ed. 219, 220; 1 Phillips on Ins. (3d ed.) 501, sec. 925; 3 Kent's Comm. 259, note e. See also § 104 herein.

[18] Security Fire Ins. Co. v. Kentucky Marine & Fire Ins. Co. 7 Bush (Ky.) 81, 3 Am. Rep. 301.

without knowledge of the embargo.[19] And where the contract is made when both parties are ignorant of the loss, the policy may be valid and binding, although it is not delivered,[20] and so although the policy is post-dated.[1]

§ 106. Where both parties know of loss when contract is made or executed.—Although in marine risks the policy may be upon property "lost or not lost," yet if the property has been totally lost and this is known by the parties, there is nothing to insure, no event to be indemnified against, no unknown event upon which to base the contract, and hence there can be in such case no lawful or valid insurance.[2] But if at the time the policy is executed a loss has occurred, and it is known to both parties, the contract will be binding if the risk has actually attached prior thereto.[3] And it is held that a binding contract may be made where the insurers know of the loss at the time the contract is entered into, and it appears that they intend to make themselves liable.[4] For if the amount of the loss is uncertain, there is no reason why the insurance should not attach.[5] Such intention where the loss is unknown is generally expressed by the words "lost or not lost." [6]

§ 107. Knowledge of loss by assured before and after risk attaches.—Where a loss occurring before the risk attaches is known only to the applicant and he obtains a policy without disclosing the fact of loss, the policy is void,[7] even though the contract be

[19] Lorent & Steinmetz v. South Carolina Ins. Co. 1 Nott & McC. (S. C.) 505, 506.

[20] Kohne v. Insurance Co. of North America, 1 Wash. (U. S. C. C.) 93, Fed. Cas. No. 7920; Union Ins. Co. v. American Fire Ins. Co. 107 Cal. 327, 48 Am. St. Rep. 140, 28 L.R.A. 692, 40 Pac. 431.

[1] Mead v. Davison, 3 Ad. & E. 303; Giffard v. Queen's Ins. Co. 1 Hann. (N. B.) 432; Merchants' Ins. Co. v. Paige, 60 Ill. 448; Horter v. Merchants' Mutual Ins. Co. 28 La. Ann. 730.

[2] So held in People v. Dimick, 107 N. Y. 13, 29, per Earle, J.

[3] Mead v. Davison, 3 Ad. & E. 303; Davenport v. Peoria Marine & Fire Ins. Co. 17 Iowa, 276; Walker v. Metropolitan Ins. Co. 56 Me. 371; 1 Phillips on Ins. (3d ed.) 502, sec. 926; Firemen's Fund Ins. Co. v. Rogers, 108 Ga. 191, 33 S. E. 954, 28 Ins. L. J. 1025, *considering* Ga. Civ. Code, sec. 2095, as not applicable as said code relates exclusively to completed contracts of insurance made between parties who were both ignorant that the loss against which it was intended to insure had already occurred.

[4] Arkansas Ins. Co. v. Bostick, 27 Ark. 539. But see People v. Dimick, 107 N. Y. 14.

[5] 2 Phillips on Ins. (3d ed.) 502, sec. 926.

[6] Mead v. Davison, 3 Ad. & El. 303; Arkansas Ins. Co. v. Bostick, 27 Ark. 539. See §§ 104 and 105 herein.

[7] Gauntlett v. Sea Ins. Co. 127 Mich. 504, 86 N. W. 1047, 30 Ins. L. J. 986; Fitzherbert v. Mather, 1 Term Rep. 12; Laidlaw v. Liverpool & London Ins. Co. 13 Grant (Ont.) 377; Mackie v. European Ins. Co. 21 L. T. R. N. S. 102. See People v.

given a date prior to the loss.[8] If a person who has directed a marine insurance to be procured at a distant place receives intelligence of a loss before his order is executed, he should countermand the order, or transmit the intelligence by the earliest and most expeditious usual route of mercantile communication. But it is not obligatory on him to resort to an unusual and extraordinary mode of transmission. So where the Atlantic cable had been only about three months in operation, and the rates were high, it was held sufficient to send notice by the first mail from Liverpool to New York, where the insurer resided.[9] In an Illinois case a marine policy was obtained on goods lost or not lost, shipped on a vessel lost two days prior to the date of the policy; this loss was known to the insured at the time, but he failed to inform the agent, and it was decided that the particular agent effecting the insurance should have been informed; that knowledge by the company of the loss did not necessarily arise from the fact that the daily papers received at the company's office on the day the policy was issued contained a notice of the loss; and that notice to one agent of the company did not import necessarily a notice to the other.[10] In Blake v. Hamburg-Bremen Fire Insurance Company [11] the agent agreed with the insured that he might obtain additional insurance, such insurance to take effect for an amount named in a letter from the time it was mailed. It was determined that the insurance could not be held to have attached from the mere posting of an unstamped letter, and that giving notice after the fire began, the insured knowing of such fact, was insufficient to bind the company.

§ 108. Assured not obligated to notify company of loss before delivery of policy when risk has attached.—There is no legal nor moral obligation resting on the assured to voluntarily notify the company of a loss occurring after the risk has attached, although the policy has not been delivered nor the premium paid.[12] So where an application was accepted and the policy made out and executed, but was permitted to remain in the hands of the company, and the plaintiff, directly after the occurrence of a loss paid the premium and received the policy without disclosing the fact that the property had been burned in the meantime, it was de-

Dimick, 107 N. Y. 13; Mittaker v. Farmers' Union Ins. Co. 29 Barb. (N. Y.) 312.

[8] Wales v. New York Bowery Fire Ins. Co. 37 Minn. 106, 33 N. W. 322.

[9] Snow v. Mercantile Mutual Ins. Co. 61 N. Y. 160.

[10] Merchants' Ins. Co. v. Paige, 60 Ill. 448.

[11] 67 Tex. 160, 60 Am. Rep. 15, 2 S. W. 368.

[12] Keim v. Home Mutual Fire Ins. Co. 42 Mo. 38, 97 Am. Dec. 291; American Home Ins. Co. v. Patterson, 28 Ind. 17. See El Dia Home Ins. Co. v. Sinclair, 228 Fed. 833, 840, 143 C. C. A. 231, 238, 47 Ins. L. J. 43, 49.

termined that the company was liable and that upon receipt of the premium and delivery of the policy the contract related back to the date of the policy,[13] and in such case the policy will also relate back to the time when it was made out and signed, notwithstanding a provision in the by-laws that the policy should take effect on the day of approval and be binding thereafter "providing the premium has been paid, and not otherwise." [14]

§ 108a. **Mutual benefit societies or associations: issuance of certificate.**—Although a statute specifies what a certificate issued by a fraternal benefit society shall contain, nevertheless this does not require such societies to issue one.[14a] But the issuance of a certificate is held to be necessary in a fraternal order,[15] and a provision requiring that the certificate be issued and dated requires delivery and acceptance.[16] Where an application was made for life insurance, the first annual premium contingently paid, a receipt given which recited that it would be binding on the company from the date of the medical examination, provided the application was approved and a policy issued by the company, such application must be read with the receipt; thus read it was an offer for a contract of insurance to be accepted by approval of the application, and by issuance of a policy. Acceptance required both. Until so accepted neither party was obligated and both parties had a right to a locus poenitentiae, therefore a mere approval revoked or not does not constitute acceptance, and no policy having issued no acceptance was made, there was no meeting of minds of the parties.[17] Again, the "issuing" of a policy of life insurance, within the meaning of a statute providing that an insurance company shall be estopped, in the absence of fraud, by the certificate of its medical examiner from setting up that the insured was not in the condition of health required by the policy at the time it was issued, includes a delivery of the policy to the as-

[13] Baldwin v. Chouteau Ins. Co. 56 Mo. 151, 17 Am. Rep. 671. See also Commercial Mutual Marine Ins. Co. v. Union Mutual Marine Ins. Co. 19 How. (60 U. S.) 318, 15 L. ed. 636.

[14] Keim v. Home Mutual Fire Ins. Co. 42 Mo. 38, 97 Am. Dec. 291.

[14a] Laws N. Y. 1911 (repealing art. VII. c. 33, Laws 1909, as am'd by c. 589) p. 451, c. 198, sec. 232. Report of Atty. Genl. 1912, Vol. 2, p. 220. See § 146 herein.

[15] Supreme Lodge Knights of Pythias v. Graham, 49 Ind. App. 535, 97 N. E. 806.

"*Issued*," see Stringham v. Mutual Life Ins. Co. 44 Oreg. 447, 75 Pac. 822, 33 Ins. L. J. 463. See § 146 herein.

[16] Supreme Council Royal Arcanum v. Pels, 209 Ill. 33, 70 N. E. 697.

[17] Kennedy v. Mutual Benefit Life Ins. Co. (U. S. D. C.) 205 Fed. 677.

sured. Until such delivery is made there is no "issuing" of the policy.[18]

Issuance and delivery of a certificate is not made effective though obtained by replevin where such issuance and delivery have been refused and the certificate is not in force.[19]

§ 108b. Mutual benefit societies or associations: actual delivery of certificate unnecessary, unless.—Actual delivery of a certificate is unnecessary in the absence of an express agreement or contract therefor.[20] But if delivery of a benefit certificate is a condition precedent to the company's liability it must be complied with.[1] And if the parties agree that actual delivery of a certificate is essential to the completion and binding effect of the contract such actual delivery is necessary.[2] But even though a delivery in person to the applicant is made a condition precedent under the by-laws this does not mean actual manual possession by insured, and the acts of the society may be such as to constitute a sufficient delivery even though there has been no delivery in person.[3] And, although the constitution and by-laws may require a delivery of a benefit certificate as a condition upon which liability of the order depends, still it is held that actual delivery is not a condition precedent to recovery where the member was in good standing when he died.[4]

§ 108c. Mutual benefit societies or associations: Initiation as prerequisite to delivery.—If initiation is required under the by-laws of a fraternal benefit association as a prerequisite to delivery of a certificate it must be complied with.[5] And mere delivery of a certificate by a local officer of a fraternal beneficiary association does not obligate the association where conditions precedent to such delivery have not been complied with.[6] But even though delivery

[18] Cunningham v. Royal Neighbors of America, 24 S. Dak. 489, 140 Am. St. Rep. 793, 124 N. W. 434.

[19] National Aid Assoc. v. Brachter, 65 Neb. 378, 91 N. W. 379, aff'd 93 N. W. 1122.

[20] Crohn v. Order of United Commercial Travelers of America, 170 Mo. App. 273, 156 S. W. 472; Wagner v. Supreme Lodge Knights & Ladies of Honor, 128 Mich. 660, 8 Det. Leg. N. 815, 87 N. W. 903.

In certain societies no certificates issued, see § 146 herein.

[1] Wilson v. Interstate Business Men's Accident Assoc. 160 Iowa, 184, 140 N. W. 860; Kirk v. Sovereign Camp of Woodmen of the World, 169 Mo. App. 449, 155 S. W. 39; McLendon v. Woodmen of the World, 106 Tenn. 695, 64 S. W. 36, 52 L.R.A. 444.

[2] Crohn v. Order of United Commercial Travelers of America, 170 Mo. App. 273, 156 S. W. 472.

[3] O'Neal v. Sovereign Woodmen of the World, 130 Ky. 68, 113 S. W. 52.

[4] Pledger v. Sovereign Camp Woodmen of the World, 17 Tex. Civ. App. 18, 42 S. W. 653.

[5] Kolosinski v. Modern Brotherhood of America, 175 Mich. 684, 141 N. W. 589. See McWilliams v. Modern Woodmen of America (1912) — Tex. Civ. App. —, 142 S. W. 641. See § 53e herein.

[6] Kolosinski v. Modern Brother-

to the applicant in person is required still the society may be estopped to deny the regularity of an initiation as where it was permitted to proceed although the society had knowledge of an error in the certificate.[7]

If initiation is expressly forbidden by the association's constitution the fact that deceased had been initiated will not warrant a recovery on a certificate never delivered to him, when such delivery is a condition precedent to a binding contract.[8]

§ 108d. Delivery of certificate to subordinate lodge, local camp, etc.—Delivery may be made and the contract completed by sending a certificate to a subordinate lodge for a member.[9] So where the Supreme Lodge of the Knights of Honor sends a benefit certificate properly signed and sealed to a subordinate lodge, for a person who has applied for membership, been balloted for, elected, and had a degree conferred upon him, and has paid his fees and passed a medical examination which has been approved, the contract relations between him and the supreme lodge are complete, although the subordinate lodge has not delivered to him the certificate.[10] But compliance with conditions precedent contained in the constitution and by-laws or in the certificate may become necessary to make sufficient a delivery to an officer of a subordinate lodge for delivery to the member.[11] And delivery of a certificate and payment of assessments and dues may be prerequisite to liability on a duly executed certificate sent to the clerk of a local society.[12] But the clerk of a local camp, without authority under the laws of the order so to do, cannot preclude recovery by not delivering a benefit certificate, where the member had fulfilled all requirements entitling him to such certificate, and was in good standing at the time of his death and this is so even though insured was not in good health when the certificate was demanded.[13]

The beneficiary may recover where the certificate issued by the sovereign camp was sent to the wrong local camp through mistake, even though the insured was killed before correction of the error

hood of America, 175 Mich. 684, 141 N. W. 589.

[7] O'Neal v. Sovereign Camp Woodmen of the World, 130 Ky. 68, 113 S. W. 52.

[8] McLendon v. Sovereign Camp Woodmen of the World, 106 Tenn. 695, 52 L.R.A. 444, 64 S. W. 36.

[9] Wagner v. Supreme Lodge Knights & Ladies of Honor, 128 Mich. 660, 8 Det. Leg. N. 815, 87 N. W. 903.

[10] Lorscher v. Supreme Lodge Knights of Honor, 72 Mich. 316, 2 L.R.A. 206, 40 N. W. 545.

[11] Wilcox v. Sovereign Camp Woodmen of the World, 76 Mo. App. 578, 1 Mo. App. Rep. 525.

[12] Wilcox v. Sovereign Camp Woodmen of the World, 76 Mo. App. 573, 1 Mo. App. Rep. 525.

[13] Pledger v. Sovereign Camp Woodmen of the World, 17 Tex. Civ. App. 18, 42 S. W. 653.

by sending it to the right local camp for delivery and although it was a condition precedent that the certificate should be personally delivered and an assessment paid before benefits should accrue it appearing that deceased had offered to pay said assessment.[14]

§ 108e. Mutual benefit societies or associations: delay in executing and delivering certificate: retention of certificate.—Mere delay in executing and delivering a benefit certificate, during which the applicant dies, will not give any right of recovery on the certificate where the terms of the contract prevent it from taking effect until its delivery to the applicant in good health, the delay not being unreasonable or caused by bad faith, and there being no time prescribed within which the delivery should be made.[15] If an association retains the certificate after the contract rights of a member with the association have become fixed such retention does not preclude a recovery.[16]

§ 108f. Where officer of society acts as custodian of certificate.—It constitutes a sufficient delivery of a certificate when given to an officer of a beneficial society who acts by request as custodian for assured.[17]

§ 108g. Mutual benefit societies or associations: delivery of certificate or prepayment of dues during life or good health.—No recovery can be had against fraternal and beneficial orders on the death of an applicant before delivery to him of the benefit certificate where such delivery, while in good health, was by the terms of the application, certificate, constitution and by-laws, a condition precedent to its taking effect.[18] So the actual payment of the premium during the applicant's good health may by the terms of the application and the policy be a condition precedent to the liability of an association which no agent thereof can waive by accepting a note contrary to the policy prohibition.[19] Nor can any recovery be had by the beneficiary upon a certificate where the insured named therein died before it was issued and

[14] Sovereign Camp Woodmen of the World v. Dees, 45 Tex. Civ. App. 318, 100 S. W. 366.

[15] McLendon v. Sovereign Camp Woodmen of the World, 106 Tenn. 695, 52 L.R.A. 444, 64 S. W. 36.

On effect of delay in passing upon application, see notes in 36 L.R.A. (N.S.) 1211, and 51 L.R.A.(N.S.) 873. On effect of stipulation in application on policy of life insurance that it shall not become binding unless delivered to assured while in good health, notes in 17 L.R.A.(N.S.) 1144; 43 L.R.A.(N.S.) 725; and L.R.A.1916F, 171.

[16] Great Hive Ladies of Modern Maccabees v. Hodge, 130 Ill. App. 1.

[17] Supreme Court, Order of Patricians v. Davis, 129 Mich. 318, 8 Det. Leg. N. 970, 88 N. W. 874.

[18] McLendon v. Sovereign Camp Woodmen of the World, 106 Tenn. 695, 52 L.R.A. 444, 64 S. W. 36.

[19] Reese v. Fidelity Mutual Life Assoc. 111 Ga. 482, 36 S. E. 637.

which was never delivered either actually or constructively,[20] and where, under the by-laws, expressly made a part of the contract delivery of the certificate by the camp clerk and the payment of dues and assessments to the applicant is required, such condition precedent must be complied with and, a delivery by the head office is insufficient. And if the insured is injured before compliance with such condition no liability attaches, nor is a payment sufficient when made after the accident to a local clerk in the absence of a ratification or waiver.[1] But the clerk of a benevolent society, without authority so to do cannot prevent a recovery on the certificate by refusing delivery because of a change in the applicant's health, even though under the constitution and by-laws of the society delivery of the certificate is a prerequisite to liability.[2] And an agreement or stipulation in a contract of fraternal insurance with a married woman, that the contract shall not take effect unless delivered to her "while in sound health" is not violated by reason of the applicant being pregnant at the time of the delivery of the policy.[3] If the by-laws provide for an increase of benefits and the issuance of a new certificate to a member in good standing, upon compliance with certain conditions as to health and fees, without any other reservation or discretion as to the issuance,—the society is liable where such conditions are complied with even though insured dies after issuance of the new certificate but before its delivery to him.[4]

[20] Alexander v. Woodmen of the World, 161 Ala. 561, 49 So. 883.

[1] Lathrop v. Modern Woodmen of America, 56 Oreg. 440, 106 Pac. 328, 109 Pac. 81.

[2] Pledger v. Sovereign Camp Woodmen of World, 17 Tex. Civ. App. 18, 42 S. W. 653.

[3] Rasicot v. Royal Neighbors of America, 18 Idaho, 85, 29 L.R.A. (N.S.) 433, 108 Pac. 1048.

[4] Rancipher v. Women of Woodcraft, 50 Wash. 68, 96 Pac. 829.

CHAPTER V.

REINSURANCE.

§ 112. Reinsurance defined.
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§ 136c. Reinsurance: recovery induced by fraud: subrogation: deduction of expenses of recovery.
§ 137. Reinsurer bound by judgment: notice to defend.
§ 138. Defenses available to reinsurer.

§ 112. Reinsurance defined.—Reinsurance is a contract whereby one for a consideration agrees to indemnify another against loss or liability assumed by the latter as insurer of a third party. Other definitions have been given as follows: A contract "by which one insurer causes the sum which he has insured to be reassured to him by a distinct contract with another insurer, with the object of indemnifying himself against his own responsibility."[5] "Reinsurance is an indemnity against a risk incurred by the assured in consequence of a prior insurance upon the same property or some part of it."[6] Reinsurance is an insurance by the first insurer of the whole or of some part of his interest in the risk created by his contract of insurance. Reinsurance is a contract that one insurer makes with another to protect the first from the risk he has already assumed.[7] "A contract whereby one party, called the 'reinsurer,' in consideration of a premuim paid to him, agrees to indemnify the other against the risk assumed by the lat-

[5] Phœnix Ins. Co. v. Erie Transp. Co. 117 U. S. 312, 323, 29 L. ed. 873, 6 Sup. Ct. 750, 1176, per Gray. See Doering's Annot. Cal. Civ. Code, secs. 2646–49; Levisee's Dak. Code, secs. 1559–62; Annot. Code Mont. (1895), sec. 3530; Civ. Code Mont. (Rev. Codes 1907); Rev. Code N. Dak. 1895, sec. 4533; Rev. Codes, Id. 1899; Civ. Code, sec. 4533; Rev. Codes S. Dak. 1903, sec. 1879.

[6] Mutual Safety Ins. Co. v. Hone, 2 N. Y. 235, 240, per Gardiner, J.

[7] Ruohs v. Traders Fire Ins. Co. 111 Tenn. 405, 102 Am. St. Rep. 720, 78 S. W. 85.

ter by a policy in favor of a third party." [8] "Reinsurance is where an insurer procures the whole or part of the sum which he has insured (i. e., contracted to pay in case of loss, death, etc.) to be insured again to him by another person. This is commonly done in case of marine insurance. . . . Formerly, by 19 George II., chapter 37, section 4, reinsurance was prohibited except in certain cases, but this provision was repealed by 30 and 31 Victoria, chapter 23." [9] Sometimes, however, reinsurance exists where an insurer about to become insolvent, or for other reasons, transfers his risks to another company, or consolidates with some other company, and the transferee or consolidated company assumes all the risks.[10] Whether a contract is or is not one of reinsurance has been before the courts in several cases. It was held in New

[8] 1 Phillips on Ins. (3d ed.) 209, sec. 374.

[9] Sweet's Dictionary of English Law (1882) 689.

For other definitions see:

United States.—Allemannia Fire Ins. Co. v. Firemen's Ins. Co. 209 U. S. 326, 52 L. ed. 815, 28 Sup. Ct. 544, 14 Am. & Eng. Ann. Cas. 948, 37 Ins. L. J. 316; Providence-Washington Fire Ins. Co. v. Atlanta-Birmingham Fire Ins. Co. (U. S. C. C.) 166 Fed. 548, 38 Ins. L. J. 461.

California.—Union Mutual Ins. Co. v. American Fire Ins. Co. 107 Cal. 327, 28 L.R.A. 692, 330, 40 Pac. 431.

Illinois.—Vial v. Norwich Union Fire Ins. Co. 257 Ill. 355, Ann. Cas. 1914A, 1224n, 44 L.R.A.(N.S.) 317n, 100 N. E. 929, aff'g 172 Ill. App. 134.

Louisiana.—Chalaron v. Insurance Co. of North America, 48 La. Ann. 1582, 1590, 36 L.R.A. 742, 21 So. 267.

Nebraska.—Allison v. Fidelity Mutual Fire Ins. Co. 81 Neb. 494, 129 Am. St. Rep. 694, 116 N. W. 274, 37 Ins. L. J. 602.

New Jersey.—Iowa Life Ins. Co. v. Eastern Mutual Life Ins. Co. 64 N. J. L. 340, 45 Atl. 762, 29 Ins. L. J. 299, 305.

New York.—London Assur. Co. v. Thompson, 170 N. Y. 94, 62 N. E. 1066, 31 Ins. L. J. 351, *quoting* from 1 Biddle on Ins. sec. 378; New York Bowery Fire Ins. Co. v. New York Fire Ins. Co. 17 Wend. (N. Y.) 359, 363.

North Carolina.—Shoaf v. Palatine Ins. Co. 127 N. Car. 308, 80 Am. St. Rep. 798, 37 S. E. 451, 30 Ins. L. J. 276.

Ohio.—Commercial Mutual Ins. Co. v. Detroit Fire & Marine Ins. Co. 38 Ohio St. 11, 15, 16, 43 Am. Rep. 413.

See also Rapalje & Lawrence's Law Dict. 1089, title "Reinsurance;" 1 May on Ins. (3d ed.) sec. 11; 11 Am. & Eng. Ency. of Law, 343; Words & Phrases, vols. 7, 8.

"Reinsurance reserve" meaning of: Assessment associations. Betts v. Connecticut Indemnity Association, 71 Conn. 751, 44 Atl. 65; Conn. Genl. Stat. secs. 2854, 2870.

[10] Glen v. Hope Mutual Life Ins. Co. 56 N. Y. 379; Johannes v. Phœnix Ins. Co. 66 Wis. 50, 57 Am. Rep. 249.

"The insurance of the solvency of an insurer is permitted and practiced in some foreign countries (Le Guidon, c. 2, art. 20; Ord. Louis XIV. h. t. art. 20; Valin, h. t. 65), but it seems never to have been in use amongst us:" 1 Marshall on Ins. (ed. 1810) *145; Emerigon on Ins. (Meredith's ed. 1850) c. viii. sec. 114, p. 205.

York that there was no contract of reinsurance, but simply an original insurance, where certain policies upon a mortgage interest were directed to be canceled, and the agent applied to defendant to reinsure the risks, which it agreed to do, but under a subsequent agreement the policies were issued directly to the insured.[11]

The word "reinsurance" is sometimes used in the sense of a renewal insurance. Thus, where partnership property was insured by the defendants, and thereafter one of the partners having purchased the others' interest applied to defendant's agent for reinsurance, which was agreed to be effected; but the agent gave the latter a paper which he supposed was a policy and so did not examine it, but it was in fact only a renewal of the old policy, and the court held it a new contract, subject to the same terms and conditions as the first.[12] There is, however, as is evidenced by the preceding definitions of reinsurance, a clear distinction between that contract and a renewal of a contract of insurance.

Reinsurance is also entirely different from what is termed "double insurance" or an insurance of the same interest.[13]

Again, an agreement whereby one insurance company covenants that it will make as prompt adjustments and payments of loss, if any, under any and all of its policies of another insurance company, as it would under its own policies, is a much broader contract than a mere technical contract of reinsurance.[14] If a tax is imposed upon gross premiums received including in addition to all other premiums, such premiums as are collected from policies subsequently canceled and "from reinsurance" the word "reinsurance," as used in the statute imposing such tax means premiums collected by such company for reinsuring the risks of other companies, and such premiums are included in the term "gross premiums received," the sum paid out by such company to other companies for reinsuring its own risks is also included and cannot be deducted from the amount thereof, since such sum is an expense of the business.[15]

[11] Excelsior Fire Ins. Co. v. Royal Ins. Co. 55 N. Y. 343, 14 Am. Rep. 271.

[12] Pierce v. Nashua Ins. Co. 50 N. H. 297, 9 Am. Rep. 235.

[13] Allemannia Fire Ins. Co. v. Firemen's Ins. Co. 209 U. S. 326, 52 L. ed. 815, 28 Sup. Ct. 544, 14 Am. & Eng. Ann. Cas. 948, 37 Ins. L. J. 316, per Mr. Justice Peckham, *cited* in Providence-Washington Fire Ins. Co. v. Atlanta-Birmingham Fire Ins. Co. (U. S. C. C.) 166 Fed. 548, 551, 553, 38 Ins. L. J. 461, 469. See also § 2455 herein.

[14] Whitney v. American Ins. Co. — Cal. —, 56 Pac. 50, 28 Ins. L. J. 254, aff'd 127 Cal. 464, 59 Pac. 897.

[15] People (ex rel. Continental Ins. Co.) v. Miller, 177 N. Y. 515, 70 N. E. 10, modifying and aff'g 85 N. Y. Supp. 1142, 90 App. Div. 618, under N. Y. Tax Law, sec. 187 (Laws 1896, c. 908, p. 859, Laws 1901, c. 118, sec. 1, p. 297).

§ 112a. Evidence admissible to show "reinsurance" has technical meaning of agency reinsurance.—It may be shown that the word "reinsurance" as used in dealings between fire insurance companies and their agents has a technical meaning of agency reinsurance and excludes home office reinsurance.[16]

§ 112b. When transfer is not reinsurance, but an illegal transaction: assets a trust fund: deposit with state.—A transfer made by a corporation of all its assets, which constitute a trust fund for the payment of its debts and upon which creditors have a lien against stockholders and all transferees except bona fide purchasers, including bonds deposited under the insurance law with the superintendent of insurance as a condition to its being permitted to do business, to a transferee upon its agreement to assume liability on all outstanding policies, pay all death losses reported, as per schedule attached to the contract, and certain named commissions to the agents as well as rents named, is, where the transferee must be deemed to have known that the transfer would make the corporation unable to pay its debts and terminate its existence by depriving it of all means of carrying into effect the object of its existence, and where the transfer is made against the will of a considerable number of stockholders and leaves a certain number of creditors unprotected, it is not such a reinsurance as is contemplated by the insurance law of New York, but is as to creditors an illegal transaction which will be set aside.[17]

§ 113. Reinsurance: nature of contract.—Although the decisions show a difference in many respects between the contract of insurance and reinsurance, yet the contract involves no legal principles essentially different from those applicable to contracts generally.[18] Nor does the contract necessarily differ in form from original insurance.[19] It is held that an agreement to reinsure is not a contract of guaranty.[20]

As we have seen elsewhere, reinsurance is a contract of indemnity to the reinsured.[1] This rule, however, is qualified in Illinois to the

[16] Federal Ins. Co. v. Gilmour, 206 Mass. 203, 92 N. E. 36, 39 Ins. L. J. 1135.

[17] Raymond v. Security Trust & Ins. Co. 89 N. Y. Supp. 753, 44 Misc. 31; Ins. Law N. Y. 1892, c. 690, p. 1940, sec. 22. See §§ 134a, 136b herein. See Wolfe v. Washington Life Ins. Co. 118 N. Y. Supp. 599.

[18] Smith v. St. Louis Mutual Life Ins. Co. 2 Tenn. Ch. 727, 742.

[19] New York Bowery Fire Ins. Co. v. New York Fire Ins. Co. 17 Wend. (N. Y.) 359; Philadelphia Ins. Co. v. Washington Ins. Co. 23 Pa. St. 250, 253.

[20] Bartlett v. Firemen's Ins. Co. 77 Iowa, 158, 41 N. W. 601.

[1] § 28 herein. See also the following cases:

Indiana.—Eagle Ins. Co. v. Lafayette Ins. Co. 9 Ind. 443, 446.

Iowa.—Bartlett v. Firemen's Ins. Co. 77 Iowa, 158, 41 N. W. 601.

Massachusetts.—Faneuil Hall Ins.

extent that the amount paid by the reinsured to the insured is the measure of indemnity from the reinsurer.[2] We shall consider the force of this qualification hereafter.[3] But by a contract of reinsurance, in whatever language expressed, the obligation of the reinsurer's to indemnify the insurer against his liability for the loss by fire of the property insured.[4] It is a contract of indemnity against liability and not merely against damage.[5] It is simply to indemnify the original insurer for a loss he may sustain upon his contract of insurance; it is a guaranty to reimburse him for any sum he may be compelled to pay under his contract of insurance with the owner.[6]

Reinsurance not to take effect except above a stated amount of loss is a contract of a special character, and cannot be inferred from the mere statement of the original insurer, "we carry our line," made when effecting the reinsurance, least of all when the written contract of reinsurance is in the ordinary form of insurance against loss to the extent of the amount specified in the policy.[7]

§ 114. Reinsurance: validity of contract.—Reinsurance was a valid contract at common law.[8] but in 1746 an act was passed[9] in England providing that it should not be lawful to make reassurance unless the insurer should be insolvent, become a bankrupt, or die.[10] This statute remained in force till the act of 1864[11]

Co. v. Liverpool & London & Globe Ins. Co. 153 Mass. 63, 67, 68, 10 L.R.A. 423, 26 N. E. 244, per Morton, J.; Manufacturers' Fire & Marine Ins. Co. v. Western Assur. Co. 145 Mass. 419, 423, 14 N. E. 632, per Knowlton, J.

Minnesota.—Barnes v. Hekla Fire Ins. Co. 56 Minn. 38, 45 Am. St. Rep. 438, 57 N. W. 314.

Ohio.—Commercial Mutual Ins. Co. v. Detroit Fire & Marine Ins. Co. 38 Ohio St. 11, 15, 16.

Pennsylvania.—Fame Insurance Company's Appeal, 83 Pa. St. 396, 398; Philadelphia Trust, Safe Deposit & Ins. Co. v. Fame Ins. Co. 9 Phila. (Pa.) 292 (a contract of indemnity against liability and not merely against damage).

[2] Illinois Mutual Ins. Co. v. Andes Ins. Co. 67 Ill. 362, 16 Am. Rep. 620. See also Commercial Mutual Ins. Co. v. Detroit Fire & Marine Ins. Co. 38 Ohio St. 11, 15, 16.

[3] See § 118 herein.

[4] Hunt v. New Hampshire Underwriters Assn. 68 N. H. 305, 73 Am. St. Rep. 692, 38 L.R.A. 514, 38 Atl. 145.

[5] Union Mutual Ins. Co. v. American Fire Ins. Co. 107 Cal. 327, 330, 28 L.R.A. 692, 40 Pac. 431; Cal. Civ. Code sec. 2648.

[6] Allison v. Fidelity Mutual Fire Ins. Co. 81 Neb. 494, 129 Am. St. Rep. 694, 116 N. W. 274, 37 Ins. L. J. 602.

[7] Chalaron v. Insurance Co. of North America, 48 La. Ann. 1582, 36 L.R.A. 742, 21 So. 267, 26 Ins. L. J. 465.

[8] Phœnix Ins. Co. v. Erie & Western Transp. Co. 117 U. S. 312, 323, 29 L. ed. 873, 6 Sup. Ct. 750, 1176; Merry v. Prince, 2 Mass. 176, 185; New York Bowery Fire Ins. Co. v. New York Fire Ins. Co. 17 Wend. (N. Y.) 359, 362.

[9] 19 Geo. II. c. 37.

[10] This act covered reassurances in England made in England either by British subjects or foreigners, wheth-

was passed, providing that reassurance of sea risks might lawfully be made.[12] Reinsurances have always been valid and lawful in this country, and in an early Massachusetts case the court decides that the statute 19 George II., chapter 37, did not extend to the then British colonies here, and was not the law of that commonwealth.[13] It was held, however, in a Maryland case [14] that the English prohibitory statute [15] was in force in that state, and related exclusively to marine reinsurance. Reinsurance is, however, not only a valid contract, but is now commonly practiced, and it is held that a parol agreement by the underwriter to transfer a risk to another is not within the prohibition of the statute 19 George II., chapter 37.[16]

§ 115. Reinsurance: validity of company's acts: its powers.— An insurance company empowered "to make contracts of insurance," or "all kinds of insurance against losses by fire," may make a contract of reinsurance.[17] So an insurance company having a controlling interest in another company may delay a statement demanded of the superintendent of insurance from the latter company, and may reinsure its risks and absorb its assets pro rata, and the assets of both companies being available to the superintendent and the reinsured company, which is solvent, the act of the reinsurer is neither a fraud against the state nor against public policy,[18] and a failure to comply with a state law requiring a certain amount of capital as a condition precedent to doing business, will not prevent an insurance company from indemnifying itself by reinsurance against risks already assumed.[19] Again, where a majority of the policy holders of a reinsured company assented to the transfer

er on British or foreign ships: Andree v. Fletcher, 2 Term Rep. 161; 1 Marshall on Ins. (ed. 1810) *144. See Edgar v. Fowler, 3 East, 222.

[11] 27 & 28 Viet. c. 56. See also 30 & 31 Viet. c. 23.

[12] Reinsurance valid under inland revenue (stamp duties) act, 1864 (27 & 28 Viet. c. 56) sec. 1; marine ins. act, 1906 (6 Edw. VII. c. 41, sec. 9) (1); 17 Earl of Halsbury's Laws of Eng. p. 375, sec. 742.

[13] Merry v. Prince, 2 Mass. 176, 185; Hastie v. De Peyster, 3 Caines (N. Y.) 190, 193; New York Bowery Fire Ins. Co. v. New York Fire Ins. Co. 17 Wend. (N. Y.) 359, 362. This case holds that there is no difference between cases of fire and marine risks. Phœnix Ins. Co. v. Erie & Western Transp. Co. 117 U. S. 323, 29 L. ed. 873, 6 Sup. Ct. 750, 1176; Commercial Mutual Ins. Co. v. Detroit Fire & Marine Ins. Co. 38 Ohio St. 11, 16, 17, 43 Am. Rep. 413; Merchants' Manufacturers Mutual Ins. Co. v. Washington Mutual Ins. Co. 1 Handy (Ohio) 408, 425.

[14] Consolidated Real Estate & Fire Ins. Co. v. Cashow, 41 Md. 59.

[15] 19 Geo. II. c. 37.

[16] Delver v. Barnes, 1 Taunt. 48.

[17] New York Bowery Fire Ins. Co. v. New York Fire Ins. Co. 17 Wend. (N. Y.) 359, 363.

[18] Alexander v. Williams, 14 Mo. App. 13.

[19] Davenport Fire Ins. Co. v. Moore, 50 Iowa, 619.

of the assets to the reinsuring company, it was held that the court might decree that all the securities deposited as a trust fund be given to those policy holders who had neither expressed assent nor dissent.[20] and a policy holder in the reinsured company who has paid premiums to the transferee company without such latter company issuing a new policy to him is entitled to recover from the reinsurer the premiums so paid, with interest thereon.[1] But the reinsurance of the policies and the transfer of the whole reserve of a solvent life insurance company to an insolvent company without security by managers who have bought the stock of the former under an agreement that its contract obligations shall be rigorously fulfiled to the same extent and in the same manner as if no change had taken place, is a breach of such contract obligations and of such agreement:[2] and where the intendment of a law was that insurance should be made in the name of and for the benefit of the company, and not individual policy holders, such law cannot be construed so as to allow reinsurance in favor of a policy holder, and thus bring it into conflict with a statute forbidding a corporation giving preferences.[3]

In Iowa it is held that a contract by a mutual benefit society, by which it agrees to assume the liabilities and death losses of another association, is ultra vires and void.[4] And an agreement by which one life insurance company transfers to another all its assets in consideration that the latter company will reinsure the risks and assume the debts and liabilities of the former company, is ultra vires and void, although the vendor company is authorized to reinsure its risk.[5] So the right of a mutual life insurance company to reinsure does not carry with it the power to sell or transfer all its property against the will of the minority of its policy holders, and a contract to so sell or transfer is ultra vires and void as against the dissenting policy holders.[6] If the subject matter has been destroyed and the reinsurer, with knowledge thereof issues a policy such act is ultra vires.[7] But where the act of incor-

[20] Relfe v. Columbia Life Ins. Co. 10 Mo. App. 150.

[1] Smith v. St. Louis Mutual Life Ins. Co. 2 Tenn. Ch. 727.

[2] Mason v. Cronk, 125 N. Y. 496, 28 N. E. 224, 35 N. Y. 859, reversing 27 N. Y. 122.

[3] Casserly v. Manners, 48 How. Pr. (N. Y.) 219.

[4] Twiss v. Guaranty Life Assn. 87 Iowa, 733, 55 N. W. 8, 22 Ins. L. J. 539. As to ultra vires, see §§ 115b, 334, 350 herein.

[5] Smith v. St. Louis Mutual Life Ins. Co. 2 Tenn. Ch. 727.

[6] Price v. St. Louis Mutual Life Ins. Co. 3 Mo. App. 262; see Barden v. St. Louis Mutual Life Ins. Co. 3 Mo. App. 248.

[7] Henshaw v. Insurance Co. of State of N. Y. 73 N. Y. Supp. 1, 36 Misc. 405. See Union Ins. Co. v. American Fire Ins. Co. 107 Cal. 327, 28 L.R.A. 692, 48 Am. St. Rep. 140, 40 Pac. 431, where both parties were ignorant of the loss.

poration of the F. company made it subject to the general laws of the state authorizing companies to "reinsure themselves," and the F. Company agreed to reinsure the E. Company on all its term risks in certain enumerated states, and to indemnify it upon all losses in one class not exceeding five thousand dollars, and in others known as "extra-hazardous," exceeding a certain sum, and to contribute in various proportionate amounts on another class of risks, and the losses were payable under a pro rata clause, and losses were sustained in the Chicago fire in 1871, it was held that the contract was not ultra vires, and would be enforced by a court of equity.[8]

§ 115a. Same subject.—The right of an insurance company to manage its business, to determine the terms of its continuance, how long it shall carry on its general business, whether or not and when, if at all, it shall turn over business by reinsuring its risks, and ceasing to do business is vital to its existence,[9] and the charter of an insurance company may empower it to make contracts of reinsurance through its board of directors of any or all risks,[10] where a life insurance company is not insolvent in a commercial or insurance sense when doing a losing business and unable to continue without further loss, it may by a contract made in good faith for the best interests of its creditors and stockholders, sell out its business to another corporation and cease operations; but a policy holder cannot be compelled to relinquish the old company and accept reinsurance in the new one.[11] An insurer may also have power to reinsure a single risk even though a statute requires the consent in writing of two thirds of the "holders of the policies" proposed to be insured, where the antecedent words "the reinsurance of any . . . outstanding risks" are used.[12] If the original insured is notified by the reinsurer of the transfer of the risk and that it will be continued on the same terms the presumption is that the company have power to insure him on the terms specified.[13]

[8] Fame Insurance Company's Appeal, 83 Pa. St. 396.

[9] Moore v. Security Trust & Life Ins. Co. 168 Fed. 496, 93 C. C. A. 652, 38 Ins. L. J. 745, case of agency contract and reinsurance.

[10] Jameson v. Hartford Fire Ins. Co. 44 N. Y. Supp. 15, 14 App. Div. 380.

[11] Raymond v. Security Trust & Life Ins. Co. 97 N. Y. Supp. 557, 111 App. Div. 191, rev'g 91 N. Y. Supp. 1041, 101 App. Div. 546, rev'g 89 N. Y. Supp. 753, 44 Misc. 31, *citing* to the last proposition People v. Empire Mutual Life Ins. Co. 92 N. Y. 105.

[12] Iowa Life Ins. Co. v. Eastern Mutual Life Ins. Co. 64 N. J. L. 340, 45 Atl. 762, 29 Ins. L. J. 299, 2 Genl. Stat. N. J. p. 1755, sec. 66 Ins. act.

[13] Mutual Reserve Life Ins. Co. v. Ross, 42 Ind. App. 621, 86 N. E.

§ 115b. Same subject: mutual benefit societies, associations, and co-operative companies: Lloyds.—Under a Federal decision the transfer of membership of one company to another being legally made results in making ipso facto members those who did not request to be transferred. But unless surrendered and exchanged for certificates of the reinsuring company nothing contained in the contract of transfer or reinsurance between the two associations or companies can alter the express terms of the original contracts of the members of the reinsured company or association.[14] But under another Federal case a member may be bound by subsequently enacted by-laws of the reinsurer where the reinsurance contract so provides, and the policy holder accepts reinsurance and without dissent pays premiums to the reinsurer after notice received of such by-laws.[15] In Iowa a statute which provides for the transfer of risks by reinsurance conditioned upon a two-thirds vote of a meeting of the members and that upon approval of such transfer a member who files his preference for transfer to another corporation than the one specified in the contract shall be accorded privileges in aid of such transfer, and also limiting reinsurance or transfers to companies authorized to transact business in the State of the enactment, does not dictate the reinsurance contract nor prohibit limiting thereby the reinsurance or transfer only of members in good standing.[16] In Missouri it is decided that a fraternal insurance company as a reinsurer of a like company cannot impose upon a member of the reinsured company who applied for reinsurance a condition precedent, such as a medical examination, to membership, where the terms of the reinsurance contract plainly provided that any member of the fraternal company, which had reinsured, should if in good standing be entitled unconditionally to reinsurance.[17] Under a Pennsylvania decision a mutual insurance company agreed to transfer, or cause to be transferred to the best of its ability its membership to another company and the statute under which the contract was made expressly conceded the right of every member, on giving the required notice, to elect to be transferred to, or reinsured by another company. The latter company agreed to

[14] Robinson v. Mutual Reserve Life Ins. Co. (Scovill v. Same) (U. S. C. C.) 182 Fed. 850, 40 Ins. L. J. 190. 189 Fed. 348, 111 C. C. A. 79; 175 Fed. 624, 629, 159 Fed. 564.

[15] Stark v. Northwestern National Life Ins. Co. (U. S. C. C.) 167 Fed. 191. See also Northwestern Life Ins. Co. v. Gray, 161 Fed. 488, 88 C. C. A. 430, 37 Ins. L. J. 757.

[16] Parvin v. Mutual Reserve Life Ins. Co. 125 Iowa, 95, 100 N. W. 39.

[17] Cox v. Kansas City Life Ins. Co. 154 Mo. App. 464, 135 S. W. 1013. *Examine* Bolles v. Mutual Reserve Fund Life Assoc. 220 Ill. 400, 77 N. E. 198.

reinsure the members of the former company upon execution of satisfactory transfer applications, on the basis of their original applications to it, and to rate them at the same amount, with premiums payable at the same date, as they were then paying in it. It was determined that the reinsurer was bound to reinsure all the members who elected to have their insurance transferred, and could not insist upon a condition that the age and health of the applicant must be satisfactory, and that a subsequent tender of the premium was waived by a refusal to accept the same.[18] Under a New York decision a reinsuring company may accept upon consolidation a policy of a person who is of a prohibited age at that time where he had attained that age when the policy was originally issued to him.[19] In Nebraska a consolidation contract between associations of different states whereby a domestic association assumes the risks of a foreign corporation is ultra vires and being so is void also in the State of the foreign corporation even though the laws of the latter State regulate the consolidation of such societies.[20] Under another decision in that State mutual fire insurance companies organized under the laws of 1897, are not authorized to transact a reinsurance business. So that a contract of reinsurance made by such a company is ultra vires.[1]

If, however, a mutual insurance company on the assessment plan reinsures in another like company and there is no express provision in the statute governing such companies which prohibits them from reinsuring property,—a claim will not be sustained in an action on a fully executed contract of reinsurance that such contract is ultra vires.[2] In Washington a beneficial association which reinsures

[18] National Mutual Ins. Co. v. Home Benefit Soc. 181 Pa. 443, 40 W. N. C. 517, 59 Am. St. Rep. 666, 37 Atl. 519, 26 Ins. L. J. 917. See Welch v. Chicago Guaranty Fund Life Soc. 2 Mo. App. Rep. 678, *noted* under § 131b herein.

[19] Rand v. Massachusetts Beneficial Life Assoc. 42 N. Y. Supp. 26, 18 Misc. 336.

[20] Starr v. Bankers' Union of the World, 81 Neb. 377, 129 Am. St. Rep. 684, 116 N. W. 61, 37 Ins. L. J. 746.

[1] Allison v. Fidelity Mutual Fire Ins. Co. 81 Neb. 494, 129 Am. St. Rep. 694, 116 N. W. 274, 37 Ins. L. J. 602, Sess. Laws Neb. 1897, c. 45, p. 257.

[2] Cass County v. Mercantile Town Mutual Ins. Co. 188 Mo. 1, 86 S. W. 237, 34 Ins. L. J. 435. The Court, per Burgess, P. J., said: "Defendant, however, claims that this contract is ultra vires for the reason that the defendant had no power to make it, and that the State Town Mutual had no power to enter into such a contract, because it is expressly prohibited from transacting such business. But we are unable to agree to this contention, for the reason, as we have before said, that there is no express provision in the statute prohibiting such companies from reinsuring property which has already been insured by another. At most the prohibition is only by implication; and as the contract between the companies was executed to

another association is estopped, after the death of a reinsured member, to deny its authority to enter into such a contract where it receives dues from such member paid under the original contract.[3]

The risks of town and co-operative insurance companies may, under the laws of New York 1898, be reinsured in another company of like character and the subject matter thereupon becomes "insured property" within the meaning of said law.[4]

In New Jersey the legislation of 1895, 1896, does not prohibit, but confers upon Lloyds associations authority to reinsure and indemnify themselves against loss in whole or in part, sustained by reason of risks taken by them against loss by fire or lightning.[5]

§ 116. Reinsurance not within statute of frauds.—Reinsurance is not a contract within the statute of frauds, and is not a promise to pay the debt of another, and need not be in writing.[6] Notwithstanding the above rule, it is held in Egan v. Fireman's Insurance Company[7] that if one insurance company assumes the policies of another, that such agreement cannot be enforced unless in writing, as it is a promise to pay the debt of another. Under an Oregon decision a consideration must be shown in order to satisfy the statute of frauds, inasmuch as a reinsurance contract, whereby a life company reinsures the members of a fraternal benefit company and agrees to meet its liabilities, constitutes a promise to pay another's debt.[8]

the fullest extent on the part of the Nevada company, and the policy issued to it by defendant in consideration thereof, the defense of ultra vires is not open to defendant in this case. It is well settled in this State that the defense of ultra vires is not open to a corporation when the contract has been fully executed on the part of the other contracting party, and is not expressly prohibited by law. . . . There is no question of public policy invoked in this case, and it would operate as a fraud upon plaintiff not to compel defendant to pay the amount of the policy in question; and it should not be allowed to keep the premium paid and escape liability upon the policy on the plea of ultra vires," reviewing numerous authorities. See also Sage v. Finney, 156 Mo. App. 30, 135 S. W. 996. See §§ 334, 350 herein.

[3] Campbell v. Order of Washington, 53 Wash. 398, 102 Pac. 410.

[4] Skaneateles Paper Co. v. American Underwriters Fire Ins. Co. 114 N. Y. Supp. 200, 61 Misc. 457; Ins. Law (Laws N. Y. 1898, p. 1506, c. 654) sec. 278 as am'd.

[5] Sun Insurance Office of London v. Merz, 64 N. J. L. 301, 52 L.R.A. 330, 45 Atl. 785, 29 Ins. L. J. 344, under "Fire Lloyd's Statute of March 25, 1895" as am'd by act March 26, 1896 (P. L. N. J. 1896, p. 156).

[6] Bartlett v. Fireman's Fund Ins. Co. 77 Iowa, 155, 41 N. W. 601. See Commercial Mutual Marine Ins. Co. v. Union Mutual Marine Ins. Co. 19 How. (60 U. S.) 318, 15 L. ed. 636.

[7] 27 La. Ann. 368.

[8] Spande v. Western Life Indemnity Co. 61 Oreg. 220, 111 Pac. 973, 122 Pac. 38.

§ 117. Relations between parties and between insured and reinsurer.—The reinsured sustains as to the reinsurer the same relation which the original insured bears to the reinsured, but the contract of reinsurance does not inure to the benefit of the assured, and he has no claim, legal or equitable, against the reinsurer,[9] nor any interest in the contract,[10] and the reinsurer is not liable to him either as surety or otherwise.[11] There is no privity of contract between them, and the reinsured remains solely liable on the original insurance, and he alone has a claim against the reinsurer.[12] Nor can the insured claim a right to share in the assets in case of reinsurance where he has not paid for ten years, on the ground that the reinsurance excused such payment;[13] and in case of insolvency of the reinsured and a recovery in full against the reinsurer, the insured has no claim against the reinsured over the per cent received from him.[14] Notwithstanding this rule, we are inclined to agree with Mr. Parsons that the statement that assured has no claim on such funds is "too sweeping, but that his claim is one in common with other creditors."[15] The rule that there is no privity of contract

[9] Herckenrath v. American Mutual Ins. Co. 3 Barb. Ch. (N. Y.) 63, 1 Barb. Ch. (N. Y.) 363; Flint v. Westchester Fire Ins. Co. 207 Mass. 337, 93 N. E. 646.

[10] Faneuil Hall Ins. Co. v. Liverpool & London & Globe Ins. Co. 153 Mass. 67, 68, 10 L.R.A. 423, 26 N. E. 244, per Morton, J.; Barnes v. Hekla Fire Ins. Co. 56 Minn. 38, 45 Am. St. Rep. 438, 57 N. W. 314; Delaware Ins. Co. v. Quaker City Ins. Co. 3 Grant's Cas. 71.

Deering's Annot. Civ. Code, Cal. sec. 2649; Comp. Laws, Dak. 1887, sec. 4186; Annot. Civ. Code Mon. 1895, sec. 3533; Rev. Code, N. Dak. 1895, sec. 4536.

The original insured under a marine policy has no right or interest in respect to the reinsurance. 17 Earl of Halsbury's Laws of Eng. p. 375, sec. 743.

[11] Ruohs v. Traders Fire Ins. Co. 111 Tenn. 405, 102 Am. St. Rep. 790, 78 S. W. 85, 93 N. E. 646.

[12] *Minnesota.*—Barnes v. Hekla Fire Ins. Co. 56 Minn. 38, 45 Am. St. Rep. 438, 57 N. W. 314.

Missouri.—Strong v. Phœnix Ins. Co. 62 Mo. 289, 296, 297, 21 Am. Rep. 417.

New York.—Hastie v. De Peyster, 3 Caines (N. Y.) 190; Hoffman v. North British & Mercantile Ins. Co. 70 N. Y. Supp. 106.

Tennessee.—Ruohs v. Traders Fire Ins. Co. 111 Tenn. 405, 102 Am. St. Rep. 790, 78 S. W. 85.

Texas.—Mutual Reserve Fund Life Assoc. v. Green, — Tex. Civ. App. —, 109 S. W. 1131.

[13] Empire Mutual Life Ins. Co., In re, 64 How. Pr. (N. Y.) 51.

[14] Consolidated Real Estate & Fire Ins. Co. v. Cashow, 41 Md. 59, 74.

[15] He says (1 May on Ins. [Parsons'] sec. 11A): "The assured has no distinctive claim on those funds, no claim different from that of any other creditor of the insolvent company, but in common with the other creditors he did have a claim. . . . The claim against the receiver was part of the assets in the hands of the receiver to be administered for the benefit of creditors." This statement of Mr. Parsons refers to words of the court in the case of Consolidated Real Estate etc. Co. last above cited,

between the insured and the reinsurer is subject, however, to such exceptions as may arise from the agreement of the parties, as where the contract provides that the assured may sue the reassurer;[16] or in case of transfer of its business and consolidation of the insurer with another company, the reinsurer becomes directly liable, or where the reinsurer assumes all risks and liabilities of the insurer here, the insured may sue the reinsurer.[17] And direct liability may be incurred by the insurer to the original insured, if the intention to create it sufficiently appears from the contract of reinsurance.[18]

A clause in a policy of reinsurance to the effect that the reinsurer is made the agent of the original insurer for the purpose of doing, in regard to outstanding policies covered by the contract of reinsurance, all acts necessary to transfer said policies according to their terms and conditions, does not make the reinsurer the sole agent for that purpose, or prevent the original insurer from lawfully consenting to a transfer.[19]

§ 117a. Same subject: Lloyds.—The contract of reinsurance is not with the members individually of a Lloyds association.[20]

§ 118. Insurable interest of reinsurer.—The fact that the insurer has assumed a risk gives him an insurable interest.[1] The relation which the reinsured sustains to the property at risk, as the original insurer thereof, gives an insurable interest.[2] Insurers, however, have no insurable interest in the property insured by them, regarded in the light of owners.[3] It is not necessary to specify in the policy that the interest is a reinsurance, although the nature of the contract would make it advisable so to do for practical reasons.[4]

and quoted by him as follows: "'The original insured has no claim in respect of the money so paid.'"

[16] Glen v. Hope Mutual Life Ins. Co. 56 N. Y. 379.

[17] Barnes v. Hekla Fire Ins. Co. 56 Minn. 38, 45 Am. St. Rep. 438, 57 N. W. 314; Fischer v. Hope Mutual Life Ins. Co. 69 N. Y. 161; Glen v. Hope Mutual Ins. Co. 56 N. Y. 37; Johannes v. Phœnix Ins. Co. 66 Wis. 50, 57 Am. Rep. 248.

[18] Ruohs v. Traders' Fire Ins. Co. 111 Tenn. 405, 102 Am. St. Rep. 790, 78 S. W. 85.

[19] Faneuil Hall Ins. Co. v. Liverpool & London & Globe Ins. Co. 153 Mass. 63, 26 N. E. 244, 10 L.R.A. 423.

[20] Thompson v. Colonial Assur. Co. 70 N. Y. Supp. 85, 60 App. Div. 325.

[1] New York Bowery Ins. Co. v. New York Fire Ins. Co. 17 Wend. (N. Y.) 359; Yonkers & New York Fire Ins. Co. v. Hoffman, 6 Rob. (N. Y.) 316; Philadelphia Ins. Co. v. Washington Ins. Co. 23 Pa. St. 250; 1 Phillips on Ins. (3d ed.) 209, sec. 375. See also § 941 herein.

"An insurer under a contract of marine insurance has an insurable interest in his risk, and may insure in respect of it." 17 Earl of Halsbury's Laws of Eng. p. 375, sec. 742.

[2] Manufacturers' Fire & Marine Ins. Co. v. Western Assur. Co. 145 Mass. 419, 423, 14 N. E. 632, per Knowlton, J.

[3] Alliance Marine Assur. Co. v. Louisiana State Ins. Co. 8 La. 1, 28 Am. Dec. 117.

[4] This question is *considered* in 1

§ 118a. Same subject: wagering contract.—A contract of reinsurance of such marine risks as the reinsured has when the contract was entered into, or might have or take during the year that it was to run, is not void as a wager policy, but is a valid contract of insurance.[5] So a contract of reinsurance against claims for loss by fire, not to exceed a certain amount, of property located anywhere in the United States, is not void as a wagering contract, although at the time of the issuance of the policy the party indemnified has no insurable interest in a portion of the property, where he acquires such interest during the life of the policy, and retains it at the time when the loss occurs.[6] A reinsurance of losses by fire as part of a marine risk is in substance and effect a marine insurance, and an open policy of this character for one year is not a wager policy although it is intended to cover not only risks which the reinsured had taken, and which were in force at the date of the policy, but is also intended to attach to and cover such marine risks as the reinsured should take thereafter during the continuance of the policy. A contract is a valid one of indemnity in regard to such risks by one insurance company with another, which shall attach as the risks

Phillips on Ins. (3d ed.) 270, secs. 498, 499, and he concludes: "That an assured may effect reinsurance directly on the insured subject against the risks or any part of the risks insured against in the original policy, without any disclosure in the policy, or otherwise, that it is a reinsurance;" but he adds: "A practical objection may arise unless a reinsurance is expressed to be such in the policy . . . on account of the usual stipulations . . . relative to notice of prior and subsequent insurance, . . . which renders it expedient for both parties that it should be so expressed;" *citing* Mutual Safety Ins. Co. v. Hone, 2 N. Y. 235; Hone v. Mutual Safety Ins. Co. 1 Sand. (N. Y.) 137.

[5] Boston Ins. Co. v. Globe Fire Ins. Co. 174 Mass. 229, 75 Am. St. Rep. 303, 54 N. E. 543.

[6] Sun Ins. Office of London v. Merz, 64 N. J. L. 301, 52 L.R.A. 330, 45 Atl. 785, 29 Ins. L. J. 344. The court, per Gummere, J., said that "up to the present time the question has not received consideration at the hands of this court" (case decided in 1900). The court continues: "An examination of the reasons upon which the earlier rule rests has led us to the conclusion that they were not well founded, and, that a contract by which parties provide for indemnity against loss by fire upon property to be subsequently acquired by the party indemnified is not in any sense a gaming contract, and void on that account; in other words, that an insurable interest, subsisting during the risk and at the time of the loss, is sufficient to support a policy insuring against loss by fire." The following cases were cited and considered:

Iowa.—Mills v. Farmers Ins. Co. 37 Iowa, 400.

Maine.—Lane v. Maine Mutual Fire Ins. Co. 3 Fairf. (Me.) 44.

Massachusetts.—Lee v. Howard Fire Ins. Co. 11 Cush. (65 Mass.) 324.

New York.—Wolfe v. Security Fire Ins. Co. 39 N. Y. 49; Hoffman v. Ætna Fire Ins. Co. 32 N. Y. 405, 88 Am. Dec. 337; Hooper v. Hudson

are taken by the original insurer.[7] But although a purely wager policy is void still one who has accepted the benefits of a partly invalid policy will be estopped from setting up its invalidity.[8]

§ 118b. Same subject: Lloyds.—A Lloyds association as an insurer of property against fire acquires, under the New Jersey statutes of 1895, 1896, by his contract an insurable interest therein which he may protect in whole or in part by reinsurance, by a contract of indemnity against loss.[9]

§ 119. Reinsurance: the risk.—The insurer may reinsure all or part of the risk or liability he has assumed,[10] in the absence of any usage or specific stipulation in the policy to the contrary,[10a] whether the perils be of the sea or fire,[11] but the same subject-matter or peril is implied as in the original, although it need not be the same specific risk or identical hazard,[12] and while it may cover a less it cannot cover a greater risk,[13] for the contract of reinsurance covers only the insurable interest or liability of the original insurer, and extends no

River Fire Ins. Co. 17 N. Y. 424.

Pennsylvania.—Western & Atlantic Pipe Lines v. Home Ins. Co. 145 Pa. 346, 27 Am. St. Rep. 703, 22 Atl. 665.

Vermont.—Wood v. Rutland & Addison Mutual Fire Ins. Co. 31 Vt. 552.

Wisconsin.—Sawyer v. Dodge County Mut. Ins. Co. 37 Wis. 503. See §§ 148 et seq., 901–904 herein.

[7] Boston Ins. Co. v. Globe Fire Ins. Co. 174 Mass. 229, 75 Am. St. Rep. 303, 54 N. E. 543, 28 Ins. L. J. 927.

[8] Sage v. Finney, 156 Mo. App. 30, 135 S. W. 996.

[9] Sun Insurance Office of London v. Merz, 64 N. J. L. 301, 52 L.R.A. 330, 45 Atl. 785, 29 Ins. L. J. 344; N. J. Fire Lloyds act March 25, 1895, as am'd March 26, 1896 (P. L. 1896, p. 156).

[10] 1 Phillips on Ins. (3d ed.) sec. 376; Insurance Co. of North America v. Hibernia Ins. Co. 140 U. S. 565, 11 Sup. Ct. 909, 35 L. ed. 517; Chalaron v. Insurance Co. of North America, 48 La. Ann. 1582, 36 L.R.A. 742, 21 So. 267; London Assur. Corp. v. Thompson, 170 N. Y. 94, 62 N. E. 1066, 31 Ins. L. J. 351. *Examine* Insurance Co. of State of Pa. v. Telfair, 57 N. Y. Supp. 780, 27 Misc. 247, rev'd 61 N. Y. Supp. 322, 45 App. Div. 564. See § 127 herein.

"Section 92 of the Insurance Law (Laws of 1892, c. 690) permits reinsurance of the whole or any part of any policy obligation in any other insurance corporation. It is said, however, that this provision of the statute does not permit an insurance company to reinsure its policy obligations as a whole, whether it does or not, no policy holder has made himself a party to this action and objected, nor has any individual creditor done so." Raymond v. Security Trust & Life Ins. Co. 97 N. Y. Supp. 557, 111 App. Div. 191, rev'g 91 N. Y. Supp. 1041, 101 App. Div. 546, 44 Misc. 31, per Houghton, J.

[10a] Insurance Co. of North America v. Hibernia Ins. Co. 140 U. S. 565, 11 Sup. Ct. 909, 35 L. ed. 517.

[11] New York Bowery Ins. Co. v. New York Fire Ins. Co. 17 Wend. (N. Y.) 359.

[12] Philadelphia Ins. Co. v. Washington Ins. Co. 23 Pa. St. 250; London Assur. Corp. v. Thompson, 170 N. Y. 94, 62 N. E. 1066, 31 Ins. L. J. 351.

[13] London Assur. Corp. v. Thompson, 170 N. Y. 94, 62 N. E. 1066, 31 Ins. L. J. 351.

further than the risk taken by it; it cannot stipulate for indemnity against a risk which it has not assumed.[14] So where the original insurance covers a certain voyage, there can be no indemnity for a different voyage under the contract of reinsurance, although the policy for reinsurance is made "subject to such risks, valuations, and conditions, including the risk of premium note, as are or may be taken" by the insurer.[15] And where a reinsurance policy was by its terms equally applicable to two charters, both of which were known to the reinsuring company, such policy will be presumed to refer to the charter on which the insured company had issued its policy, and which the evidence shows was the one intended.[16] Although the contract of reinsurance applies to the subject matter of insurance specified in the original policy and to risks of the same kind, the risk need not be identical, and this is the law, in the absence of special stipulations except such as have no application to reinsurance, and the words "subject to coinsurance clause," in the application of the reinsured company, may constitute a material part of the description of the risk upon which reinsurance is sought, and so affect the liability of the reinsurer.[17]

[14] Commonwealth Ins. Co. v. Globe Mutual Ins. Co. 35 Pa. St. 475.

[15] Commonwealth Ins. Co. v. Globe Mutual Ins. Co. 35 Pa. St. 475.

[16] Ocean Ins. Co. v. Sun Mut. Ins. Co. 15 Blatchf. (U. S. C. C.) 249, Fed. Cas. No. 10,408.

[17] Royal Ins. Co. v. Home Ins. Co. 68 Fed. 698, 15 C. C. A. 609. McCormick, C. J., says: "The appellee—the Home Ins. Co.—applied to the appellants for reinsurance, and received the respective policies, which are the subjects of the litigation. The applications to the Royal were made on printed forms, with certain blanks filled in in writing. The application to the Imperial does not appear to have been in writing, but was substantially the same in effect as those made to the Royal, the features of which material to note here were and are that the applicant warranted to retain twenty-five thousand dollars, and described the property applicant had insured as 'cotton subject to coinsurance clause.' The Royal has now abandoned any contention on the retention clause. The Imperial still insists on its construction of that clause, but the proof abundantly supports the action of the circuit court on the issues made on the warranty by the Home to retain twenty-five thousand dollars or more on the risk. During the life of these policies of coinsurance a large amount of the cotton was destroyed by fire. At the time of the fire the appellee had written, and in force on the cotton, subject to the fire, policies with the coinsurance clause to the amount of ninety-seven thousand seven hundred dollars and policies without the coinsurance clause to the amount of twenty-five thousand dollars. The loss on the cotton covered by the first-named class of these policies was thirty-eight thousand seven hundred and seven dollars and fifty-eight cents, and the loss on the other exceeded the amount of the policies. There is substantially no issue as to what were the actual facts as to the contracts and the loss, and there can be no dispute that if the contention of the appellee as to the construction of the contract of coinsurance is correct, the decree of the circuit court should be affirmed. Having found

§ 119a. Same subject.—Reinsurance of a single policy obligation may be made under a statute requiring the assent of two-thirds in

that its construction of the retention clause is correct, it only remains to consider the other clauses of the policies on which issue is joined. The judgment and decree of the circuit court construe these clauses in favor of the appellee, and a majority of the judges of this court concur in that decision. The questions here involved are so well stated, and the authorities, so far as any authority exists, bearing on the question are so well applied in the brief of counsel for appellee, that, in justice to ourselves and to him, we must adopt and use his reasoning almost literally, and substantially to the full extent that he has advanced it, there being left little or nothing to add to or qualify what he had said, viz.: It is urged that the defendants are not liable for the losses paid by the plaintiff to F. and B. because the policies issued to them did not contain the coinsurance clause. It is urged that the two slips pasted on the policies of reinsurance are descriptive of the risk assumed by the reinsurer. The defendants are driven to take this ground because the reinsurer has insured the liability of the original insurer, whatever that be, unless in the contract of reinsurance there can be found some clause whereby the reinsurer stipulated that it assumed no risk, unless the original contract contained the coinsurance clause. It is observed that the policies of reinsurance bear the following dates: That of the Imperial is dated Nov. 23, 1891, and those of the Royal Nov. 12, '91, and Dec. 26, '91; the F. and B. policies are dated Oct. 12, '91, Nov. 19, '91, Feb. 9, '92, Feb. 11, '92, and Feb. 26, '92. Only one of the policies is dated before those of the Royal, and only two are dated before that of the Imperial. Three of them are dated after all the policies of reinsurance were issued. The description of the risk in the reinsurance policies is that the Home are insured on ten thousand dollars of their liability as insurers under their various policies issued to various parties for various amounts, and covering as follows: Ten thousand dollars on cotton in bales, their own or held by them in trust or on commission, while contained in the yard No. 1, Shippers' Press, New Orleans. A part of this description is clearly inapplicable to the reinsurance, for the words, 'their own or held in trust or on commission,' have no meaning as between the insurer and the reinsurer. The cotton itself was not the subject of reinsurance as between the insurer and reinsurer, but as between them the subject of the insurance was the liability of the insurer, as an insurer, on the cotton, owned or held by the original insured. This policy was issued for a year, and to cover any liability that the insurer, during the year, might assume as insurer of cotton in the designated press. It was not restricted to a liability then existing, but extended to future liability which might be incurred by the Home on cotton in the Shippers' Press-yard 1. What was the stipulation as to the risk assumed by the reinsurer? He agreed to cover any risk which the insurer might be willing to take, for that is the meaning of the words, 'This policy to be subject to the same risks, conditions, etc., as are or may be assumed by the reinsured, and the loss, if any, payable pro rata at the same time and in the same manner as by said company, etc.' Any printed stipulation having reference to the property itself or the cash value thereof cannot be applied to the contract of reinsurance between the reinsurer and the reinsured, because the property is not the subject matter of their contract. It is true that the contract of reinsurance must apply to the subject matter of

number of the "holders of the policies" proposed to be reinsured where the antecedent words "the reinsurance of any . . . out-

insurance specified in the original policy; that is to say, to cotton in Press-yard 1, and to risks of the same kind as those specified in the original policy. In other words, if the original policy is a contract of insurance against loss by fire, the reinsurance must be against loss by fire, and not against loss by storms on land or at sea. But the specific risk in the policy of reinsurance need not be identical with that in the original policy: that is to say, an original insurance may be effected for six months, with use of all ports of the world, except those of Texas. The reinsurance may be for a single voyage within bounds not prohibited and for a less amount: Philadelphia Ins. Co. v. Washington Ins. Co. 23 Pa. St. 250. Such is the law in the absence of stipulations contained in the lower printed slip annexed to the policies sued on. That slip provides that this policy is to be subject to the same risks, conditions, etc., that are or may be assumed by the original insurer. Hence reinsurance, under these policies, is reinsurance against any of the fire risks assumed by the original insurer in any of its policies on cotton in Press-yard 1, and on the same conditions as those contained in any of the original policies issued by the original insurer to the original insured on cotton thus located. This clause gives to the original insurer the privilege of taking such risks on cotton in the designated place as it may choose. The reinsurer says: 'I will reinsure whatever contract you make, and, to protect me from any imprudence on your part, you must retain at least twenty-five thousand dollars on the same risk.' This view is taken by the supreme court of Massachusetts in Manufacturers' Fire & Marine Ins. Co. v. Western Assur. Co. 145 Mass. 424, 14 N. E. 632. The court said: 'It is often doubtful how far provisions which relate to the conduct of an insured person, as general owner of that which is the subject of the contract, shall be given effect in a policy to indemnify against a risk which the insured has taken on the property of another. The nature of the risk against which it insured, if there was no special stipulation regarding it, would suggest troublesome questions with reference to the applicability of these provisions of this peculiar kind of insurance, some of which it might be necessary to decide.' But in connection with the statement of the risk, the following sentence was inserted, which relieves the court of this difficulty: 'This policy to be subject to the same risks, conditions,' etc., 'as are or may be assumed or accepted by the insured company,' etc. The language of the clause is almost identical with the language used in the lower slip or rider attached to the policies sued on in these cases. The court said: 'By this language the defendant bound itself by what had been done and by what might be assumed by the plaintiff, properly pertaining to the risk which it was reinsuring. This agreement rendered nugatory many printed portions of the policy in which it was inserted. This was special and peculiar, pertaining directly to the subject matter of the contract, and it controlled those parts of the policy which were inconsistent with it. It assumed knowledge on the part of the defendant of all the terms and conditions of the plaintiff's policy, and it implied that the plaintiff, as original insurer, might properly assume risks, conditions, etc., without materially changing the nature of the liability created by the original policy.' This was a case of reinsurance of a risk on a factory which had been assumed by the reinsured company, and the number of the policy designating the

risk was inserted in the contract of reinsurance. The court of appeals of New York, in the case of Jackson v. St. Paul Fire & Marine Insurance Co. 99 N. Y. 129, 1 N. E. 539, confirms the doctrine of the Massachusetts court. Justice Danforth says: 'The reinsurers had no property right in the subject insured by them, but, by underwriting the policy, rendered themselves liable to loss by fire, and they thereby acquired an insurable interest to the extent of that liability. But it was in relation only to the peril against which they had insured. It is that to which their request for reinsurance applied.' By it, in effect, they say as insurers: 'We have undertaken a risk as follows: It amounts to four thousand five hundred dollars, and we ask indemnity against a portion of it.' It is not pretended that they did not state the risk literally as they had taken it, and it was, in fact, described in their policy in terms similar to those used in the policy of reinsurance. The case may indeed be taken in like manner as if they had exhibited to the defendants the original policy, and the defendants had indorsed upon it an assumption of the risk of one thousand five hundred dollars. In both these cases the reinsurance applied to a specific original policy of insurance, designated by number in the contract of reinsurance. In these cases the original contract of insurance had been made before the reinsurance contract. In this case most of the original insurance was subsequent to the contract of reinsurance, and none of the policies of insurance originally issued prior to the contract of reinsurance are designated by numbers or otherwise. The original policies are not only not described in the contract of reinsurance, but the contract covers a period of one year, and it contemplated subsequent insurance. It also contemplated that existing policies might expire and new policies be made. Other insurance was permitted by the reinsurer. How was it possible to describe these future contracts of insurance intended to be covered by the reinsurance? They could not be described except as to the species of property and their locality, and therefore the reinsurer said to the reinsured: 'We will protect you against any loss on the cotton in Shippers' Press-yard 1 which you may assume as insurer, and we agree to accept the terms and conditions you may make with your customers, but you must retain, as insurer, a liability of at least twenty-five thousand dollars on the risk which we take, though we permit you to take other reinsurance, and, in case of loss, we fix the proportions in which we are to make payment. For that purpose we put in the following stipulation: This policy to be subject to the same risks as are or may be assumed by the reinsured company, and any loss payable pro rata at the same time and in the same manner as by said company,' etc. The court of appeals of New York says, in Blackstone v. Alemannia Insurance Co., 56 N. Y. 107, that by the virtue of this clause the defendant is not bound to pay the full amount reinsured by its policy, but only such proportion of the amount of the loss as is in the ratio of the amount of reinsurance to the amount originally insured. Thus, the defendant's reinsurance being for half the amount of the original insurance, the defendant is to pay half the loss. The agreement to pay pro rata with the original insurer whatever liability may be assumed is entirely inconsistent with the clause providing for a different basis of liability, and it has no application to reinsurance, which does not cover property, but covers only the insurable interest of the reinsured growing out of his liability as insurer. In the Massachusetts case (145 Mass. 424, 14 N. E. Rep. 632) it was held that the clause requiring the written consent of the company to a change in the

title or possession of the property insured had no application to the reinsurer, and no notice of such change need be given to him. It sufficed if such change was assented to by the original insurer. In Uzielli v. Boston Marine Ins. Co. 15 Q. B. 11, 13, it was held that the reinsurer was not entitled to notice of abandonment, though the primitive insured may have abandoned to his insurer. The court quotes Phillips on Insurance and Hastie v. De Peyster, 3 Caines (N. Y.) 196. In that case Chief Justice Kent says: 'The reinsurer has no connection or concern with the first insurance, and is at all times bound in indemnify his own assured when the other can show that he has been damnified in consequence of the first insurance.' Mr. Justice Livingston says there was no privity at all between the primitive insured and the reinsurer. In the Uzielli case it was held that the suing and laboring clause in an original insurance policy and in the policy of reinsurance has no application to reinsurers. That clause provides that in the case of loss or misfortune it shall be lawful for the assured, his agents, etc., to sue, labor, and travel in and about the safeguard, defense, and recovery of goods, etc., and the ship, without prejudice to this insurance, to the charges whereof the insurers agree to contribute. In that case the reinsurance was for one thousand pounds, but the loss as between the insurer and the assured was one hundred and twelve per cent, because the loss was eighty-eight per cent, and the expenses incurred, when added to the loss, made the original insurer responsible for one hundred and twelve per cent; that is to say, eighty-eight per cent of the loss, plus the expenses. The court said: 'The plaintiffs seeks to recover eighty-eight per cent which the French company have paid for a total loss, and they seek to recover more under the suing and laboring clause in the policy. Now, in the policy sued on, the ship, as between the plaintiffs and the defendants, is insured at one thousand pounds. The policy itself is declared to be a reinsurance, and also it contains the suing and laboring clause. If it were not for the clause whereby the defendants were rendered subject to the same terms and conditions as were contained in the original policy, and were to pay as might be paid thereon, the plaintiffs, in my opinion, would be entitled to recover only eighty-eight per cent, etc. The plaintiffs rely, however, upon the special clause, whereby the defendants have undertaken to pay as the French company shall have paid, and under this clause they are entitled to recover any sum not exceeding one thousand pounds.' This special clause referred to is in the main similar to that contained in the lower slip of the policies sued on. The defendants in this English case were reinsurers of the French company, which itself was a reinsurer of English underwriters. In this case it will be observed that though the suing and laboring clause was a part of the policy of reinsurance, the court held it had no application to the reinsurers. Why? For no other reason than that the reinsurer does not insure the owner of the ship, but the insurable interest of the insurer. Hence that interest is the loss that the insurer might suffer under the policy issued by him, and the master of the rolls said the suing and laboring in that case for the safeguard of the ship was not by the assured under the policy of reinsurance, but by the assured under the original policy, for the ship was not insured under the reinsurance policy. So totally distinct is the original insurance from the reinsurance, that the premium of reinsurance may be less or greater than that of the original insurance, as well as the extent of the risk. The most instructive case on the subject is the most recent—Faneuil Hall Ins. Co. v. Liverpool & London & Globe

Ins. Co. 153 Mass. 70, 10 L.R.A. 423, 26 N. E. 244. The reinsurance policy in that case contained a clause similar to that in the lower slip attached to the policies sued on, to wit: 'This policy is subject to the same risks, conditions, mode of settlement, and, in case of loss, payable at the same time and in the same manner as the policies reinsured.' The court said that many of the provisions in the printed blank would be inapplicable, and quotes one provision at the very commencement of the blank, viz: 'This company shall not be liable beyond the actual value of the insured property at the time of any loss or damage.' This, said the court, does not measure the defendant's liability under the contract of indemnity. Under that it may be liable, not only for the original loss, but for the costs and expenses incurred by the German company in defending itself against Chauncey's suit. Again, in speaking of the provision quoted above, the court says: 'We think this provision means, not that the various terms in the reinsured policy as to risk, etc., and time and mode of payment in case of loss are incorporated with, and form part of, the contract for indemnity—so that, for instance, claims by the plaintiff on the defendant here be settled by arbitration, or the plaintiff shall submit its books to the inspection of the defendant, or shall bring suit within one year—but that the reinsured or original policies furnish in these and other particulars the basis upon which the contract of indemnity stands, and that in all dealings with the original insured the provisions of the policy issued to him are to be observed.' The object of the coinsurance clause is to make the owner of the property carry a part of the risk, unless he insures to the full value of his property. The purpose is to compel the owner to take out policies to the full value of the property, and pay premiums on such full value, whereas the retention clause in policies of reinsurance is intended to discourage and prevent full reinsurance, and is, in fact, a coinsurance clause as between the reinsured and his reinsurer, for the retention clause is a contract between the insurer and his reinsurer that the original insurer will not effect reinsurance to the extent of his entire liability, but will carry himself a part of that liability, and the part to be carried was fixed in this case as not less than twenty-five thousand dollars. Hence the retention clause, the coinsurance clause, as between the reinsured and the reinsurer, is intended to accomplish an object totally different from the object intended to be secured by the coinsurance clause in the primitive policy issued to the insured. It is, therefore, plain that the clause in the upper slip or rider attached to the policies of reinsurance has no application to reinsurance. That clause provides 'that this company shall be liable for only such proportion of the whole loss as the sum hereby insured bears to the cash value of the property hereby insured.' No property whatever is insured by the reinsurer. His policy applies to a liability of the original insurer, arising out of his insurance of the property, and this liability is the incorporeal subject matter of the reinsurance contract, and is collateral to the property. If the above-quoted clause were applicable to reinsurance, the liability of the Imperial company on its policy for ten thousand dollars would be only eight hundred and thirty-three dollars and thirty-three cents, or one-twelfth thereof, inasmuch as the amount insured (ten thousand dollars) is one-twelfth of one hundred and twenty thousand dollars, which sum, for the purpose of illustration, is assumed to be the total value of the cotton insured. This result is almost absurd in the face of an agreement contained in the policy of reinsurance that 'this company will be liable, in case of reinsurance, for the loss sustained

only in the proportion which the sum reinsured shall bear to the whole sum covered by the reinsured company.' Besides, there is an express pro rata clause in the lower slip attached to the policy which provides for pro rata payments to be made by the reinsurer at the same time and in the same manner as by the Home company. It is apparent, therefore, that in case of reinsurance the value of the property is abandoned as a test of proportionate liability, and in place thereof is substituted the proportion which exists between the amount of insurance carried by the reinsurer and the total amount of insurance carried by the original insurer. This is necessarily the case, as the property is not insured by the reinsurer; the liability of the original insurer in respect to the property, being the subject matter of the reinsurance contract. The coinsurance clause cannot be said to be descriptive of the risk, as between the reinsured and the reinsurer, because the risk which the reinsurer takes is the risk described in the original policy, whatever that may be, unless some clause can be found in the reinsurance contract which expressly varies that description. We find no clause in the reinsurance policies which modifies the risk as assumed by the original insurer. The complaint is not that any clause in the reinsurance policy has been violated by the Home company, but that the Home company did not insert the coinsurance clause in its contract with the primitive insured. This reduces the case to one of misrepresentation or concealment. No averment in the answers is made on which such a defense can be based. Indeed, such a defense is inconsistent with the answers, which assert that the coinsurance clause is contained in the policies sued on, and treat as such that part of the policy which declares that the insurer shall be liable for only such part of the whole loss as the sum insured bears to the cash value of the whole property at the time of the fire. The answers insist that all the terms of the contract between the parties are to be found in the policies of reinsurance. We need not therefore go beyond these policies to determine the rights of the parties, and hence no case of concealment or misrepresentation is presented by the pleadings. The defendants claim that the clause just quoted is the co-insurance claim and that their liability is for only 'such proportion of the whole loss as the sum insured bears to the cash value of the whole property insured.' It appears to us that this clause has no application to reinsurance and is inconsistent with the pro rata clause which provides that the reinsurance is subject to the risk specified in the original policy, and that the reinsurer is to pay the loss pro rata with the reinsured. It is urged that one of the applications for reinsurance expressly asks for reinsurance subject to coinsurance, and appellants insist that this is not only a material, but the most material, of the descriptions of the risk, because when these contracts of reinsurance were made, the market rate at New Orleans upon policies on cotton containing the coinsurance clause was one per cent, while those not containing such clause commanded a premium of one one-half per cent. Let us see: F. and B. had—to use round numbers—sixty thousand dollars' worth of cotton. They lost thirty thousand dollars' worth. On this they had twenty-five thousand dollars of insurance without the coinsurance clause, for which they paid one and one-half per cent premium, or three hundred and seventy-five dollars, and got twenty-five thousand dollars on these policies. Now, on that property and that amount of loss, how much coinsurance must they have had to get twenty-five thousand dollars indemnity? That received was five-sixths of the loss. To have received a like amount under coinsurance policies they must have had

standing risks" are used.[18] The surrender of a policy in the reinsured company and the relinquishment of the right to a return premium constitutes a consideration for issuance of a policy by the reinsurer, and in addition thereto gaining of new business by the reinsurance of the reinsured's risks is to be considered as a factor.[19]

policies written nominally for five-sixths of the value of the property insured; that is to say, to the amount of fifty thousand dollars, which, at one per cent, would have cost them five hundred dollars, instead of three hundred and seventy-five dollars. This is basing our calculations on the facts of the case. The proof shows that Mr. B. is a director in the Home company, and that he would not accept coinsurance policies on his cotton at risk. It shows that another firm of cotton factors, who took more insurance in the Home on cotton than all other persons combined, would not take coinsurance policies. It is not contended that they are not as binding according to their terms as other policies, or that they present any difficulty in the matter of adjustment. We incline to think that those who preferred policies without the coinsurance clause were justified in resting their choice on the knowledge they had that such insurance was the cheapest. Therefore, in addition to the reasoning of appellee's counsel which we have above adopted, we suggest that, considered as a representation, the materiality of the words, 'subject to coinsurance,' is not made to appear by the proposition which we have quoted from the brief of appellant's counsel, which is the proof text of their discourse. It seems to be clear that the purpose of the coinsurance clause is to stimulate full insurance. This being the chief object, insurance companies cannot claim that it lessens the moral hazard. It cannot affect the physical hazard. The fact that some of the appellee's policies did not have the coinsurance clause cannot, therefore, be relied on as a concealment, though 'all the authorities concerning matters of insurance concur in the position that, if the concealment is material, it will avoid the policy, notwithstanding the insured did not intend to commit any fraud. The suppressio veri may happen by mistake and be entirely without fraudulent intention; still the underwriter is deceived and the policy is thus void for the very plain reason that the risk run is really different from the risk understood and intended to be run at the time of the agreement. A concealment which is only the effect of accident, inadvertence, or mistake is equally fatal to the contract as if it were designed. The principle is that, if the party proposing insurance conceals anything which may influence the rate of premiums which the underwriter may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy. By a 'material fact' is meant one which, if known by the underwriter, would induce him either to decline the insurance altogether, or not to accept it unless at a higher premium:' Angell on Insurance, sec. 175. Within the meaning of the authorities, it was not material, even if it can have relation to the contracts of reinsurance here involved. The decree of the circuit court in each case is affirmed." Pardee, C. J., dissented from the above opinion.

[18] Iowa Life Ins. Co. v. Eastern Mutual Life Ins. Co. 64 N. J. L. 340, 45 Atl. 762, 29 Ins. L. J. 299, sec. 66, 2 Genl. Stat. N. Y. ins. act, p. 1755.

[19] Gazzam v. German Union Fire Ins. Co. 155 N. Car. 330, Ann. Cas. 1912C, 362, 71 S. E. 434, 40 Ins. L. J. 1586.

A contract for reinsurance cannot be sustained where the subject matter has been destroyed and the reinsurer has knowledge thereof before issuing the policy.[20] But although a vessel is lost before particulars are furnished in accordance with an ad interim covering memorandum providing for the issue of a policy on goods on receipt of particulars, a contract for reinsurance on such goods is not affected by said loss. A reasonable time will be allowed to furnish particulars.[1]

Failure of one insurance company to object to risks contained in schedules sent to it by another company, a certain amount of whose risks it has made a compact to reinsure, will not amount to an acquiescence on which the latter can rely in case they are not covered by the compact, since reliance may be placed on the good faith of the other company and its acting within the contract, without the necessity of making a personal investigation of the property covered by each schedule.[2]

§ 119b. Same subject: mutual, etc., companies.—Where a stock company offers to the policy holders of a defunct mutual company free insurance for the period for which the premiums had been paid in the insolvent company there is no guaranty or assumption of the old contract and the substituted policy need not conform to the original one, especially so when the insured, in accepting the offer, agreed that upon the issue of such new policy his existing policies in the defunct company should thereafter be void and of no effect.[3] A contract of insurance is not completed by surrendering and sending in a certificate of original insurance to the reinsurer with a request for a policy where it appears that the latter issued several different kinds of policies at different rates, and so even though it had offered to exchange its policies for certificates of members of the reinsured company.[4]

§ 120. Duration: term of risk may be controlled by original insurance.—This is illustrated by a Pennsylvania case, where the duration of the reinsurance was stated as for one year, but the policy did not mention when that period was to commence or terminate. The original insurance was for one year from February 24th, with

[20] Henshaw v. Insurance Co. of State of N. Y. 73 N. Y. Supp. 1, 36 Misc. 405. *Examine* Union Ins. Co. v. American Fire Ins. Co. 107 Cal. 327, 28 L.R.A. 692, 48 Am. St. Rep. 140, 40 Pac. 431.

[1] General Marine Assur. Co. v. Ocean Marine Ins. Co. 16 Rap. Jud. Que. C. S. 170.

[2] German American Ins. Co. v. Commercial Fire Ins. Co. 95 Ala. 469, 11 So. 117, 16 L.R.A. 291.

[3] Brown v. United States Casualty Co. (U. S. C. C.) 88 Fed. 38, 27 Ins. L. J. 951. Dismissed 90 Fed. 829.

[4] Cotton v. Southwestern Mutual Life Assoc. 115 Iowa, 729, 87 N. W. 675.

privilege of renewing, and the reinsurance was taken out May 31st of the ensuing year, and it was decided that the reinsurance should be construed as running one year from the date February 24th, that being the date of commencement of the original risk, and that the reinsurer was liable, the death of the insured having occurred between February 24th and May 31st.[5] So the terms of the original policy may control the contract of reinsurance.[6] Contracts of reinsurance can be made covering a different period of time from that covered by the original policy of insurance, they need not be coterminus.[7]

§ 121. Custom of underwriters may affect risk.—Where the custom among underwriters in the city of New Orleans was to divide the risk, and not take the whole of it, such a custom will be understood, although not mentioned in the application.[8] If a contract of reinsurance is made by parties with reference to a custom that such contracts are to take effect from the time when granted, such custom will govern and the reinsurer is not liable for a loss of which neither party had knowledge, but which occurred prior to said time. "In the present case we find no circumstance indicating the mutual intention of the parties to give to their contract a retrospective effect. The stipulated facts show that at all the times mentioned it was the custom among fire insurance companies doing business upon the Pacific Coast, granting reinsurance to other fire insurance companies, to charge and collect premiums as and from the date of reinsurance, and to write their policies so as to cover the reinsured company from the date upon which the reinsurance would be granted. Both plaintiff and defendant were fire insurance companies, doing business in San Francisco, and may be presumed to be familiar with these customs, and, in the absence of a showing to the contrary, to have contracted with reference to them. Indeed, plaintiff alleges, in effect, that its contract with defendant was subject to the customs in vogue, and understood by insurance men, when it avers that 'defendant did agree to and did reinsure plaintiff thereon in said sum, and did agree to issue to it a policy of reinsurance in the usual form, and for the premium usually chargeable upon risks of the character assumed.' Where there is a known us-

[5] Philadelphia Life Ins. Co. v. American Life & Health Ins. Co. 23 Pa. St. 65.

[6] Commonwealth Ins. Co. v. Globe Mutual Ins. Co. 35 Pa. St. 475; London Assur. Co. v. Thompson, 47 N. Y. Supp. 830, 22 App. Div. 64, aff'd (mem.) 54 App. Div. 637, aff'd 170 N. Y. 94, 62 N. E. 1066, 31 Ins. L. J. 351.

On limitation clause as part of contract of reinsurance, see note in 1 B. R. C. 184.

[7] Milwaukee Mechanics' Ins. Co. v. Palatine Ins. Co. 128 Cal. 71, 60 Pac. 518, 30 Ins. L. J. 84.

[8] Louisiana Mutual Ins. Co. v. New Orleans Ins. Co. 13 La. Ann. 246.

age of trade, persons carrying on that trade are held to have contracted with reference to the usage, unless the contrary appears, and the usage forms a part of the contract.[9] Without pursuing the authorities further, we are of opinion: 1. Where the exact time of the commencement and termination of the risk are specified in the policy, or, if no policy has been written, in the contract, such specification governs; 2. Where no time has been expressly indicated, the circumstances of the case will be considered for the purpose of determining it; 3. If there are no circumstances indicating the intention of the parties, and no time is specified in the contract, the risk will be deemed to have commenced at the date of the contract; 4. In the case last mentioned, if before the contract of insurance is made, the property has ceased to exist, although unknown to the parties, the risk never attaches." [10] If a contract for reinsurance is made where a custom exists among insurers to charge and collect premiums as and from the date of reinsurance, and to write policies so as to cover the reinsured risk from the date of reinsurance, and there is nothing indicating a mutual intention of the parties to give the contract of reinsurance in suit a retroactive effect, the reinsurer is not liable if the property is destroyed prior to the execution of the contract of reinsurance without the knowledge of either party of the loss at that time.[11] But a general custom to issue reinsurance policies for the same period of time covered by the original policy cannot be shown against the plain letter of a contract prescribing a different period of time for its termination.[12]

§ 122. Limitation of risk of specified date: change of risk.— If a policy of reinsurance covers by limitation only risks existing at a specified date, in such case a subsequent alteration or change in the risk by the original insured, even with the consent of the original insurer, releases the reinsurer.[13]

If the reinsurance is made subject to all the conditions of the original policy, which are or may be adopted by the insurer therein, the reinsurer binds itself by what the insurer adopts within the terms of the original contract, and where the original policy is con-

[9] *Citing* Auzerais v. Naglee, 74 Cal. 60, 15 Pac. 371; Taylor v. Castle, 42 Cal. 367; Brown v. Howard, 1 Cal. 423.

[10] Union Ins. Co. v. American Fire Ins. Co. 107 Cal. 327, 28 L.R.A. 692, 40 Pac. 431.

[11] Union Ins. Co. v. American Fire Ins. Co. 107 Cal. 327, 48 Am. St. Rep. 140, 28 L.R.A. 692, 40 Pac. 431.

[12] Milwaukee Mechanics' Ins. Co. v. Palatine Ins. Co. 128 Cal. 71, 60 Pac. 518, 30 Ins. L. J. 84. *Examine* London Assur. Corp. v. Thompson, 47 N. Y. Supp. 830, 22 App. Div. 64, aff'd 54 App. Div. 637, aff'd 170 N. Y. 94, 62 N. E. 1066, 31 Ins. L. J. 351.

[13] St. Nicholas Ins. Co. v. Merchants' Fire Ins. Co. 83 N. Y. 604.

ditioned to be void in case of a change of ownership of the property, without consent of the insurer, and the reinsurance is made subject to such condition, the insured need only be required to look to the insurer for consent to such change.[14] The court said in this case: "When Marden wished to transfer his policy, that (the original insurer) was the company for him to go to. The policy provided that he should procure its assent, and not that of any other company. Moreover there was no provision either in the policy received by the German American Company from the plaintiff, or by the plaintiff from the defendant, or in the contract between the plaintiff and the defendant that the German American Company or its agent should not assent to the transfer of its policies. The insurance companies must be held to have entered into their respective contracts with the knowledge that as matter of law neither Marden nor any other German-American policy holder could be compelled to procure the assent of any other company, and with the knowledge that in the ordinary course of business applications of this kind would be made to that company by its policy holders, and therefore to have contemplated and understood, in the absence of any contrary provision, that the original insurer or its agent was to give the required assent to transfers, to receive proof of loss, and to attend to what may be called the local conditions of the policy, subject, in all cases, to the implied condition that nothing should be done without its assent to enhance the risk. We do not, therefore, think there is anything in the nature of the contract of reinsurance or of indemnity inconsistent with the power of the original insurer or its agent to assent to the assignment of the policy." [15] The reinsurer may be bound by the insurer's assent in writing to a change of title and by an assignment of the policy, as where a mortgage was foreclosed by a trustee to whom the policy was payable, and the property was bought by an agent of the mortgage bondholders, where the original policy permitted such change upon written consent of the insurer.[16]

§ 122a. Reinsurance not retroactive: property destroyed when contract made.—An agreement to issue a policy of reinsurance in the usual form and for the usual premium, made after the property

[14] Faneuil Hall Ins. Co. v. Liverpool & London & Globe Ins. Co. 153 Mass. 63, 10 L.R.A. 423, 26 N. E. 244.

[15] *Citing* Consolidated Real Estate & Fire Ins. Co. v. Cashow, 41 Md. 59; Manufacturers' Fire & Marine Ins. Co. v. Western Assur. Co. 145 Mass. 419, 14 N. E. 632; Jackson v. St. Paul Ins. Co. 99 N. Y. 124; Fire Ins. Assn. v. Canada Ins. Co. 2 Ontario, 481, 495.

[16] Manufacturers' Fire & Marine Ins. Co. v. Western Assur. Co. 145 Mass. 419, 14 N. E. 632.

was destroyed, of which fact both parties were ignorant, will not become operative by relating back to the beginning of the original insurance, but will be deemed to commence at the date of the contract.[17]

§ 123. Limitation of risk to particular locality.—When the contract of reinsurance limits the risks to a particular locality, it will only include policies within that locality, as where the contract limited the reinsurance to risks in the state of New York, and schedules describing the risks to be reinsured embraced certain risks elsewhere, as well as those in that state. It was decided that although the policies of reinsurance covered in terms the risks which were set forth in the schedules, yet they only included the risks in New York state.[18] So locality is important as where wheat is reinsured "while located and contained as described herein and not elsewhere" and it was contained in an elevator for which the rate of premium was higher than that of the warehouse in which it was represented that it was stored; and the policy is thereby avoided.[19] And where the reinsured risk was only of property while stored in a certain manner, in a certain place, as in case of rosin which was not to be covered unless it was in or on specified warehouses and sheds, and the reinsurance policy does not mention property in any other place, it is necessary in order to recover that the rosin destroyed should have been so located.[20]

§ 124. Condition as to assignment.—Where upon the decease of the insured the plaintiff obtained a judgment against the original insurer, and an assignment from it of its contract of reinsurance which prohibited any assignment or sale thereof, it was held that an action would lie against the reinsurer upon said contract, and that the prohibition was limited to assignment prior to loss.[1] An insurer who has reinsured his risks with another insurer has power to assent to the transfer of one of his policies, according to its provisions, in the absence of anything in the contract of reinsurance expressly depriving him of such power. And a provision in a policy of reinsurance issued in accordance with a contract made months previously cannot avail to make invalid a consent by the original

[17] Union Ins. Co. v. American Fire Ins. Co. 107 Cal. 327, 28 L.R.A. 692, 48 Am. St. Rep. 140, 40 Pac. 431. See § 1442 herein.

[18] London and Lancashire Fire Ins. Co. v. Lycoming Fire Ins. Co. 105 Pa. St. 424.

[19] Fireman's Fund Ins. Co. v. Aachen & Munich Ins. Co. 2 Cal. App. 690, 84 Pac. 253.

Location, locality important see generally §§ 1742–1750, 2068 herein.

[20] London Assur. Corp. v. Thompson, 170 N. Y. 94, 62 N. E. 1066, 31 Ins. L. J. 351, aff'g 54 App. Div. 637, aff'g 47 N. Y. Supp. 890, 22 App. Div. 64.

[1] Lee v. Fraternal Mutual Ins. Co. 1 Handy (Ohio) 217. See Faneuil Hall Ins. Co. v. Liverpool & London

insurer to the transfer of one of the policies covered by the contract, which was granted between the date of the contract and the issuance of the policy, where such consent was permitted by the contract.[2]

§ 125. Condition as to other insurance.—A condition in a policy of reinsurance, providing against other insurance, refers to other reinsurance, and the reinsurer cannot evade liability under this clause where there is no other reinsurance;[3] and where it is conditioned that the written consent of the company shall be obtained within ten days in case the property should be reinsured, the mere proof of the existence of an unauthorized reinsurance, without evidence that the same had been in existence at least ten days before the fire, will not avail the company.[4]

§ 126. Conditions: time limit for suing: award.—Although the original contract for insurance contains certain limitations providing for an appraisal and award before suit, and limits the time for suing, such conditions do not become a part of, nor affect the contract of reinsurance.[5] But the six years' limitation applies to a policy of reinsurance.[6]

§ 127. Amount of reinsurance.—It is the loss or liability of the insurer assumed by him under his contract with the insured which forms the basis of the contract of reinsurance. The contract is one of indemnity, and the insurer has an insurable interest only to the extent of that liability, and for this reason the amount of interest in reinsurance is limited by the insurer's liability under the original contract. It need not, however, be for the specific risk thereunder, as the insurer may reinsure for a smaller amount than his total liability.[7]

& Globe Ins. Co. 153 Mass. 63, 10 L.R.A. 423, 26 N. E. 244.

[2] Faneuil Hall Ins. Co. v. Liverpool & London & Globe Ins. Co. 153 Mass. 63, 26 N. E. 244, 10 L.R.A. 423.

[3] Mutual Safety Ins. Co. v. Hone, 2 N. Y. (2 Comst.) 235.

[4] Cumberland Mutual Fire Ins. Co. v. Giltinan, 48 N. J. L. 495, 57 Am. Rep. 586, 7 Atl. 424.

[5] Eagle Ins. Co. v. Lafayette Ins. Co. 9 Ind. 446; Jackson v. St. Paul Fire & Marine Ins. Co. 99 N. Y. 124. *Examine* Providence Ins. Co. v. Ætna Ins. Co. 16 U. C. Q. B. 135. See also Alker v. Rhoads, 76 N. Y. Supp. 808, 73 App. Div. 158; Royal Ins. Co. v. Vanderbilt Ins. Co. 102 Tenn. 264, 52 S. W. 168, 28 Ins. L. J. 910.

[6] Alker v. Rhoads, 76 N. Y. Supp. 808, 73 App. Div. 158.

When statute of limitations begins to run against reinsured, see Insurance Co. of Pa. v. Telfair, 57 N. Y. Supp. 780, 27 Misc. 247, rev'd 61 N. Y. Supp. 322, 45 App. Div. 564.

[7] See Philadelphia Ins. Co. v. Washington Ins. Co. 23 Pa. St. 250. "In reinsurance the amount of interest is the sum insured in the original policy, with the addition of the premium of reinsurance deducting the original premium:" 2 Phillips on Ins. sec. 1248. See §§ 113, 119 herein.

A policy of reinsurance, to apply to the excess which the original insurer may have in its various policies over $50,000, pro rata with all insurance policies on the same excess, does not prevent the original insurer from protecting himself by obtaining reinsurance from other companies within that sum.[8] And if a statute limits the amount which an indemnity company may accept as a single risk to a certain per cent of its capital and surplus but also permits it to reinsure such excess it is obligated to reimburse where it accepts a risk in excess of such per cent.[9]

§ 127a. Same subject: separate risks: notice.—The existence of brick partitions extending above the roof and dividing a building into stores or sections will not constitute each section a separate building or the goods therein a separate risk, within the meaning of a reinsurance contract limiting the amount of insurance to be placed on any one "building of risk," if all the sections are inclosed by a common exterior wall and are all under one management and devoted to the same use, while the floors of the different stories are on the same level and connected by large doors through the partition. And notice that three stores belonging to the same person are all located at the foot of the same street is not notice to the reinsurer that they are all in the same building so as to bind it under a contract for reinsurance which limits the amount of insurance on any one building or risk.[10]

§ 128. Representations and warranties in reinsurance: concealment.—In the contract of reinsurance it is incumbent upon the insurer to communicate to the reinsurer all the facts of which he has knowledge which are material to the risk. And where he states as a fact something untrue with intent to deceive, or where he states a fact positively as true without knowing it to be true, and which tends to mislead, the policy is avoided where such facts materially affect the risk. And any undue concealment or intentional withholding of facts material to the risk which ought in good conscience to be communicated by him likewise avoids the contract.[11] But if

[8] Insurance Co. of North America v. Hibernia Ins. Co. 140 U. S. 565, 35 L. ed. 517, 11 Sup. Ct. 909.

[9] Mosier v. United States Fidelity & Guaranty Co. 119 N. Y. Supp. 157, 134 App. Div. 849, N. Y. Ins. Law (Laws 1892, c. 690, p. 1941) sec. 24, and Laws 1906, p. 768, c. 226, sec. 7.

[10] German American Ins. Co. v. Commercial Fire Ins. Co. 95 Ala. 469, 11 So. 117, 16 L.R.A. 291.

[11] New York Bowery Fire Ins. Co. v. New York Fire Ins. Co. 17 Wend. (N. Y.) 359; Sun Mutual Ins. Co. v. Ocean Ins. Co. 107 U. S. 485, 1 Sup. Ct. 582, 27 L. ed. 337. It is also said in this case that the "exaction of information in some instances may be greater in a case of reinsurance than as between the parties to an original insurance." Merchants' Manufacturers Mutual Ins. Co. v. Washington Ins. Co. 1 Handy (Ohio) 408. Insurer must communicate all the representations of orig-

the reinsurer issues a new policy as a substitute for one issued by the reinsured, any warranty of the truth of the representations relates to the date of the original application, and not to the date of the new policy, and if such representations were true when made, no breach of warranty arises from the fact that they were false at the date of the new policy, nor is it any defense that the risk was not a safe one at the time of the issuance of the latter policy, where by the agreement between the reinsurer and insurer the former was obligated to reinsure all the risks of the latter.[12] And where it appeared that at the time the original insurance was affected the word "charter" was understood by the parties thereto to mean a guano charter, and the insurer did not communicate such fact to the reinsurer before making the contract of reinsurance, it was held that the information was material to the risk, and the reinsured was not entitled to recover in view of the fact that in the absence of an explanation to the contrary the "charter" intended must be regarded under the policy as covering only the route of the voyage described in the policy, and that a recovery against the reinsured for part of the insurance money based upon parol proof of the understanding of the parties to the original insurance as to the meaning of the word "charter," did not bind the reinsurer, and that a payment before said suit of a portion of said money did not amount to a recognition of an insurance on the guano charter;[13] and in a case in the United States Supreme Court[14] it was held[15] that it was not sufficient to convey specific information material to the risk in general terms.

Under an English decision a reinsurance policy is not invalidated by nondisclosure of a clause in the original policy, where the former is subject to the same clauses and conditions as the original policy, and "to pay as may be paid thereon." Both policies were for the same period and the original policy provided that should the vessel be at sea or abroad on the expiration of the policy it should

inal insured, and also all the knowledge and information he possesses material to risk, whether previously or subsequently acquired. See opinion (near end) in note 17, § 119 herein.

See Comp. Laws, Dak. 1887, sec. 4184; Civ. Code, Cal. sec. 2647; Booth's Annot. Civ. Code, Mon. 1895, sec. 3531; Rev. Code, N. Dak. 1895, sec. 4534.

When moral character of assured may become material: Reinsurance. See § 1864 herein.

[12] Cohen v. Continental Life Ins. Co. 69 N. Y. 300. See also Jackson v. St. Paul Fire & Marine Ins. Co. 99 N. Y. 124.

[13] Ocean Ins. Co. v. Sun Mutual Ins. Co. 8 Ben. (U. S. C. C.) 272, Fed. Cas. No. 10407; Sun Mutual Ins. Co. v. Ocean Ins. Co. 107 U. S. 485, 27 L. ed. 497, 2 Sup. Ct. 355.

[14] Sun Mutual Ins. Co. v. Ocean Ins. Co. 107 U. S. 485, 510, 511, 27 L. ed. 497, 2 Sup. Ct. 355.

[15] Three justices dissenting.

be held covered until her arrival at her port of final destination at a pro rata daily premium, said continuation clause being a usual clause. The policy was, however, held void as it covered a period exceeding twelve months that being the duration of the risk expressed in the original policy.[16] Under another English case fraudulent misrepresentations of an official in the employment of shipowners whereby the payment of losses on vessels is induced are a ground for a recovery from the shipowners.[17]

In Louisiana a statement made to the reinsurer by the original insurer, in obtaining reinsurance, "We carry our line," without specifying any amount, will not be deemed falsified if in point of fact the insurer does bear a part of the risk, i. e., to the extent not reinsured. And the failure of the original insurer to bear any part of the risk, owing to the fact that the assured did not put on board the entire cargo agreed to be insured, will not avoid a reinsurance on the ground of fraud, although the original insurer in obtaining it said, "We carry our line," when this was said in the belief that the full cargo would be placed on board, in which case he would have borne a large part of the risk.[18]

Where a statute empowers insurers to reinsure their risks with insured's consent and makes the reinsurer liable to the same extent as if it had originally issued the policy, a vested right under the original policy cannot be impaired by a reinsurance contract which imposes conditions as to representations and warranties limiting in effect the reinsurer's liability, where the original policy is incontestable after two years for breach of warranty or misstatement in the application.[19]

§ 129. Abandonment unnecessary in reinsurance.—The insurer is under no obligation to abandon to the reinsurer, nor give the latter notice of abandonment to him by the insured, for it would be of disadvantage to the reassured to compel him to accept the abandonment of his assured, as he would be compelled to do before he himself could abandon.[20]

[16] Charlesworth v. Faber, 5 Coml. Cas. 408.

Reinsurance: nondisclosure of material fact: policy "subject without notice to the same clauses and conditions as the original policy:" liability of reinsurer. Property Ins. Co. v. National Protector Ins. Co. 108 L. T. 104, 18 Com. Cas. 119, 12 Asp. M. C. 287, 57 S. J. 284. See Scottish National Ins. Co. v. Poole, 18 Com. Cas. 9, 57 S. J. 45, 29 T. L. R. 16. See note 17, § 119 herein.

Reinsurance: concealment by agent of insured, see § 648 herein.

[17] Assicurazioni Generali De Trieste v. Empress Assur. Corp. Ltd. [1907] 2 K. B. Law Rep. 814.

[18] Chalaron v. Insurance Co. of N. A. 48 La. Ann. 1582, 21 So. 267, 36 L.R.A. 742.

[19] Federal Life Ins. Co. v. Kerr, — Ind. App. —, 82 N. E. 943, 85 N. E. 196, aff'd 173 Ind. 613, 91 N. E. 230, 89 N. E. 398.

[20] Hastie v. De Peyster, 3 Caines

§ 130. Proofs of loss in reinsurance.—Generally, the original notices and proofs of loss are sufficient as against the reinsurer,[1] and if the reinsurer is presented with copies of the proofs of loss, he must object and demand the originals at the time, or the right to object will be presumed to have been waived.[2] If a policy of reinsurance is conditioned that all persons having a claim for loss shall proceed at once to give immediate notice and render a particular account of the loss, this means that the notice and schedule must be served in a reasonable time under the circumstances.[3] Proofs of loss may, under an agreement authorizing the company assuming the liabilities of another company to receive proofs of loss, be made to the former company.[4] Preliminary proofs of loss may, however, be dispensed with by the terms of the policy of reinsurance.[5] If risks of an insurance company have been reinsured it is not necessary to furnish proofs of death to the original insurer.[6] If prompt notice is given by the reinsured to the reinsurer of the loss immediately after its occurrence, and also notice of the resistance of the reinsured to payment of the loss in which the reinsurer acquiesces, it is sufficient, and recovery is not barred even though no formal proofs of loss or demand for reimbursement is made until after settlement with the original insured by the reinsured which had been furnished proofs of loss immediately by the former.[7]

§ 131. Extent of reinsurer's liability.—In the absence of an agreement to the contrary or a limitation clause, the reinsurer is bound to indemnify the reinsured to the extent of the latter's liability,[8] provided the amount of such liability does not exceed the

(N. Y.) 190, 194, per Kent, C. J., 195, per Livingston, J.; 2 Phillips on Ins. (3d ed.) 246, sec. 1506.

[1] New York Bowery Life Ins. Co. v. New York Fire Ins. Co. 17 Wend. (N. Y.) 359. See also Cashau v. North Western Mutual Ins. Co. 5 Biss. (U. S. C. C.) 476, Fed. Cas. No. 2499. See § 3295 herein.

The reinsured must prove loss in the same manner as assured must have proved it against him: Yonkers & New York Fire Ins. Co. v. Hoffman Fire Ins. Co. 6 Rob. (N. Y.) 316.

Proofs of loss must be made by the reinsured under a marine policy in the absence of any provision to the contrary in the reinsurance contract. 17 Earl of Halsbury's Laws of Eng. p. 375, sec. 744.

[2] Norwood, Ex parte, 3 Biss. (U. S. C. C.) 504, 516, 517, Fed. Cas. No. 10364.

[3] Cashau v. Northwestern Mutual Ins. Co. 5 Biss. (U. S. C. C.) 476, Fed. Cas. No. 2499.

[4] Whitney v. American Ins. Co. 127 Cal. 464, 59 Pac. 897, aff'g 56 Pac. 50, 28 Ins. L. J. 254.

[5] Consolidated Real Estate & Fire Ins. Co. v. Cashow, 41 Md. 59.

[6] Federal Life Ins. Co. v. Petty, 177 Ind. 256, 97 N. E. 1011.

[7] Royal Ins. Co. v. Vanderbilt Ins. Co. 102 Tenn. 264, 52 S. W. 168, 28 Ins. L. J. 910.

[8] Eagle Ins. Co. v. Lafayette, 9 Ind. 443; Chalaron v. Ins. Co. of North America, 48 La. Ann. 1582, 36 L.R.A. 742, 21 So. 267, 26 Ins. L. J. 465; Hone v. Mutual Safety

actual loss and is within the amount reinsured,[9] and in case of a reinsurance of a fire risk a total loss is the full value in the policy of reinsurance, provided it does not exceed the value in the original policy, nor is the liability of the reinsurer limited to a proportionate sum, nor can the liability be thus limited by evidence of a custom of the place of contract so to do.[10] The above statements are subject to such qualifications as appear under the next following sections.

§ 131a. Same subject.—The terms of the reinsurance contract are the test of the reinsurer's liability and not whether a legal loss has been suffered by the insured under the original policy.[11] If one third of a risk is reinsured, and one half of this, or one sixth of the whole risk, is again reinsured for the first reinsuring company, which afterward becomes insolvent, the last reinsuring company is answerable in case of loss, for the whole amount against which it is indemnified: and not merely for one half the sum which the insolvent company may pay to its creditors.[12] Again, a company receiving the transfer of all the business and assets of a life insurance company will be bound by its express contract to assume and pay all the latter's outstanding contractual liabilities.[13] And the surrender by a reinsured to the reinsurer of its covering note on the day after the insured property has, without the knowledge of either party, been injured by fire, upon the request of the reinsurer that

Ins. Co. 1 Sand. (N. Y.) 137; Heckenrath v. American Mutual Ins. Co. 3 Barb. Ch. (N. Y.) 63; Hastie v. De Peyster, 3 Caines (N. Y.) 190; Delaware Ins. Co. v. Quaker City Ins. Co. 3 Grant's Cas. (Pa.) 71. See Ocean Steamship Co. v. Ætna Ins. Co. (U. S. C. C.) 121 Fed. 882. As to liability of reinsurer see notes in 8 L.R.A.(N.S.) 844, and 44 L.R.A. (N.S.) 317. See § 119 herein, at end thereof, and note.

"It seems to me that upon the principles of the common law, under like circumstances, the party reassured is entitled to recover a full indemnity for the entire loss sustained by him, and also for the costs and expenses which he has reasonably and necessarily incurred, in order to protect himself and entitle him to a recovery over against the reassurers." New York State Mutual Ins. Co. v. Protection Ins. Co. 1 Story (U. S. C. C.) 458, 461, Fed. Cas. No. 10,216, per Story, J., *cited* in Hone v. Mutual Safety Ins. Co. 1 Sand. (N. Y.) 137, 148. See also, as to costs, Hastie v. De Peyster, 3 Caines (N. Y.) 190. See §§ 28, 132 herein.

[9] New York State Mutual Ins. Co. v. Protection Ins. Co. 1 Story (U. S. C. C.) 458, Fed. Cas. No. 10,216; Commercial Mutual Ins. Co. v. Detroit Fire & Marine Ins. Co. 38 Ohio St. 11, 43 Am. Rep. 413.

[10] Hone v. Mutual Safety Ins. Co. 1 Sand (N. Y.) 137; 2 Comst. (2 N. Y.) 235.

[11] Firemen's Fund Ins. Co. v. Aachen & Munich Fire Ins. Co. 2 Cal. App. 690, 84 Pac. 253. See § 132 herein.

[12] Hunt v. New Hampshire Fire & Underwriters Assn. 68 N. H. 305, 73 Am. St. Rep. 602, 38 L.R.A. 514, 38 Atl. 145.

[13] Crowell v. Northwestern Life & Savings Co. 99 Minn. 214, 108 N. W. 962.

the risk be placed elsewhere, being made under a mistake of fact, may under the statute be rescinded; and therefore it does not relieve the reinsurer from liability for the existing loss.[14] But a company is not liable for a prior occurring loss by assuming a contingent liability of another insurer.[15] And a reinsurer may reject a risk and relieve itself of liability even though it retains the premium sent as part of a larger check in settlement of current accounts, and there is no estoppel to assert the nonbinding force of the policy.[16]

The extent of the reinsurer's liability was also determined in the following English case. It appeared that a time policy of insurance on a ship was expressed to be "a reinsurance of policy or policies" [16a] "and subject to the same terms, conditions and clauses as original policy or policies, and to pay as may be paid thereon." The assured had underwritten two time policies on the ship, and these were in force when the reinsurance was effected. Subsequently, during the currency of the reinsurance policy, the two other policies came to an end, and assured underwrote a fresh time policy of insurance on the same subject matter, differing as to the valuation of the ship, and in other respects from the two earlier policies. A loss occurred and was paid under the fresh policy. It was decided that the original policies referred to in the reinsurance policy were the policies then in existence, and that the liability of the reinsurer did not extend to losses which might be incurred by the assured under a policy not containing the same terms, conditions and clauses as the original policies.[17]

§ 131b. Same subject: mutual benefit societies, etc.—A reinsuring association which assumes the certificate contracts of another association may obligate itself by the terms of a rider attached to an original certificate assuming the obligations and benefits thereof.[18] And if an assessment company receives the benefits of a writ-

[14] Traders Ins. Co. v. Aachen & Munich Fire Ins. Co. 150 Cal. 370, 8 L.R.A.(N.S.) 844 note, 89 Pac. 109.

[15] Olson v. California Ins. Co. 11 Tex. Civ. App. 371, 32 S. W. 446.

[16] Northwestern Fire & Marine Ins. Co. v. Connecticut Fire Ins. Co. 105 Minn. 483, 117 S. W. 825.

[16a] There was an unfilled blank space after "policies," as in above text.

[17] Lower Rhine and Wurtemburg Insurance Assoc. v. Sedgwick (1899) 1 Q. B. Div. Law Rep. 179 (Syl.) 80 Law T. N. S. 6, 47 Wkly. Rep. 261, 8 Asp. M. C. 380, 466, rev'g (1899) 1 Q. B. 739, 67 L. J. Q. B. N. S. 330, 78 Law. T. R. 496. Also held that *the words "original policy or policies" in the policy might be explained* by admitting in evidence the slip on which the reinsurance was written.

As to clause: "Subject to same risks, conditions," etc., see note 17, § 119 herein.

[18] Weber v. Ancient Order of Pyramids, 104 Mo. App. 724, 78 S. W. 660. *Examine* Federal Life Ins. Co. v. Kerr (1908) — Ind. App. —, 82 N. E. 943, 85 N. E. 796, 173 Ind. 613, 91 N. E. 230, 89 N. E. 398.

ten contract of reinsurance it is estopped from denying liability.[19] So a statute together with a reinsurance contract and as a part thereof may obligate the reinsurer to the same extent as under the original certificate.[20] And if a fraternal order issues benefit certificates, which are treated by its successor, another order of like character, as though issued by it, and the holders of such certificates are in every respect also treated as members of the new association and the officers of the old are continued as officers of the new association, such association will, upon death of the beneficiaries, be held liable to the same extent, that the association issuing the certificate would have been liable had it continued in business.[1] Again, there may be a waiver of the reinsurer's requirement that a member shall be in good health before a certificate is issued to him, so that the reinsurer will be held liable.[2] A reinsuring company will also be liable upon a certificate of a member, even though his name does not appear upon its books, where he was in fact in good standing, where it is the company's duty to ascertain what persons are entitled to appear upon its books as members in good standing.[3]

But the wrongful, unjust or mistaken exclusion, by reinsured company, of a member from a transfer under a reinsurance contract cannot affect the reinsurer's liability.[4] And a legally incorporated company is not liable upon a policy or certificate issued by an old but illegally incorporated company having the same name, doing the same general business and composed of some of the same members even though the latter has transferred to the former its reserve fund upon certain advantages of which members of the old association may avail themselves if they choose.[5]

§ 131c. Same subject: reinsurer not liable where risk materially altered.—In an English case insurance was by a covernote issued by plaintiffs to a certain firm with intent to provide for insurance of all shipments of coal and coke for one year, the premiums therefor varying in accordance with the date of sailing and port of destination. On July 30, 1900, declaration was made to plaintiffs under

[19] Watts v. Equitable Mutual Life Assoc. 111 Iowa, 90, 82 N. W. 441.

[20] Federal Life Ins. Co. v. Risinger, 46 Ind. App. 146, 91 N. E. 533, Burn's Ann. Stat. Ind. 1908, sec. 4753.

[1] Cooley v. Gilliam, 80 Kan. 278, 102 Pac. 1091, 38 Ins. L. J. 954. See § 135b herein.

[2] Welch v. Chicago Guaranty Fund Life Soc. 2 Mo. App. Rep. 678. See § 115b herein.

[3] Bolles v. Mutual Reserve Fund Life Assoc. 220 Ill. 400, 77 N. E. 198, Ill. act 1898, sec. 16; Hurd's Rev. Stat. Ill. 1903, c. 73, par. 246. See also Brown v. Mutual Reserve Fund Life Assoc. 224 Ill. 576, 79 N. E. 943, rev'g 124 Ill. App. 277; Ill. Laws, 1893, p. 124, sec. 16.

[4] Parvin v. Mutual Reserve Life Ins. Co. 125 Iowa, 95, 100 N. W. 39.

[5] Adams v. Northwestern Endowment & Life Assoc. 63 Minn. 184, 65 N. W. 360, 25 Ins. L. J. 352.

the covernote of a cargo of coals from the Tyne. Upon receiving said declaration plaintiffs gave instructions to reinsure and reinsurance was effected with defendant and others at Lloyds on August 2d at a premium which was the lowest for a summer risk and varied from the premium the plaintiffs were entitled to charge for August and September. The slip was initialed on said day by underwriters who were under the impression that the ship would sail in a few days, or at least during August. Said slip named the vessel and purported to be subject to the reinsurance and deviation clauses. The Brenttor did not sail until September 25th, and became with her cargo a total loss on October 2d. The policy of reinsurance was issued October 5th in pursuance of the coverslip of August 2d. The plaintiffs having paid the coal owners for a total loss, claimed payment from the defendant upon the policy of reinsurance. It was held that the delay in the date of sailing having materially altered the risk, the underwriters were not liable.[6]

§ 132. Agreements affecting reinsurer's liability.—The parties may agree to such terms in reinsurance as will bind the reinsurer to the settlement or adjustment of loss made between the parties to the original insurance, as where the policy of reinsurance provided that the contract was "to be subject to the same risks, valuations, conditions and mode of settlements as are or may be adopted by the" company reinsuring,[7] and the agreement may be such as to make the reinsurer and reinsured jointly liable.[8] The reinsurer may also by agreement become liable directly to the original insurer. So in a New York case[9] the reinsurer agreed to reinsure and assume all risks on outstanding policies of another company and to pay to the policy holders all sums thereon for which the insurer would be liable. Two of said policies were life risks payable to plaintiff upon the death of the insured. The insured collected the sums due under said policies, and it was held that the collection of such insurance by the insurer did not under the agreement prevent a recovery against the reinsurer by plaintiff. Where a policy of reinsurance to a company which had insured a ship contained the clause "subject to the same terms and conditions as the original policy and to pay as may be paid thereon," and the reinsured company became

[6] Maritime Ins. Co. v. Stearns, 71 Law. J. K. B. 86, [1901] 2 K. B. 912, 50 Wkly. Rep. 238, 6 Com'l Cas. 182. As to delay in commencing adventure, see §§ 1494 et seq. herein. As to change of voyage, see chapter thereon §§ 2365 et seq. herein.

[7] Consolidated Real Estate & Fire Co. v. Cashow, 41 Md. 59. See note 17, § 119 herein.

[8] Whitney v. American Ins. Co. 127 Cal. 464, 59 Pac. 897, aff'g 56 Pac. 50, 28 Ins. L. J. 254.

[9] Glen v. Hope Mutual Life Ins. Co. 56 N. Y. 379; Whitney v. American Ins. Co. — Cal. —, 56 Pac. 50, 28 Ins. L. J. 254, aff'd 127 Cal. 464, 59 Pac. 897.

liable for a loss, but had not yet paid the amount of the same, it was held that payment by such reinsured company of the loss was not a condition precedent to the recovery by the reinsured of the reinsurer.[10] But a clause in a contract for reinsurance, that "this policy is subject to the same risks, conditions, mode of settlement, and, in case of loss, payable at the same time and in the same manner as the policies reinsured."—does not mean that the various terms in the reinsured policies as to risks, conditions, mode of settlement, time, and manner of payment, in case of loss, and limitation period, were incorporated with and form a part of the contract of reinsurance, but that the original policies furnish in those particulars the basis on which the contract of reinsurance stands, and that in all dealings with the original insured the provisions of the policy issued to him are to be observed.[11] The reinsurance contract may also limit the reinsurer's liability by excluding all liabilities of the reinsured to members or beneficiaries except claims for death occurring after the agreement has been ratified, and thereby preclude recovery upon a policy providing for a cash surrender value.[12] If, however, the reinsurer agrees unconditionally to assume the reinsured's liability to members in good standing it cannot impose as a condition precedent upon a member that he submit to a medical examination in order to obtain the benefits of the reinsurance.[13] If a provision of a reinsurance contract conflicts with the policy it has no effect upon insured's rights as fixed by the policy and this applies to a provision whereby the reinsurer attempted by the contract to provide for forfeiture for nonpayment of premiums.[14]

The New York standard fire policy provides that "liability for reinsurance shall be as specifically agreed hereon."

§ 133. Reinsurer's liability: pro rata clause.—If the policy contains a clause, "loss, if any, payable pro rata and at the same time with the reinsured," or like words, the recovery is limited thereby to that proportion which the amount reinsured sustains to the original amount.[15] If two insurers obtain reinsurance from a third "the

[10] Eddystone Marine Ins. Co. In re, Western Ins. Co. Ex parte (Eng. C. A. Ch. D. 1892) L. R. 2 Ch. D. (1892) 423, 7 Asp. M. C. 167.

[11] Faneuil Hall Ins. Co. v. Liverpool & London & Globe Ins. Co. 153 Mass. 63, 26 N. E. 244, 10 L.R.A. 423. *Cited* and *considered* in note 17, § 119 herein.

[12] Mutual Reserve Fund Life Assoc. v. Green (1908) — Tex. Civ. App. —, 109 S. W. 1131.

[13] Cox v. Kansas City Life Ins. Co. 154 Mo. App. 464, 135 S. W. 1013.

[14] Federal Life Ins. Co. v. Arnold, 46 Ind. App. 114, 90 N. E. 493.

[15] Cashau v. Northwestern Mutual Ins. Co. 5 Biss. U. S. (C. C.) 476, Fed. Cas. No. 2499; Consolidated Real Estate & Fire Ins. Co. v. Cashow, 41 Md. 59; Hone Ins. Co. v. Continental Ins. Co. 70 N. Y. Supp. 824, 62 App. Div. 63, aff'd 89 App. Div. 1, 180 N. Y. 389, 73 N. E. 65. See § 134 herein.

loss, if any, payable pro rata at the same time, and in the same manner as by such companies," the respective amounts of loss which the original insurers and the reinsurer must pay is proportionate to the amount of the original and the amount of the reinsurance, and this proportion cannot be changed by any act of the original insurers in diminishing the amount of the insurance. Therefore, if the original insurance was for ten thousand dollars and the reinsurance for five thousand dollars, and afterward the original insurance was reduced to two thousand dollars, and subsequently a loss occurs, the reinsurer's liability is for one half of the last-named sum only.[16] So in case the reinsurance is for half the amount originally insured and a loss occurs which is less in amount than the original insurance, the recovery is limited to one half the loss.[17] In this case the court, per Johnson, J., says: "In the case of Hone v. The Mutual Safety Insurance Company,[18] it was adjudged that under a contract of reinsurance the extent of the liability of the reinsurer was not affected by the insolvency of the reassured, nor by its inability to fulfil its own contract with the original insured. This proposition was maintained by Mr. Justice Sandford, giving the judgment of the superior court of New York in a careful and learned opinion, thoroughly setting forth the reasons on which the decision rested and the authorities supporting it. This judgment was affirmed in the court of appeals.[19] We have examined the printed record as it was presented to the court, and find that the questions mentioned were distinctly raised both by the exceptions taken at the trial and by the points of the counsel on both sides used in the argument. That these questions were not particularly noticed in the opinions delivered in the court of appeals must be attributed to their being regarded as too well settled to require notice. They were necessarily involved in the judgment pronounced, and the silence of the opinions scarcely diminishes the force of the precedent. A recovery was had in the case for the full amount of the reinsurance, notwithstanding it appeared that the reassured company was insolvent and had been dissolved, and that its assets were not sufficient to pay more than fifty per cent of its debts. The policy now in suit differs from that in the case cited in containing the following clause: 'Loss, if any, payable pro rata, and at the same time with the reinsured.' By virtue of the first part of this clause the defendant is not bound to pay the full amount reinsured by its policy, but only such a proportion of

[16] Home Ins. Co. v. Continental Ins. Co. 180 N. Y. 389, 105 Am. St. Rep. 772, 73 N. E. 65.

[17] Blackstone v. Alemannia Fire Ins. Co. 56 N. Y. 104.

[18] 1 Sand. (N. Y.) 137.

[19] In 2 N. Y. 235.

the amount of the loss as is in the ratio of the amount of the reinsurance to the amount originally insured. Thus, the defendant's reinsurance being for half the amount of the original insurance, the defendant is to pay half the loss." The latter part of such clause does not require that payment by the reinsured should precede or accompany payment by the reinsurer,[20] and where in addition to the pro rata clause the policy also contained a provision that the loss should be settled in the proportion which the amount reinsured bore to the whole amount originally covered, the reinsurer was held liable to the reinsured in the same proportion it was obligated to indemnify its insured.[1] It is held, however, that the pro rata clause merely gives the company the benefit of any defense, deduction, or equity which the first insurer may have, making the liability of the reinsurer the same as the original insurer, and that it does not limit such liability to what the original insurer may have paid or be able to pay,[2] and in Illinois [3] it is decided that the pro rata clause limits the liability of the reinsurer to a proportionate share of the amount actually paid by the reinsured. In this case the original insurance was for six thousand dollars, the reinsurance was for two thousand dollars, and the insurer becoming insolvent settled with the insurer at ten per centum or six hundred dollars, and the court held that the reinsurer's liability was only two hundred dollars. This decision, however, involves a question as to what extent the insolvency of the insurer affects the liability of the reinsurer, which will be considered in the next section.

§ 133a. Same subject.—Where an ordinary policy is used, and only one of the conditions is applicable to a contract of reinsurance, but a slip is pasted thereon to cover the reinsured's liability, and it stipulates that such reinsurance is a pro rata part of each and every item insured by the policy of the reinsured, and is subject to the same conditions and mode of settlement assumed by the reinsured, and that the loss is payable at the same time, in the same manner, and pro rata with the amount paid by the reinsured, such contract should be construed most strongly against the reinsurer, where a time limitation clause therein is inconsistent with said stipulations and the reinsurer is liable in accordance with its agreement.[4] Again, inability of the reinsured, by reason of insolvency, to pay a fire loss in full or in part, does not affect the liability of the reinsurer

[20] Blackstone v. Alemannia Fire Ins. Co. 56 N. Y. 104.

[1] Norwood v. Resolute Fire Ins. Co. 4 Jones & L. (N. Y.) 552.

[2] Norwood, Ex parte, 3 Biss. (U. S. C. C.) 504, and note, 519, Fed. Cas. No. 10364.

[3] Illinois Mutual Ins. Co. v. Andes Ins. Co. 67 Ill. 362, 16 Am. Rep. 620.

[4] Royal Ins. Co. v. Vanderbilt Ins. Co. 102 Tenn. 264, 52 S. W. 168, 28 Ins. L. J. 910.

under the contract of reinsurance, even though it provides that the reinsurer shall in no event be liable for an amount in excess of a ratable proportion of the sum "actually paid," etc., since these words will be construed to mean "actually payable." [5]

The terms of the contract may make it one of reinsurance and not of coinsurance to pro rate the loss as where a marine carrier reinsured a risk, assumed by him under an insured bill of lading issued to a shipper, by a policy providing for reinsurance of risks assumed or to be assumed by said reassured and agreeing to pay assured in full all claims for such losses arising from perils enumerated in the policy "as the assured may, in their judgment, settle for with the owners or other persons interested in the merchandise;" and the reinsurer was therefore held liable for the full amount paid by the reassured for the loss to the extent specified in the policy.[6] Under a Missouri decision if the extent of the reinsurer's liability is not in any way contingent upon the amount paid on a loss by the reinsured company and the contracts of both were independent, and their performance did not depend upon each other the reinsurer cannot sustain a claim that it is liable only for a pro rata share of the amount paid on a loss by the reinsured.[7]

§ 134. Reinsurer's liability: compromise: insolvency of insurer.—There has been much discussion, both by the courts and text-writers, as to what effect the insolvency of the insurer and his consequent inability to fully pay the insured, or his compromise with the assured, has upon the liability of the reinsurer to him, the insurer. Mr. Marshall [8] asserts that the reinsurer can gain nothing by the insurer's insolvency but must pay his loss in full. Mr. Parsons,[9] however, upholds the doctrine which makes the reinsurer liable not in full but only to the extent proportionally for which the insured settled. He bases this conclusion upon the principle of indemnity, and makes a distinction between a settlement by the insurer with the insured before and after having recourse to the reinsurer, and says that in the former case the insurer may recover to the extent of his liability as governed by the reinsurance contract, and settle as best he can with the insured, while in the latter case he can recover no more than he has paid. Mr. Wood [10] says: "The reinsur-

[5] Allemannia Fire Ins. Co. v. Firemen's Ins. Co. 28 App. D. C. 330, 14 L.R.A.(N.S.) 1049.

[6] Ocean Steamship Co. v. Ætna Ins. Co. (U. S. C. C.) 121 Fed. 882.

[7] Cass County v. Mercantile Town Mutual Ins. Co. 188 Mo. 1, 86 S. W. 237, 34 Ins. L. J. 435.

[8] 1 Marshall on Ins. 143, *citing* Emerigon.

On effect of compromise by original insurer upon reinsurer's liability, see note in 6 B. R. C. 896.

[9] 1 May on Ins. (3d ed.) sec. 11a. See also Id. (4th ed. Gould's) sec. 11a, pp. 18, 19.

[10] 1 Wood on Fire Ins. (2d ed.) p. 194, sec. 87.

er must pay his share of the loss whether the insurer has paid, or has the ability to pay, its proportion of the loss or not;" but he also declares[11] that the question is an open one, and that while the "weight of authority" does not give the reinsurer the benefit of the compromise, the opposite conclusion "would be more consistent and consonant with principle," on the ground of indemnity. If it be assumed that there is no settled rule of law in view of which the parties would be presumed to have contracted, and the question were now for the first time to be determined, then there would seem to be no reason why the reinsurer should not be obligated to the full extent of the liability of the insurer under the original contract, notwithstanding the latter's insolvency or settlement for a less sum with the insured, provided always that such liability is not in excess of the amount covered by the reinsurance. If reinsurance is one of indemnity, the reinsured should only recover for the actual loss sustained. The principle of indemnity would not seem to conflict with such a rule since the indemnity contemplated relates to the loss or liability of the insurer under the original insurance,[12] and the reinsurer's liability must be held to have attached when that loss arises and the insurer becomes liable to the insured. The reinsurer has agreed to pay according to the terms of its contract, nor can another and different agreement be engrafted thereon to the effect that any compromise by the insurer with the insured of his liability shall inure to the benefit of the reinsurer. Again if the principle of indemnity is governed by the fact whether a settlement is made before or after recourse to the reinsurer, it must be a peculiar one, since it would then admit of a profit in one case and not in the other, which is a perversion of the principle. Again there is no privity of contract between the insured and the reinsurer in any case where this question could arise.[13] If the insurer be insolvent, the reinsurance moneys form part of the general fund for the payment of its debts,[14] and the sum due from the reinsurer belongs to his creditors pro rata;[15] and the original

[11] 2 Id. 818.

[12] § 112 herein.

[13] § 117 herein.

[14] Herckenrath v. American Mutual Ins. Co. 3 Barb. Ch. (N. Y.) 63. See also May on Ins. (3d ed.) sec. 11a, where Mr. Parsons says: "The claim against the reinsurer was part of the assets in the hands of the receiver to be administered for the benefit of all the creditors." See also Id. (4th ed. Gould's) sec. 11a, p. 19. On proceeds of reinsurance as special fund in case of insolvency, see note in 38 L.R.A. 110.

[15] Hone v. Mutual Safety Ins. Co. 1 Sand. (N. Y.) 137, 2 N. Y. (2 Comst.) 235; Goodrich's Appeal (Pa. S. C.) 109 Pa. St. 523. See Mason v. Cronk, 125 N. Y. 496, 28 N. E. 224, 35 N. Y. 859, reversing 27 N. Y. 122. See Home Ins. Co. v. Continental Ins. Co. 180 N. Y. 399, 105 Am. St. Rep. 772, 73 N. E. 65.

insured has no equitable lien or preferable claim upon the money due upon the contract of reassurance.[16] Again, the indemnity intended is that which the contract of reinsurance contemplates.

Finally, the weight of authority is that the reinsurer can derive no advantage from the insolvency of the insurer, and the settlement by him with the insured for a less sum than his liability under the original contract. So where the amount insured was ten thousand dollars and the reinsurance five thousand dollars, and the policy contained a pro rata clause, the reinsurer was held liable for one-half the insurer's loss, notwithstanding his bankruptcy and settlement for a small dividend,[17] and other cases hold that the reinsurer is bound to pay the amount which the original insurer becomes legally liable to pay to the assured in consequence of the risk assumed, and not merely the amount which the original insurer actually pays in consequence of the risk assumed by him.[18] Since the liability of the reinsurer does not depend upon the insolvency of the reinsured or upon the latter's inability to fulfil its contract with the original insured, the reinsured's claim is not based upon its greater or less ability to pay, but upon its liability to pay.[19] And under a New Hampshire decision the liability of a reinsurer is not lessened by the insolvency of an intermediate insurer which has become unable to pay the loss, but the reinsurer's liability is for the entire amount of the loss against which they agreed to indemnify the prior insurer.[20]

[16] Consolidated Real Estate Fire Ins. Co. v. Cashow, 41 Md. 59. Strong v. Phœnix Ins. Co. 62 Mo. 289, 296, 297, 21 Am. Rep. 417; Herckenrath v. American Mutual Ins. Co. 3 Barb. Ch. (N. Y.) 63.

[17] Consolidated Real Estate Fire Ins. Co. v. Cashow, 41 Md. 59. Clause in this case was, "Loss, if any, payable pro rata to them . . . at same time and in same manner as they pay." See also Providence-Washington Fire Ins. Co. v. Atlanta-Birmingham Fire Ins. Co. (U. S. C. C.) 166 Fed. 548. Here the settlement with the creditors was 30 per cent in full of proved claims and reinsurers were held liable for full amount and were not allowed the 70 per cent.

[18] Cashau v. Northwestern Mutual Ins. Co. 5 Biss. (U. S. C. C.) 476, Fed. Cas. No. 2499; Eagle Ins. Co. v. Lafayette Ins. Co. 9 Ind. 443; Gantt v. American Central Ins. Co. 68 Mo. 503; Strong v. Phœnix Ins. Co. 62 Mo. 289, 296, 297, 21 Am. Rep. 417; Blackstone v. Alemannia Fire Ins. Co. 56 N. Y. 104; Herckenrath v. American Mutual Ins. Co. 3 Barb. Ch. (N. Y.) 63; Hone v. Mutual Safety Ins. Co. 1 Sand. (N. Y.) 138, 2 N. Y. (2 Comst.) 235; Hastie v. De Peyster, 3 Caines (N. Y.) 193, 194, per Kent, C. J.; 1 Marshall on Ins. (ed. 1810) *143. See § 133 herein.

[19] Allemannia Fire Ins. Co. v. Firemen's Ins. Co. 209 U. S. 326, 52 L. ed. 815, 28 Sup. Ct. 544, 14 Am. & Eng. Ann. Cas. 948, 37 Ins. L. J. 316; Providence-Washington Fire Ins. Co. v. Atlanta-Birmingham Fire Ins. Co. (U. S. C. C.) 166 Fed. 548, 38 Ins. L. J. 461. See § 135 herein.

[20] Hunt v. New Hampshire Fire Underwriters' Asso. 68 N. H. 305, 73

There are decisions, however, which hold that the sum paid by the insurer is the measure of indemnity.[1]

A reinsurer of an insolvent company may by assuming all its outstanding risks and by taking possession of all its assets be precluded from asserting its non-liability to the policy holders.[2] And a reinsurer may be required to pay the amount of the loss which it is liable for, directly to the insured or the party ultimately entitled to the money when the prior insurer which it has indemnified has become insolvent.[3]

§ 134a. Same subject: mutual benefit societies, etc.: trust fund.—A society which reinsures an insolvent order of like nature is liable upon a certificate issued by the reinsured to the same extent that the latter would have been, had it continued in business. And where the reinsurer succeeded to the insolvent's business, property, and to a fund raised by assessments to pay in full a death claim which it had approved, said fund constitutes a trust fund for the payment of the claim to the amount due under the certificate.[4] If reinsurance is obtained in companies which had either gone out of business or had become insolvent a policy holder who has paid a cash premium to a mutual insurance company is entitled upon cancelation

Am. St. Rep. 602, 38 L.R.A. 514, 38 Atl. 145.

[1] Illinois Mutual Ins. Co. v. Andes Ins. Co. 67 Ill. 362, 16 Am. Rep. 620; for facts in this case, see end of § 133, ante; Commercial Mutual Ins. Co. v. Detroit Fire & Marine Ins. Co. 38 Ohio St. 11, 43 Am. Rep. 413; 2 Wood on Fire Ins. 818, note 8.

[2] Ruohs v. Traders' Fire Ins. Co. 111 Tenn. 405, 102 Am. St. Rep. 790, 78 S. W. 85.

[3] Hunt v. New Hampshire Fire Underwriters' Assoc. 68 N. H. 305, 38 L.R.A. 514, 73 Am. St. Rep. 602, 38 Atl. 145.

[4] Cooley v. Gilliam, 80 Kan. 278, 102 Pac. 1091, 38 Ins. L. J. 954. The following syllabus is by the court in this case:

A fraternal order approved proofs furnished upon the death of a benefit certificate holder, made and collected an assessment for a fund to pay the same in full, and ordered its secretary and treasurer to pay the claim, who did pay a part thereof. The remainder of the amount so collected was intermingled with other funds, but having on hand money sufficient to complete the payment set it apart and reserved it in the hands of its secretary and treasurer for that purpose. Becoming embarrassed, the association entered into an agreement with another of like nature which thereby succeeded to its business, property, and effects, to which successor the secretary and treasurer paid the fund so reserved upon the express agreement and promise that such successor should apply the fund to the purpose for which it had been so reserved. This application was not made, the balance due upon the certificate has not been paid, and the association which issued it is insolvent. Held, That the fund so set apart and reserved was impressed with a trust for the payment of this claim, and that the officer so parting with it, and the company so receiving it, are liable to the claimant for the amount due upon the certificate. See §§ 112b, 135, 136b herein.

of the policy to the return of a proportion of such cash premium and this obligation of the company to pay must be discharged by the receiver.[5]

§ 135. When suit may be brought against reinsurer: rights of original insured.—The insurer may wait until suit brought and judgment obtained by the insured before seeking indemnity from the reinsurer,[6] and the reinsurer is bound under a valid contract of reinsurance when the reinsured has been found liable or the loss adjusted.[7] It is also held, however, that before reinsurers can recover, they must show that they have paid a valid claim, by showing that the primitive insurers had a risk upon the subject insured and that such subject was destroyed;[8] but it is not necessary that the insured should have paid the loss before proceeding against the reinsurer. Suit may be brought as soon as the liability occurs, for the contract is one of indemnity against the liability of the insurer for loss, and it is sufficient that such liability to pay for the loss exists, for the contract does not go to the insurer's payment of, or ability to pay, the loss.[9]

Where a company transfers its stock to a reinsuring company upon a guaranty that its obligations to its policy holders shall be fulfilled, some liability to such policy holders must accrue before any action lies upon such guaranty, but when the reinsurer passes into a receiver's hands, and the claims of the policy holders are presented and established, the guaranty should be turned into assets to meet the claims of creditors.[10] If a policy holder, upon learning of the insolvency of the company, enters into a contract of reinsurance with another company, he may lose his remedy against the original company,[11] and where a New York company had an office

[5] Raegener v. Equitable Mutual Fire Ins. Corp. 60 N. Y. Supp. 478, 44 App. Div. 41.

[6] Hone v. Mutual Safety Ins. Co. 1 Sand. (N. Y.) 137, 2 N. Y. (2 Comst.) 235.

[7] Jackson v. St. Paul Fire & Marine Ins. Co. 99 N. Y. 124, 1 N. E. 539. See Norwood, Ex parte, 3 Biss. (U. S. C. C.) 504, Fed. Cas. No. 10,364.

[8] Yonkers & New York Fire Ins. Co. v. Hoffman Fire Ins. Co. 6 Rob. (N. Y.) 316.

[9] Alemannia Fire Ins. Co. v. Firemens' Ins. Co. 209 U. S. 326, 52 L. ed. 815, 28 Sup. Ct. 544, 14 Am. & Eng. Ann. Cas. 948, 37 Ins. L. J. 316; Providence-Washington Fire Ins. Co. v. Atlanta-Birmingham Fire Ins. Co. (U. S. C. C.) 166 Fed. 548, 38 Ins. L. J. 461; Norwood, Ex parte, 3 Biss. (U. S. C. C.) 504, Fed. Cas. No. 10364; Eagle Ins. Co. v. Lafayette Ins. Co. 9 Ind. 443; Gantt v. American Central Ins. Co. 68 Mo. 503; Hone v. Mutual Safety Ins. Co. 1 Sand. (N. Y.) 137; 2 N. Y. (2 Comst.) 235; Blackstone v. Alemannia Fire Ins. Co. 4 Daly (N. Y.) 299; Philadelphia Trust, Safe & Deposit Ins. Co. v. Fame Ins. Co. 9 Phila. (Pa.) 292.

[10] Mason v. Cronk, 125 N. Y. 496, 28 N. E. 224, 35 N. Y. 859.

[11] Ewing v. Coffman, 12 Lea (80 Tenn.) 79.

in Chicago, and reinsured with another company which afterward became bankrupt, and the reinsured went into insolvency and a receiver was appointed by a New York court, it was held that such receiver might prove the debt against a bankrupt in the United States court.[12] Where the defendant reinsured all its risks and had a large sum of money in the treasury, being the proceeds of cash payments by the then present and also by the past policy holders, and the interest on the investments thereof, which sum had been of about the same amount for several years, it was held that all the policy holders who contributed to such surplus were entitled to a proportion thereof according to the amount of their respective payments, whether they continued to be policy holders at the period of distribution or not.[13] Where an insurance company sells out its business to another company, and in consideration thereof the latter reinsured the former company's risks, and agreed to pay, satisfy, and discharge the losses, this is a mere contract of reinsurance, and there is sufficient privity between a policy holder and the vendee company to enable the former to maintain an action against the latter for a loss.[14] And it is held that it is a breach of contract which constitutes a cause of action where a company transfers and assigns to a reinsuring company all its assets including its legal reserve on life policies.[15] The deposit required under the Missouri statute of a life insurance company is a trust fund for the benefit of the policy holders of the company making such deposit, and where notes are made to take the place of this fund by a company which has assumed the policies of the original company, these notes are held upon the same trust as the funds they were intended to replace.[16] The fact that the policy holders of the reinsured company have paid premiums to the reinsuring company does not deprive them of the remedy against the trust fund, nor does the fact that the reinsuring company has paid many policies of the reinsured company discharge the trust.[17] In Glen v. Hope Mutual Life Insurance Company [18] the insurer reinsured the life of one of its policy holders in two other companies for ten thousand dollars, the original insurance being for fifteen thousand dollars. Subsequently a third company reinsured all the outstanding policies of the original insurer, and

[12] Norwood, Ex parte, 3 Biss. (U. S. C. C.) 504, Fed. Cas. No. 10364.

[13] Smith v. Hunterdon County Mutual Fire Ins. Co. 41 N. J. Eq. 473, 4 Atl. 652.

[14] Johannes v. Phœnix Ins. Co. 66 Wis. 50, 57 Am. Rep. 249.

[15] Wolfe v. Washington Life Ins. Co. 63 Misc. 571, 118 N. Y. Supp. 599. See § 112b herein.

[16] Relfe v. Columbia Life Ins. Co. 10 Mo. App. 150. See §§ 112b, 134a, 136b herein.

[17] Relfe v. Columbia Life Ins. Co. 10 Mo. App. 150.

[18] 56 N. Y. 379.

thereafter the insured died. In an action upon the policies it was decided that the last reinsurer was liable directly to the policy holders, notwithstanding its agreement to indemnify the original insurer against losses. It was also held that said last reinsurer was liable to the policy holders for the whole amount reinsured, although arbitrators acting between such reinsurer and the original insurer alone, the policy holders not being parties thereto, had rendered a decision limiting such liability to five thousand dollars.

§ 135a. Same subject.—The original insurer by instituting an action against the reinsurer adopts only such a reinsurance contract as the law authorizes.[19]

If an insurance company covenants with another to make as prompt adjustments and payments of loss under any and all of the latter's policies as it would under its own policies if issued direct to said assurer the reinsuring company is directly liable to insured.[20] So where an original insurer sells its business and good will to another person, and the latter, in consideration thereof, reinsures the risks of the first insurer, and contracts to pay losses under its outstanding policies, the reinsurer becomes liable to the originally insured policy holders. And if in reinsuring risks for which policies are outstanding, the reinsurer contracts with the reinsured to assume the policies and to pay the holders thereof all such sums as the reinsured may become liable to pay, the original policy-holders suffering loss may recover from the reinsurer directly, although not named in the contract.[1] A policy holder in a reinsured company may also sue a reinsurer direct to recover a loss under his policy without first suing the reinsured, although he is not a party to or in privity with the reinsurance agreement under which the reinsured company was not to be paid for losses except upon duly proven claims in a suit against it, which the reinsurer agreed to defend.[2] Again, the original insured may have the same rights and the reinsurer may be obligated to the same extent as under the original contract where a statute fixes said rights and obligations as a part of the reinsurance agreement.[3] And where the reinsurer and orig-

[19] Federal Life Ins. Co. v. Kerr, (1908) — Ind. App. —, 82 N. E. 943, 85 N. E. 796, aff'd 173 Ind. 613, 89 N. E. 398, 91 N. E. 230.

[20] Whitney v. American Ins. Co. — Cal. —, 56 Pac. 50, 28 Ins. L. J. 254, aff'd 127 Cal. 464, 59 Pac. 897, Cal. Civ. Code, §§ 2646 et seq.

[1] Ruohs v. Traders' Fire Ins. Co. 111 Tenn. 405, 102 Am. St. Rep. 790, 78 S. W. 85.

[2] Shoaf v. Palatine Ins. Co. 127 N. Car. 308, 37 S. E. 451, 80 Am. St. Rep. 798, 30 Ins. L. J. 276. First time this question before this court.

[3] Federal Life Ins. Co. v. Risinger, 46 Ind. App. 146, 91 N. E. 533, Burns' Ann. Stat. Ind. 1908, sec. 4753.

inal insurer are the same a suit may be brought upon proper allegations setting forth the fact.[4] So holders of policies outstanding at the time of the transfer of assets and who were entitled to certain payments by the original insurer, may join in a bill for enforcement of a trust against the transferee of said assets.[5]

But an original assured is estopped where he fails to assert his original contract rights but accepts conditions expressly incorporated in an agreement under which one company absorbs and reinsures another company.[6]

Under a Mississippi decision a policy holder cannot sue on a strict contract of reinsurance.[7] Nor can the insured sue the reinsurer under a code provision which only permits the party in whom the legal interest is vested to sue the party who made the contract in person or by agent.[8]

§ 135b. Same subject: mutual benefit societies, etc.—If an insurance certificate is surrendered and another is issued in its place and stead any claim which can be enforced must be against the company issuing the last certificate and the former company which issued the first certificate is relieved of all obligation thereunder.[9] If an insurance company enters into a contract by which it agrees to transfer its membership to another company, and the latter agrees to take such members and reinsure them on the basis of their original applications in the former company, on the execution of satisfactory transfer applications, and a member of the former company sends a check for a premium due, and fills out a transfer application, in which he states that he has recently recovered from an attack of pneumonia, but that his health is then fair, the latter company has no right to return his check and reject his application on the ground that it "is not satisfactory on account of physical condition and age," nor to insist that the applicant submit to a medical examination, and his failure to pay a subsequent premium when it falls due does not forfeit the right to recover on the policy.[10] So where an association in addition to assuming all the liabilities on certificates of membership of another society in consideration of

[4] Smith v. Bankers' Union of Chicago, 144 Ill. App. 384.

[5] Watson v. National Life & Trust Co. (U. S. C. C.) 162 Fed. 87.

[6] Davitt v. National Life Assoc. 56 N. Y. Supp. 839, 36 App. Div. 632.

[7] Moseley v. Liverpool & London & Globe Ins. Co. 104 Miss. 326, 61 So. 428. See also Hoffman v. North British & Mercantile Ins. Co. 35 Misc. 40, 70 N. Y. Supp. 106.

[8] North British & Mercantile Ins. Co. v. Speer, 7 Ga. App. 330, 66 N. E. 815, Ga. Civ. Code, 1895, sec. 4939.

[9] Gallenbeck v. Northwestern Mutual Benefit Assoc. 84 Minn. 184, 87 N. W. 614.

[10] National Mutual Ins. Co. v. Howe Benefit Soc. 181 Pa. St. 443, 59 Am. St. Rep. 666.

a transfer of its assets and good will, specifically assumes liability upon a certain certificate it is a direct contract of reinsurance measuring the reinsurer's liability thereon to the certificate holder from the date of the reinsuring agreement.[11]

Where a mutual insurance company on the assessment plan reinsures in another like company, and the performance of their contracts does not depend upon each other but the contracts are independent, if a loss occurs which is covered by both policies, suits can be instituted at once upon both policies by the holders thereof, unless otherwise provided by the policies.[12]

§ 135c. **Same subject: Lloyds.**—A contract of reinsurance with a Lloyds association as the reinsured is not one with the individual members so as to enable one of them to sue thereon for his proportionate share of the loss even though each of them is liable only for his proportionate share of losses sustained on policies issued by the association.[13]

§ 136. **Reinsurance: recovery: evidence.**—If it appears that no liability has attached against the insurer under the original contract, there can be no recovery against the reinsurer, for nothing exists upon which to base an indemnity,[14] and if the claim of the insured is paid it must have been a valid one to warrant a recovery from the reinsurer.[15] It must also appear that the insurer has an insurable interest, although this is evidenced by the fact that he is a reinsurer of the original insured; he must also prove his loss and the amount the same as the original insured must have proved it against him;[16] and proof of a judgment against the insurer upon the original contract, in defense of which the reinsurer engaged, is sufficient evidence of the insurable interest of the insurer, and a sufficient proof of the loss.[17] An order for the production on oath of ship's papers will be granted in an action on a marine policy of reinsurance by a reinsured underwriter against the reinsurer.[18]

When a reinsurer has agreed to pay the amount stipulated in the original certificate the beneficiary cannot recover the amount speci-

[11] Cosmopolitan Life Ins. Assoc. v. Koegel, 104 Va. 619, 52 So. 166. See § 131b herein.

[12] Cass County v. Mercantile Town Mutual Ins. Co. 188 Mo. 1, 86 S. W. 237, 34 Ins. L. J. 435.

[13] Thompson v. Colonial Assur. Co. 70 N. Y. Supp. 85, 60 App. Div. 325, aff'g 68 N. Y. Supp. 143, 33 Misc. 37.

[14] Eagle Ins. Co. v. Lafayette Ins. Co. 9 Ind. 443.

[15] Yonkers & New York Fire Ins. Co. v. Hoffman Ins. Co. 6 Rob. (N. Y.) 316.

[16] Yonkers & New York Fire Ins. Co. v. Hoffman Ins. Co. 6 Rob. (N. Y.) 316.

[17] Ocean Ins. Co. v. Sun. Mut. Ins. Co. 15 Blatchf. (U. S. C. C.) 249, Fed. Cas. No. 10408.

[18] China Traders' Ins. Co. v. Royal Exchange Assur. Corp. 67 Law J. Q. B. 736 [1898] 2 Q. B. 187, 78 Law T. N. S. 783, 46 Wkly. Rep. 497, 8 Asp. 409.

fied in a rider attached to such certificate.[19] In a New Jersey case the defendant, a life insurance company, agreed in writing with the plaintiff, another life company, to pay the plaintiff, in consideration of a specified premium, a certain sum of money upon proof that a named person, who was originally insured in the latter's company should have died on or before a certain future date, a later date was fixed by a supplementary written agreement. The plaintiff sued on the agreements, alleging the death of said insured before said date, proof thereof to defendant, and payment by the plaintiff of the amount of the insurance on said life. It did not appear from the declaration what this amount was. The general issue was pleaded and also specifically in bar of the action, that the defendant was a New Jersey corporation, and that the agreements were contracts of reinsurance and were invalid, because not made in conformity with the statutory requirements. A demurrer was overruled and judgment rendered in favor of the defendant on which record error was assigned. It was held that there was no error.[20]

If there is a second reinsurance of fire risks, and a loss covered by one of the original policies, and a suit by the insured against the reinsurer, of which the second reinsurer is not notified, in which the reinsurer is successful; and a subsequent suit by the original insurer, after paying the loss, against the reinsurer of which the second reinsurer is notified, in which the reinsurer is defeated,—in a suit by the reinsurer on the second reinsurance policy a recovery may be had against the second reinsurer for the costs incurred by the reinsurer in the second suit against him, but not for those incurred in the first one.[1]

§ 136a. Same subject: mutual benefit societies, etc.: fraud of directors.—If a reinsurer association expressly agrees to pay the full benefit provided for in the certificate at death less amounts previously paid for disability benefits, and unpaid assessments, whether such benefit is provided for under its laws or not, it cannot claim the benefit of its by-law reducing benefits where the original contract of insurance neither contained nor was subject to such a by-law; nothing can be deducted except amounts previously paid for disability etc., and none such amounts were shown.[2] Under an Iowa decision if the directors of a mutual benefit insurance company dissolve the corporation by consolidating it with another, and attempt to turn

[19] Hatcher v. National Annuity Assoc. 153 Mo. App. 538, 134 S. W. 1.

[20] Iowa Life Ins. Co. v. Eastern Mutual Life Ins. Co. 64 N. J. L. 340, 45 Atl. 762, 29 Ins. L. J. 299.

[1] Faneuil Hall Ins. Co. v. Liverpool & L. & G. Ins. Co. 153 Mass. 63, 26 N. E. 244, 10 L.R.A. 423.

[2] National Annuity Ins. Assoc. v. Carter, 96 Ark. 495, 132 S. W. 633, 40 Ins. L. J. 205.

over the insurance to such other company; and such company refuses to issue to a policy holder a new policy in lieu of the one held by him, on the ground that he has contracted a certain disease,—such policy holder may maintain an action for fraud against the directors of the former corporation, and may recover from them the amount which he has paid into the company. And he is not estopped by his application to the consolidating company, as such application does not amount to a ratification of the consolidation.[3] A member of an accident company which has reinsured its business is not obliged, where he has not so agreed, to show in an action on his policy, that he has complied with the constitution and by-laws of the reinsuring company, even though compliance with the reinsured's constitution and by-laws was a condition precedent to assured's right to participate in its benefit fund.[4]

§ 136b. Same subject: recovery of statutory deposits.—The reinsurer is entitled to deposits made with the state treasurer by the reinsured company under mistake that the law required such deposits, where there is nothing in the contract of reinsurance requiring the reinsurer to maintain the same, and a decree winding up the affairs of the reinsured, and which embodied the reinsurance contract, granted the reinsurer all securities and property of the reinsured with authority to sue for possession thereof. And the fact that the reinsurer stated in letters to each policy holder that the deposits would be maintained does not estop it from recovering them where the state department held them unlawfully.[5] In an English case it appeared that in 1904 the Popular Life Assurance Company was incorporated and made the statutory deposit of £20,000. They did not accumulate out of premiums any life assurance fund, and in 1906 they agreed to sell their business and assets to the United Provident Assurance Company in consideration of shares in that company. The vendor company passed resolutions for a voluntary winding-up, and their property and policies had been transferred, the shares allotted, all claims on the vendor company discharged, and the company itself dissolved. The purchasing company now petitioned for the payment out of court to them of the £20,000 deposited by the vendor company. It was held that, although the

[3] Grayson v. Willoughby, 78 Iowa, 83, 4 L.R.A. 365n, 42 N. W. 591.

[4] Young v. Railway Mail Assoc. 126 Mo. App. 325, 103 S. W. 557.

[5] Illinois Life Ins. Co. v. Tully, 174 Fed. 355, 98 C. C. A. 259, Kan. Laws 1901, sec. 3424, ins. act, 1879 (Kan. Laws 1879, c. 115, p. 225, amending Laws 1871, c. 93), Kan. Laws 1903, p. 511, c. 320, sec. 3; Kan. Const. art. 12, sec. 1.

When foreign company entitled to withdraw funds on deposit where it reinsures domestic company, see Prewitt v. Illinois Life Ins. Co. 29 Ky. L. Rep. 447, 93 S. W. 633, 35 Ins. L. J. 688. See §§ 112b, 134a, 135 herein.

vendor company had not accumulated a life assurance fund, yet, inasmuch as their obligations had come to an end on dissolution, the deposit ought to be paid out to the petitioners as their assignees.[6]

§ 136c. Reinsurance: recovery induced by fraud: subrogation: deduction of expenses of recovery.—The right of the reinsurer to subrogation where the reinsured recovers damages over the insurer appears under the following facts. The plaintiffs gave the defendants an open cover slip by which they undertook to reinsure the defendants to the extent of one-half their interest up to £1,000 on certain shipments of lumber. Pursuant to the cover slip, the plaintiffs reinsured the defendants by two policies respectively on interests by two vessels. Under the policies the defendants claimed and were paid by the plaintiffs sums amounting to £1.354 4s. 10d. The defendants subsequently recovered from the shipowners damages by reason of having been induced to pay losses on the two vessels by fraudulent misrepresentations of an official in their employment. The measure of the damages so recovered by the defendants was the sum which upon inquiry appeared to flow from the liability of the defendants as insurers in respect of the two vessels, and included the £1,354 4s. 10d. The plaintiffs then sued the defendants for the repayment of the £1,354 4s. 10d. as money received by them to the use of the plaintiffs. Held, (1) That the plaintiffs were entitled upon principles laid down in prior cases, to recover the £1,354 4s. 10d. upon the ground that the money was obtained by the defendants by enforcing a right which diminished the defendants' loss, and that therefore the doctrine of subrogation applied; (2) that the

[6] Popular Life Ins. Co. Ltd., In re (Syl.) [1909] 1 Ch. Div. Law Rep. 80, (Life Assur. Co.'s act, 1870 [33 & 34 Vict. 61] sec. 3) dist'g Scottish Economic Life Assur. Soc. [1890] 45 Ch. Div. 220. The court, per Warrington, J., said: "Under these circumstances the question is, what is the proper thing to be done? In the first place the mere payment of the premiums by the policy holders does not, in accordance with the provisions of the act of 1872, amount to a release of the liability of the Popular Life Assurance Company, but it seems to me that in this case, no claim having been made in the winding up by any policy holder, the winding up having resulted in the dissolution, and there, therefore, being no such body in existence as the original contracting party, all contracts to which that body was a party must of necessity have come to an end, not merely by the action of the creditors in not making a claim, but by the fact that through no such claim having been made the statutory provision has taken effect and the obligor has ceased to exist. It seems to read, therefore, that, so far as that is concerned, the position of the policy holders is exactly the same as if they had released the Popular Life Assurance Company from their obligation, and not merely as if the United Provident Assurance Company had made itself liable to them."

defendants were entitled to deduct from the £1,354 4s. 10d. the reasonable expenses of recovering that sum from the owners.[7]

§ 137. Reinsurer bound by judgment: notice to defend.—The insurer may, before proceeding against the reinsurer, contest the right of the insured to recover on the original contract, and in such cases, if the reinsurer is notified and it refuses or neglects to defend, it is bound by the judgment against the insurer and is liable for the reasonable and necessary expenses and costs incurred bona fide in such defense,[8] although the reinsurer is not a party of record,[9] especially where such suit was defended by the advice and for the benefit of the reinsurer.[10] So it is liable for the costs and expenses incurred bona fide and paid to the insured after notice to it to defend.[11] In Gantt v. American Central Insurance Company,[12] an agreement was made with the reinsurers by the insurer under which the latter was to employ counsel and defend a suit of the insured, and, in case of a successful defense, the reinsurers were to pay pro rata the counsel fees and costs. If unsuccessful, then to pay its pro rata of the judgment, counsel fees and costs. Pending suit a compromise was effected with the insured without the reinsurer's consent, whereby the insured was paid a certain amount of cash and the policies of reinsurance were to be assigned to him in case of judgment in his favor, and he was to enter satisfaction of the judgments on receiving the assignments. The right of the insurer to continue the suit was reserved, but the money paid the insured was to be retained whether the suit should be lost or won. The insured obtained judgment. The policies were assigned to him and satisfaction was entered of the judgment. Although the reinsurers knew of this agreement, they did not defend nor prevent the insurer's doing so. An action was brought by a trustee of the insured upon the assigned policies. The court decided that the insurer was the agent of the reinsurers to conduct the defense, but that the reinsurers were not prevented from also coming in and defending for themselves; that the insurer had the right to compromise as it did, and the authority to continue

[7] Assicurazioni Generali De Trieste v. Empress Assur. Corp. Ltd. [1907] 2 K. B. Law R. 814 (Syl. for greater part.)

[8] New York State Marine Ins. Co. v. Protection Ins. Co. 1 Story (U. S. C. C.) 458, Fed. Cas. No. 10216; Strong v. Phœnix Ins. Co. 62 Mo. 289, 21 Am. Rep. 417; New York Central Ins. Co. v. National Protection Ins. Co. 20 Barb. (N. Y.) 468; Hastie v. De Peyster, 3 Caines (N. Y.) 190b; Hone v. Mutual Safety Ins. Co. 1 Sand. (N. Y.) 148.

[9] Strong v. Phœnix Ins. Co. 62 Mo. 289, 21 Am. Rep. 417.

[10] Strong v. Phœnix Ins. Co. 62 Mo. 289, 21 Am. Rep. 417.

[11] New York State Marine Ins. Co. v. National Protection Ins. Co. 1 Story (U. S. C. C.) 458, Fed. Cas. No. 10216.

[12] 68 Mo. 503.

the suit thereafter; that the reinsurers' neglect to defend must be considered as an acquiescence on their part to the defense made by the insurer, and that the reinsurers, in the absence of a showing of a lack of bona fides on the part of the insurer in defending were liable.

§ 138. Defenses available to reinsurer.—Inasmuch as the reinsurer is only liable for the amount for which the insurer is legally liable,[13] the former may avail himself of every defense which could have been made by the insurer. This rule is well settled.[14] So the reinsurer may defend on the ground that the loss was partial and obtain the benefit thereof notwithstanding the insurer has paid a total loss.[15] But the reinsurer cannot avail himself of defenses which did not exist in favor of the reinsured.[16] And policies incontestable when reinsurance is taken out are incontestable by the reinsurer.[17] If the insurer makes an assignment, and before the filing of a petition in bankruptcy the reinsurer purchases claims against the insurer for losses, such claims may be set up as counterclaims when covered by the reinsurance, otherwise not.[18] But where the insurer, without fraud or falsehood, makes an oral promissory representation before the policy issues, and it is not mentioned in the policy, the failure to comply therewith by the insurer does not constitute a defense.[19] A reinsurer who has accepted the benefits of a contract is estopped to deny liability on the ground that its contract is ultra vires even though a part of said contract is invalid, nor can he deny such parts thereof as are against his interests.[1]

[13] Delaware Ins. Co. v. Quaker City Ins. Co. 3 Grant Cas. (Pa.) 71. See cases next note.

[14] *United States.*—New York State Marine Ins. Co. v. National Prot. Ins. Co. 1 Story (U. S. C. C.) 458, Fed. Cas. No. 10216.

Indiana.—Eagle Ins. Co. v. Lafayette Ins. Co. 9 Ind. 443, 447.

Louisiana.—Merchants' Mut. Ins. Co. v. New Orleans Mutual Ins. Co. 24 La. Ann. 305.

New York.—Hastie v. De Peyster, 3 Caines (N. Y.) 190, *195.

Pennsylvania.—Delaware Ins. Co. v. Quaker City Ins. Co. 3 Grant Cas. (Pa.) 71.

See Hone v. Mutual Safety Ins. Co. 1 Sand. (N. Y.) 137; St. Nicholas Ins. Co. v. Merchants' Ins. Co. 11 Hun (N. Y.) 103. Washington Mutual Ins. Co. v. Merchants' & Manufacturers' Mutual Ins. Co. 5 Ohio St. 450.

[15] Merchants' Mutual Ins. Co. v. New Orleans Ins. Co. 24 La. Ann. 305.

[16] Federal Life Ins. Co. v. Kerr (1908) — Ind. App. —, 85 N. E. 796, s. c. 82 N. E. 943, s. c. 173 Ind. 613, 91 N. E. 230, 89 N. E. 398. See Brown v. Mutual Reserve Fund Life Assoc. 224 Ill. 576, 79 N. E. 949, rev'g 124 Ill. App. 377.

[17] Federal Life Ins. Co. v. Petty, 177 Ind. 256, 97 N. E. 1011, Laws Ind. 1897, c. 194, sec. 15, Burns' Ann. Stat. 1908, sec. 4753.

[18] Cleveland Ins. Co. In re, 22 Fed. 200.

[19] Prudential Assur. Co. v. Ætna Life Ins. Co. 23 Fed. 438.

[1] Sage v. Finney, 156 Mo. App. 30, 135 S. W. 996. See §§ 115, 115b herein.

CHAPTER VI.

THE POLICY—ITS FORM AND REQUISITES—SUBSTANCE GENERALLY.

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§ 145. Policy defined.—A policy of insurance is the written or printed form to which the contract has been reduced, and which evidences the agreement or contract between the parties, and it may, as we have stated, be either a specialty or simple contract.[2]

[2] "Policy" covers any contract or agreement for sea insurance under the stamp act: 30 Viet. c. 23, sec. 4. Definitions under stamp act, England, of policy of insurance; "policy of sea-insurance;" "a contract of sea-insurance." See 1 Arnould on Marine Ins. (8th ed. Hart v. Simey) pp. 8, 9, sec. 7; Id. p. 45, sec. 31.

When "Open Cover" is "contract for sea insurance under stamp act 1891 (54 & 55 Viet. c. 39) sec. 93, subsec. 1, but held invalid as such policy under subsec. 3. Home Marine Ins. Co. Ltd. v. Smith [1898] 2

§ 146. Certificates in mutual benefit societies or associations.—In mutual benefit companies or associations whose legal status is that of mutual insurance companies, and which issue certificates of membership, such certificates are in effect insurance policies and the measure, to a certain extent, of the rights of the parties,[3] although they may not be strictly policies,[4] especially in regard to the

Q. B. D. Law R. 351, 67 L. J. Q. B. N. S. 777, 78 Law T. Rep. 734, aff'g [1898] 1 Q. B. 829, 78 Law T. R. 465, 67 L. J. Q. B. N. S. 554.

"The instrument in which the contract of marine insurance is generally embodied is called a policy" (marine insurance). Earl of Halsbury's Laws of England, vol. 17, p. 336.

Anchor policy: Lloyds. "Strictly speaking, however, the term 'Lloyds policy' denotes a policy with the device of an anchor in the margin, encircled by the words: 'For signature by the underwriting members of Lloyds only.'" 1 Arnould on Marine Ins. (8th ed. Hart & Simey) p. 17, sec. 10.

"A policy is a contract in writing by which the insurer for a reasonable compensation, engages that certain property of the insured, specified in the policy, shall sustain no loss or damage from any of the perils enumerated in the contract between the parties." Ins. Co. of North America v. Jones, 2 Bin. (Pa.) 547, 561.

"Policy" will be construed as referring to the insurance contract providing for the payment to the beneficiary of a certain sum on the death of the insured. Schaeffer, In re (U. S. D. C.) 189 Fed. 187.

"The written instrument in which a contract of insurance is set forth is called a policy of insurance." Cal. Civ. Code, sec. 2586; Comp. Laws, Dak. 1887, secs. 4141, 4142; 1 Levisee's Dak. Codes, sec. 1517. Same definitions in Civ. Code Mont. (Rev. Codes Mont. 1907) sec. 5591 (sec. 3450); Rev. Codes N. Dak. 1899, sec. 4487; Rev. Codes S. Dak. 1903, sec. 1837, p. 808.

"Old line policy" defined. Knott v. Security Mutual Life Ins. Co. 161 Mo. App. 579, 144 S. W. 178.

Throughout the insurance laws and in insurance parlance the word "policy" is ordinarily used to indicate the contract of insurance upon which there is a fixed premium. Pennsylvania Life Ins. Co. of Phila. In re, 36 Pa. Co. Ct. 687 (opinion of atty. genl.). For other definitions see 6 Words & Phrases, pp. 5440–5442.

Fire policy after loss not an instrument for payment of money under N. Y. Code Civ. Proc. sec. 649, subdiv. 2, providing for levy upon such an instrument since the obligation of insurer is conditioned upon proofs of loss being submitted. But levy was held valid. Trapagnier & Bros. Ltd. v. Rose, 46 N. Y. Supp. 397, 20 App. Div. 621, aff'd (mem.) 155 N. Y. 637, 49 N. E. 1105 (N. Y. C. A.)

[3] Chartrand v. Brace, 16 Col. 19, 25 Am. St. Rep. 235, 32 Cent. L. J. 410. Supreme Council Order of Chosen Friends v. Forsinger, 125 Ind. 52, 9 L.R.A. 501, 25 N. E. 129, 21 Am. St. Rep. 196; Elkhart Mutual Aid Benevolent & Relief Assoc. v. Houghton, 98 Ind. 149, 103 Ind. 286, 2 N. E. 763, 53 Am. Rep. 513. See Holland v. Taylor, 111 Ind. 125, 12 N. E. 116; National Ben. Assn. v. Bowman, 110 Ind. 357, 11 N. E. 316; Bolton v. Bolton, 73 Me. 299; Knights of Honor v. Nairn, 60 Mich. 44, 26 N. W. 826; State v. Farmers' & Mechanics' Mut. Ben. Association, 18 Neb. 276, 281, 25 N. W. 81. 1 Bacon on Benefit Societies and Life Ins. (2d ed.) sec. 304.

On whether benefit association is an insurance company, see note in 38 L.R.A. 33.

[4] *Alabama.*—Supreme Commandery Knights of the Golden Rule v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332.

right to change beneficiaries and as regards assignment.[5] Again, a "certificate of membership" refers only to the contract between a mutual company or a beneficial association and its members. It differs from a "policy" in that the latter indicates a contract based upon a fixed premium and does not indicate a certificate of membership or a contract with a member of a beneficial association or mutual insurance company.[6] But under a Georgia decision if a certain sum of money is payable on the death of a member of an association who agrees to pay a fixed sum at fixed periods the contract is a life insurance policy irrespective of its designation and not merely a certificate of membership.[7]

Again, as said by Mr. Niblack, they are only a part of the written evidence of the contract, the charter, constitution, and by-laws in

Illinois.—Martin v. Stubbings, 126 Ill. 387, 403, 18 N. E. 657, 9 Am. St. Rep. 625.

Kansas.—State v. Vigilant Ins. Co. 30 Kan. 585, 587, 588, 2 Pac. 840.

Kentucky.—Sherman v. Commonwealth, 82 Ky. 102.

Massachusetts.—Commonwealth v. Weatherbee, 105 Mass. 160.

Missouri.—State v. Merchants' Exchange Mutual Benevolent Soc. 72 Mo. 160.

Nebraska.—State v. Farmers' & Mechanics' Mutual Benefit Assoc. 18 Neb. 276.

As to distinction between certificate and policy, see notes 5 L.R.A. 98, 12 Id. 210.

The application and certificate constitute the contract: Supreme Lodge New England Order of Protection v. Hine, 82 Conn. 315, 73 Atl. 791; Redmond v. Industrial Ben. Assn. 78 Hun (N. Y.) 104, 60 N. Y. 531, 28 N. Y. Supp. 1075; *citing* Hutchinson v. Supreme Tent Knights of Maccabees of The World, 68 Hun (N. Y.) 355; Smith v. Brown, 75 Hun, 231, 27 N. Y. Supp. 11.

When not a policy: The certificate of membership of a beneficial association is not an insurance policy within the meaning of an act providing for the attachment of application to policy, otherwise that it shall not be admitted in evidence: Lithgow v. Supreme Tent Knights of Maccabees of the World, 165 Pa. St. 292, 30 Atl. 830 (under act Pa. May 11, 1881, No. 23, P. L. 20).

[5] Freund v. Freund, 218 Ill. 189, 109 Am. St. Rep. 283, 75 N. E. 925; Holland v. Taylor, 111 Ind. 125, 12 N. E. 116; Nye v. Grand Lodge Ancient Order U. W. 9 Ind. App. 148, 36 N. E. 429, per Lotz, J., who says: "For many purposes such associations as the appellee, the A. O. U. W., are insurance companies, and the certificate issued by them is governed by the same rules applicable to insurance policies. There are, however, essential differences between them; the most usual is the power on the part of the assured in such associations to change the beneficiary:" Where charter, etc. against such right. See chapter on Beneficiaries §§ 727 et seq. herein; Niblack's Mutual Benefit Societies and Accident Ins. (ed. 1888) 199, sec. 166a; Id. 2d ed. secs. 136 et seq., 165 et seq. 211 et seq.; 1 Bacon's Benefit Societies and Life Ins. (2d ed.) sec. 304.

[6] Pennsylvania Mutual Life Ins. Co. of Phila. In re, 36 Pa. Co. Ct. Rep. 687 (opinion of atty. genl.).

[7] Cosmopolitan Life Ins. Co. v. Koegel, 104 Va. 619, 52 S. E. 166, Va. Code, sec. 3251, Va. Code 1904, p. 1178, sec. 2415a, acts 1897, 1898, p. 734, c. 688.

force at the time of the member's admission, being a part of the contract, while a policy should express the entire contract.[8] It has been held that, under certain requirements of the charter and by-laws of a mutual benefit society relating to beneficiaries, the issuing of a certificate of membership was not a condition precedent to the right to recover the benefit fund, and that such certificate was only necessary where the money was to be paid as directed by a member to some person or body other than the family, heirs, or legal representatives of the deceased member.[9] It is decided, however, that such certificate of membership issued by an insurance benefit society is a contract, and can be changed only by and with the consent of both parties.[10] But a certificate of a benefit society, such as the Ancient Order of United Workmen, is, like a policy of insurance, evidence of a property right.[11] So a certificate in a fraternal benefit association constitutes the measure of the rights of the parties as it also does of the contract rights of the named beneficiaries.[12] And in making a prima facie case for recovery upon a benefit certificate, the action is to be treated as founded on so much of the contract as is set forth in the policy.[13]

When the company is one that issues certificates, these together with the charter or articles of association and the by-laws or rules of the organization, and the general laws of the state, constitute the contract;[14] but the certificate may show that certain by-laws have been waived, or that they are inconsistent with its terms, or they may not be annexed thereto as required by certain statutes,[15] all of which factors are important in considering what weight should be given to the certificate as evidence in controlling the construction of the contract, and such contracts are, therefore, subject to the rules of law governing insurance policies in like cases, except so far

[8] Niblack's Benefit Societies and Accident Ins. (2d ed.) p. 271, sec. 136.

[9] Bishop v. Grand Lodge of Empire Order of Mutual Aid, 112 N. Y. 627, 20 N. E. 562, reversing 43 Hun (N. Y.) 472.

[10] Russ v. Supreme Council American Legion of Honor, 110 La. 588, 98 Am. St. Rep. 469, 34 So. 697. See also Supreme Council of the Order of Chosen Friends v. Forsinger, 125 Ind. 52, 21 Am. St. Rep. 196, 9 L.R.A. 501, 25 N. E. 129.

[11] Grimbley v. Harrold, 125 Cal. 24, 73 Am. St. Rep. 19, 57 Pac. 558.

[12] Mund v. Rehaume, 51 Col. 129, Ann. Cas. 1913A, 1243, 117 Pac. 159.

[13] O'Connell v. Supreme Conclave Knights of Damon, 102 Ga. 143, 6 Am. St. Rep. 159, 28 S. E. 282.

[14] See §§ 186, 191, herein; King v. Wynema Council No. 10, Daughters of Pocahontas, etc. 25 Del. (2 Boyce's) 255, 78 Atl. 845; Downes v. Knights of Columbus, 76 N. H. 165, 80 Atl. 227; Haywood v. Grand Lodge of Texas K. P. — Tex. Civ. App. —, 138 S. W. 1194.

[15] §§ 186–188 herein.

as these rules must be held to be modified by the peculiar organization, objects, and policy of such societies or companies.[16]

In certain mutual benefit or fraternal societies, however, no certificate is required to be issued. In such case the charter, constitution, and by-laws must be looked to to determine the contract, both in relation to the member himself and the beneficiary.[17]

§ 147. Division and kinds of policies.—Policies are divided with reference to (1) insurable interest, (2) the amount, and (3) duration. Insurable interest covers wager and interest policies. The amount covers open and value policies. Open policies are sometimes known as floating or blanket policies. Duration covers time and voyage policies. There is also a class of policies known as "mixed policies," which may relate to the amount, as where the policy is partly open and partly valued; or to the duration, as where the policy sets out the termini but limits the risk by time. There are also many other kinds of policies, or, rather, plans of insurance, such as endowment, tontine, semi-tontine, etc. These will be considered hereafter, however, under the sections relating to the terms and stipulations in the policy, so far as there are decisions bearing thereon.

§ 148. Wager policies.—Wager policies are those in which the insured has no interest whatever in the subject matter insured, but only an interest in its loss or destruction.[18] This contract is an in-

[16] Martin v. Stubbings, 126 Ill. 387, 403, 9 Am. St. Rep. 625, 18 N. E. 657; Elkhart Mutual Aid Benevolent & Relief Assoc. v. Houghton, 98 Ind. 149.

See, as to change of beneficiary, Miner v. Michigan Mutual Benefit Assn. 63 Mich. 338, 29 N. W. 852; Titsworth v. Titsworth, 40 Kan. 571, 20 Pac. 213; Union Mut. Assn. v. Montgomery, 70 Mich. 587, 14 Am. St. Rep. 519, 38 N. W. 588, and note, 526, 527.

[17] Baldwin v. Golden Star Fraternity, 47 N. J. L. 111, 112. See Tyrell v. Washburn, 6 Allen (88 Mass.) 466, 468; Bishop v. Grand Lodge of Empire Order of Mutual Aid, 112 N. Y. 627, 20 N. E. 562, reversing 43 Hun (N. Y.) 472.

[18] Connecticut Mutual Life Ins. Co. v. Schaefer, 94 U. S. 457, 460, 24 L. ed. 291.

See also the following cases:

United States.—Warnock v. Davis, 104 U. S. 775, 26 L. ed. 924; Ætna Life Ins. Co. v. France, 94 U. S. 561, 24 L. ed. 287; Cammack v. Lewis, 15 Wall. (82 U. S.) 643, 21 L. ed. 244; Gordon v. Ware National Bk. 132 Fed. 444, 65 C. C. A. 580, 67 L.R.A. 550; Langdon v. Union Mutual Life Ins. Co. 14 Fed. 272, 274.

Georgia.—West v. Sanders, 104 Ga. 727, 31 S. E. 619.

Illinois.—Cisna v. Shelbley, 58 Ill. App. 385.

Indiana.—American Mutual Life Ins. Co. v. Bertram, 163 Ind. 51, 64 L.R.A. 935, 70 N. E. 258; Davis v. Brown, 159 Ind. 644, 647, 65 N. E. 908; Prudential Insurance Co. of America v. Hunn, 21 Ind. App. 525, 69 Am. St. Rep. 380, 52 N. E. 772.

Kansas.—Metropolitan Life Ins. Co. v. Elison, 72 Kan. 199, 115 Am. St. Rep. 189, 3 L.R.A.(N.S.) 934, 83 Pac. 410.

Michigan.—Smith v. Pinch, 80 Mich. 332, 45 N. W. 183.

surance in name only.[19] It is speculative in its nature and does not deal with real values. The usual words in a wager policy are "interest or no interest," or "without further proof of interest than the policy," or "free of average without benefit of salvage to the assured," although these words are not conclusive in this country in determining whether or not the policy is a wager.[20] So where a

Missouri.—Whitmore v. Supreme Lodge Knights & Ladies of Honor, 100 Mo. 36, 35 S. W. 495.

North Carolina.—Hinton v. Mutual Reserve Fund Life Assoc. 135 N. Car. 314, 323, 65 L.R.A. 161, 165, 166, 102 Am. St. Rep. 545, 47 S. E. 474.

Wisconsin.—Sawyer v. Dodge County Mutual Ins. Co. 37 Wis. 538, 539.

See 17 Earl of Halsbury's Laws of Eng. pp. 377, 378. Wager policies; gambling act of 1774. See Id. pp. 514 et seq. See next following section herein.

When charge does not define wagering contract. McFarlane v. Robertson, 137 Ga. 132, 73 S. E. 490. For other definitions see 8 Words & Phrases pp. 7368–9.

An insurance against fire must be based on an interest in the property insured or it is void. Bennett v. Mutual Fire Ins. Co. 100 Md. 337, 60 Atl. 99.

"The term *Wager Policy* relates to the form of the instrument as well as to the nature of the contract." 1 Arnould on Marine Ins. (8th ed. Hart & Simey, 1909) sec. 311, p. 409.

As to the distinction between contracts of marine insurance and wagers it is said, 1 Arnould on Marine Ins. (8th ed. Hart & Simey) p. 7, sec. 6: "It appears that two things are mainly essential to every contract of marine insurance: 1. An interest in the subject-matter insured. 2. Exposure of that interest to risk of loss or detriment by sea perils. It is the necessity for these requisites which entirely distinguishes contract of marine insurance, properly so-called from mere wagers upon the issue of maritime adventures. Such maritime wagers although framed externally as policies of sea-assurance, and therefore called wager policies were . . . prohibited in this country nearly two centuries ago by a solemn act of the legislature, and in most other maritime states are either expressly forbidden or practically disused, and thus on the ground that it is plainly opposed to the true interests of a mercantile state to enable those who have no real stake in the safety of a maritime adventure to give themselves (by means of such a contract) a great interest in its loss or destruction." See also Id. pp. 409 et seq., secs. 311 et seq.

[19] Emerigon on Ins. (Meredith's ed. 1850) 4.

[20] A wager (or honor policy) may be defined as one in which the parties, by express terms, disclaim on the face of it, the intention of making a contract of indemnity. Such a policy is generally known by having one or other of the following clauses written on the face of it: 'Interest or no interest,' or 'This policy to be deemed sufficient proof of interest,' or any other terms which purport either to entitle the assured to recover against the underwriters a stipulated sum of money, whether he has any interest in the ship or cargo or not; or to bind the underwriter not to require any proof of the assured's interest other than the policy itself." (*Citing* judgment of Best, C. J., in Murphy v. Bell [1828] 4 Bing. 567–572, "A clause of this kind is usually called a 'p. p. i.' [policy proof of interest] clause, and the policy containing it is also known as a 'p. p. i.' policy"). "As, moreover, in these cases there is nothing actually at risk which can be sea-

policy was underwritten for ten thousand dollars on profits on merchandise on board a brig from C. to B., free of average and salvage, and the policy to be the only proof of interest required, it was held not a gaming policy, the insured having property on board and neither he nor the insurers intending a wager policy, but an interest policy,[1] it being declared in this case that both parties must intend to wager, and that if one party only intends a gaming policy, and procures the other to underwrite it as a policy on interest, the policy is void for fraud. The whole question depends upon whether the contract covers an actual insurable interest or is intended as an indemnity therefor, or whether it is a mere wager. For an insurance made without such interest is void,[2] the presumption being in such case that the policy was taken out for the purpose of a wager or speculation;[3] although where for a premium of two and a half per cent A. agreed with B. to insure a negro slave, at the time reported to be lost while on board a boat, and B. had no interest in the negro, but his loss was proved as reported, he was held entitled to recover his value.[4] But precisely what interest is necessary to exist in order to make the policy not a wager has been much discussed. In that class of insurances where the contract is strictly one of indemnity, as in marine and like insurances, there is not so much difficulty as in life insurance or in accident insurance where the injury results in death, since in such cases the loss can seldom be measured by pecuniary values.[5] A wager policy may exist where the insured has an interest in the subject matter and still wagers respecting it.[6]

§ 149. Wager policies, valid at common law, now void.—It is well settled that wager policies and wagers which were not contrary to the policy of the law were valid contracts at common law.[7]

damaged or abandoned, such policies frequently also contain the clause, 'Free of all average, and without benefit of salvage." 1 Arnould on Marine Ins. (8th ed. Hart & Simey, 1909) sec. 311, p. 409. Interest or no interest. See article 40 L. T. 83; same art. 21 Ir. L. T. 313.

[1] Alsop v. Commercial Ins. Co. 1 Sum. (U. S. C. C.) 451, Fed. Cas. No. 262. See Hemminway v. Eaton, 13 Mass. 108; Glendinning v. Church, 3 Caines (N. Y.) 141, 144.

[2] Goddart v. Garrett, 2 Vern. 269. See Spare v. Home Mutual Ins. Co. 15 Fed. 707; Farmers' Ins. Co. v. Butler, 38 Ohio St. 128, 133.

[3] United Brethren Mutual Aid Soc. v. McDonald, 122 Pa. 324, 1 L.R.A. 238, 15 Atl. 439, 9 Am. St. Rep. 111, 1 L.R.A. 238.

[4] Shepherd v. Sawyer, 2 Murph. (6 N. C.) 26, 5 Am. Dec. 517.

[5] Connecticut Mutual Life Ins. Co. v. Schaefer, 94 U. S. 457, 460, 24 L. ed. 251, per Bradley, J.

[6] Kent v. Bird, 2 Cowp. 583. See Juhel v. Church, 2 Johns. Cas. (N. Y.) 333.

[7] Trenton Mutual Life & Fire Ins. Co. v. Johnson, 4 Zab. (24 N. J. L.) 576, 583; Buchanan v. Ocean Ins. Co. 6 Cow. (N. Y.) 331; Abbott v. Sebor, 3 Johns. Cas. (N. Y.) 39, 2 Am. Dec. 239; Juhel v. Church, 2 Johns. Cas. (N. Y.) 333, note b;

Although it is said that this doctrine had never been applied to fire insurance,[8] yet it has been held that such insurances were void as wager policies at the common law.[9] In 1746, however, the statute 19 George II., chapter 37, was enacted prohibiting this class of contracts in marine risks with certain exceptions, and a few years later, in 1774, the statute 14 George III., chapter 48, was passed prohibiting insurances upon lives by way of gaming or wagering.[10] Al-

Dalby v. India & London Life Assur. Co. 15 Com. B. 365, 386, 13 Eng. Rul. Cas. 383; Crauford v. Hunter, 8 Term. Rep. 23; Cousins v. Nantes, 3 Taunt. 522, 13 Eng. Rul. Cas. 342; Dean v. Dicker, 2 Str. *1250. See Allen v. Hearn, 1 Term Rep. 56, 12 Eng. Rul. Cas. 385; Atherton v. Beard, 2 Term Rep. 610; Roebuck v. Hammerton, Cowp. 737; Evans v. Jones, 5 Mees. & W. 77; Goddart v. Garrett, 2 Vern. 269; Bunyon on Life Assurance (2d ed.) 8 Arnould on Marine Ins. (8th ed. Hart & Simey) sec. 311, p. 410. Contra, Ruse v. Mutual Benefit Life Ins. Co. 23 N. Y. 516. See cases pro and con as to validity of wagers generally: 2 Parsons on Contract (7th ed.) 896, *755. See also notes 6 L.R.A. 137, 7 Id. 217, 12 Id. 409, 13 Id. 434; Articles in 43 L. J. 632–3, 699; 17 Bench & Bar, 43–48; 53 Sol. L. J. 209–10; 15 Case & Comment, 78–9; 100 L. T. 195, 213.

[8] Wood on Fire Ins. sec. 37, p. 94.

[9] Freeman v. Fulton Fire Ins. Co. 14 Abb. Pr. (N. Y.) 398. But see Juhel v. Church, 2 Johns. Cas. (N. Y.) 333, note b.

[10] The act 19 George II., chapter 37, provides that any assurance made on ships, "or on any goods, merchandises, or effects laden or to be laden on board of any such ship or ships, interest or no interest, or without further proof of interest than the policy or by way of gaming or wagering, or without benefit of salvage to the assurer," shall be void, excepting, however, assurance on private ships of war, assurances on effects from Spain and Portugal, etc. The act 14 George III., chapter 48, prohibits insurance "on the life or lives of any person or persons, or on any other event or events whatsoever wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made shall have no interest, or by way of gaming or wagering."

Act George II., c. 37, repealed by sec. 92 marine insurance act, sec. 4, which provides: (1) Every contract of marine insurance by way of gaming or wagering is void. (2) A contract of marine insurance is deemed to be a gaming or wagering contract —(a) Where the assured has not an insurable interest as defined by this act, and the contract is entered into with no expectation of acquiring such an interest; or (b) Where the policy is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term: Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer. 1 Arnould on Marine Ins. (8th ed. Hart & Simey, 1909) sec. 313, p. 412, considering the changes which this act effects, stating that wager policies are void in Ireland, considering the effect of no expectation of interest, also whether wager policies are void under the gaming act 1845 (8 & 9 Vict. c. 109), sec. 18 (although no underwriter had raised the question, and reviewing the cases." See also 17 Earl of Halsbury's Laws of England, secs. 746 et seq., pp. 377 et seq. where the above matters are considered, and it is also said: "A still

though there are statutes in some of the states against wagering contracts, and although wager policies were held valid in New York prior to the enactment of the statute in that state,[11] yet a wager insurance should be held void on general principles of public policy and morality, and the tendency of our courts has been against upholding these contracts,[12] and courts should not concern themselves

more modern statute, marine insurance (gambling policies) act 1909 (9 Edw. VII. c. 12) sec. 1, declares every contract of marine insurance effected by any person not having a *bona fide* interest or expectation of interest, and every such contract effected by any person, not being a part owner, in the employment of the owner" ("owner" includes charterer under sec. 1 [8] of the act) "of a ship, in relation to that ship in the terms above specified (marine insurance act 1906 [6 Edw. VII. c. 41], sec. 4 [2] [b]), to be a 'contract by way of gambling on loss by maritime perils;' and the person who effects it, and the broker through whom and the insurer with whom it is effected (if these persons act knowingly) are guilty of a criminal offense punishable on summary conviction." Id. sec. 747, pp. 377, 378. See 53 Sol. L. J. 464.

[11] See Buchanan v. Ocean Ins. Co. 6 Cow. (N. Y.) 318; Juhel v. Church, 2 Johns. Cas. (N. Y.) 333, note b. As to statutes affecting wagering policies see note 128 Am. St. Rep. 304, 305.

"Every stipulation in a policy of insurance for the payment of loss, whether the person insured has or has not any interest in the property insured, or that the policy shall be received as proof of such interest, and every policy executed by way of gaming or wagering, is void:" Cal. Civ. Code, sec. 2558.

Statutes 14 Geo. III. chap. 48, was never in force in Wisconsin, Hurd v. Doty, 86 Wis. 1, 21 L.R.A. 746, 56 N. W. 371.

[12] *United States.*—Crotty v. Union Mutual Life Ins. Co. 144 U. S. 621, 12 Sup. Ct. 749, 36 L. ed. 566; Connecticut Mutual Life Ins. Co. v. Schaefer, 94 U. S. 457, 460, 24 L. ed. 251; Gordon v. Ware National Bank, 132 Fed. 444, 65 C. C. A. 580, 67 L.R.A. 550; Kentucky Life & Accident Ins. Co. v. Hamilton, 63 Fed. 101, 11 C. C. A. 50, 22 U. S. App. 548.

Alabama.—White v. Equitable Nuptial Benefit Union Co. 76 Ala. 251, 52 Am. Rep. 325.

Maryland.—Bennett v. Mutual Fire Ins. Co. 100 Md. 337, 60 Atl. 99.

Massachusetts.—King v. State Mutual Fire Ins. Co. 7 Cush. (61 Mass.) 1, 10, 54 Am. Dec. 683.

Missouri.—Sage v. Finney, 156 Mo. App. 30, 135 S. W. 996.

New Hampshire.—Hoit v. Hodge, 6 N. H. 104, 105, 25 Am. Dec. 451.

New York.—Ruse v. Mutual Benefit Life Ins. Co. 23 N. Y. 422.

North Carolina.—Trinity College v. Travelers' Ins. Co. 113 N. C. 248, 22 L.R.A. 291, 18 S. E. 175, 23 Ins. L. J. 53, per Burwell, J.

Pennsylvania.—United Brethren Mutual Aid Soc. v. McDonald, 122 Pa. 324, 1 L.R.A. 238, 15 Atl. 439; Pritchett v. Insurance Co. of North America, 3 Yeates (Pa.) 461.

Texas.—Manhattan Life Ins. Co. v. Cohen (1911) — Tex. Civ. App. —, 139 S. W. 51, 40 Ins. L. J. 1685.

Vermont.—Callamer v. Day, 2 Vt. 144.

England.—Anctil v. Manufacturers Life Ins. Co. 68 L. J. P. C. 123 [1899] App. Cas. Law R. 604, 81 Law L. T. N. S. 279; Manufacturers Life Ins. Co. v. Anctil, 28 Can. S. C. 103.

See also 3 Kent's Comm. (13th ed.) 277; 1 Duer on Ins. (ed. 1845) 92. Emerigon, in his work on Insurance

with the disposition of the proceeds of wagering policies,[13] for the above reason and also on the ground already indicated, that the contract of insurance is intended only to protect an actual insurable interest, or to indemnify for an actual loss, and deals with real values, and is not intended to be speculative, and it is immaterial that the policy is taken in good faith and with full knowledge. The policy of the law does not admit of such insurance, although the parties may willingly contract therefor. The foundation of all insurances, unless of the wager kind, is the real value of the thing insured.[14]

§ 150. Wager policy: conflict of laws.—It is held in Pennsylvania that a wagering life policy cannot be enforced there, although valid in the state where it was signed and is to be paid.[15] And under

(Meredith's ed. 1850) c. i. see. 1, p. 4), writing of wager policies, declares that the reason of their not being more generally allowed to embrace the fortune of ships is, that "navigation has been viewed as a matter interesting the state. . . . It is not to be borne, therefore, that one should be placed in a situation to desire the loss of a vessel. The greediness of gain is capable of producing crimes which it is desirable to prevent. Hence the cause that in most commercial places wager insurances have been prohibited."

See note 128 Am. St. Rep. 304.

[13] Exchange Bank v. Loh, 104 Ga. 446, 44 L.R.A. 372, 31 S. E. 459, a case of insurance of life for creditor's benefit.

[14] See the following cases:

United States.—Connecticut Mutual Life Ins. Co. v. Schaefer, 94 U. S. 457, 460, 24 L. ed. 251; Snell v. Delaware Ins. Co. 1 Wash. (U. S. C. C.) 509, Fed. Cas. No. 13,137.

Massachusetts.—Mutual Life Ins. Co. v. Allen, 138 Mass. 24, 27, 52 Am. Rep. 246, 247; Stetson v. Massachusetts Mutual Fire Ins. Co. 4 Mass. 336, 337, 3 Am. Dec. 219, per Sewall, J.

Michigan.—Agricultural Ins. Co. v. Montague, 38 Mich. 548, 7 Ins. L. J. 708, 31 Am. Rep. 326.

New York.—Freeman v. Fulton Fire Ins. Co. 38 Barb. (N. Y.) 247, 14 Abb. Pr. (N. Y.) 398.

Ohio.—Farmers' Ins. Co. v. Butler, 38 Ohio St. 133, per McIlvaine, J.

Reinsurance; Wagering contracts, see § 118a herein.

Concealment of "honour" policies and of overinsurance will make policy void. Thames & Mersey Marine Ins. Co. v. "Gunford" Ship Co.; Southern Marine Ins. Assoc. v. "Gunford" Ship Co. 80 L. J. P. C. 146, [1911] A. C. 529, 105 L. T. 312, 15 Com. Cas. 270, 55 L. J. 631, 27 T. L. R. 518, H. L. (Sc.).

[15] McDermott v. Prudential Ins. Co. 7 Kulp (Pa.) 246. See § 232 herein.

Upon the general rule it is held that if a contract is valid by the laws of one state and invalid by those of another, the parties are presumed to incorporate in the contract the law which would make it operative. Carey v. Mackey, 82 Me. 516, 9 L.R.A. 113, 20 Atl. 84, 17 Am. St. Rep. 500.

But it is also held that courts will enforce contracts valid by the laws of the state or country wherein they were made, unless clearly contrary to good morals or repugnant to the policy or positive statutes of the jurisdiction in which it is sought to be enforced. Sondheim v. Gilbert, 117 Ind. 71, 5 L.R.A. 432, 18 N. E. 687, 10 Am. St. Rep. 23; Robinson v.

a Texas decision where an assignment of a policy was made in that state by a resident there to the assignee's agent there it was held that the Texas law governed in determining the validity of the assignment and not the laws of Georgia where the assignee resided.[16] But in Indiana a statute which makes void assignments of policies, of corporations organized in that state, where the assignee has no insurable interest does not apply to policies issued by a foreign corporation.[17]

§ 151. Valued policy may be shown to be a wager.—Since wager policies were valid prior to the act 19 George II., chapter 37, the value in a valued policy ought, it would seem, to have been conclusive whether merely speculative or founded on a real interest. But subsequent to the statute, Lord Mansfield, in Lewis v. Rucker,[18] while declaring that it was only necessary for the assured to prove some interest in case of valued policies to take them out of the statute,[19] yet he adds that "the insured can never be allowed in a court of justice to plead that he has greatly overvalued or that his interest was a trifle only," and that "if it should come out in proof that a man had insured two thousand pounds, and had interest on board to the value of a cable only," the statute could not be defeated by such an evasion.[20] This doctrine of Lord Mansfield is, of course,

Queen, 87 Tenn. 445, 3 L.R.A. 214, 11 S. W. 38, 10 Am. St. Rep. 690.

And a contract made in Connecticut after sunset on Sunday, being valid in that state, may be enforced in Rhode Island, although the law of the latter state prohibits business in one's ordinary calling during all Sunday. The enforcement of such a contract does not involve a breach of good morals. Brown v. Browning, 15 R. I. 222, 7 Atl. 403, 2 Am. St. Rep. 908.

[16] Manhattan Life Ins. Co. v. Cohen (1911) — Tex. Civ. App. —, 139 S. W. 51, 40 Ins. L. J. 1685. The court per Neill, J., declares that there is a conflict of authorities as to what law governs such an assignment reviews the authorities at length and holds that the contract was consummated in Texas. The court also says: "The consideration for the assignment of these policies having been advanced by Hilsman for the express purpose of assisting the insured to participate in a gambling transaction with said Hilsman and his agent at San Antonio, Tex., the consideration was void in law and the attempted assignment of the policies for that reason alone vested no right in Hilsman to either the policies or the proceeds thereof." See § 232 herein.

[17] Metropolitan Life Ins. Co. v. Brown (Davis v. Brown) 159 Ind. 644, 65 N. E. 908, 32 Ins. L. J. 322.

[18] 2 Burr. 1171, 14 Eng. Rul. Cas. 215.

[19] See Barclay v. Cousins, 2 East, 544; Kane v. Commercial Ins. Co. 8 Johns. (N. Y.) 229.

[20] 1 Marshall on Ins. (ed. 1810) *136, et seq., Mr. Wood (1 Wood on Fire Ins. [2d ed.] sec. 38, p. 94) says that "a partial interest in the property insured, bearing a small proportion to the sums insured if the policy is valued, does not save the policy from being a mere wager, unless the assured stands in such a relation to the property that, as to all the balance of the sum insured, he stands as trustee for the owner."

based upon the statute, and should be held applicable in all cases where there is legislative prohibition against wagering contracts, and in those cases where a wager policy is held void on the ground of public policy, there would seem to be no reason why the same rule should not govern. But in Alsop v. Commercial Insurance Company [1] it is decided that there cannot in strictness be a gaming policy under the laws of Massachusetts unless both parties intend to wager, and that if the valuation is a mere cover for a wager it will be set aside and the insured may recover according to his actual interest.[2]

§ 152. Policy valid at inception cannot become wager.—Where a life insurance policy is valid at its inception, the insured may dispose of it at his pleasure, nor can it be afterward converted into a wager policy by any use of it by the insured subsequent to effecting a valid contract.[3]

§ 153. Wager policies: loss should be total.—In wager policies the loss must be absolutely total. This follows from the fact that the contract is not based on any insurable interest, and necessarily there can be no liability for a partial loss. And for the reason that the insurer could claim no benefit from what may have been saved, the clauses existed in wager policies "free of average," and "without benefit of salvage." [4]

§ 154. Wager policies: what are and are not. (Transferred see §§ 894a, 914a, 954a herein.)

§ 155. Interest policy defined.—An interest policy is one in which it appears that the insured has an actual, assignable, insurable interest in the subject matter, and this is the import of the general form of contract now in use.[5] In cases

[1] 1 Sumner (U. S. C. C.) 451, Fed. Cas. No. 262.

[2] Clark v. Ocean Ins. Co. 16 Pick. (33 Mass.) 289. See Wolcott v. Eagle Ins. Co. 4 Pick. (21 Mass.) 429.

[3] Valton v. National Assur. Soc. 22 Barb. (N. Y.) 9; Phillips Estate, In re, 238 Pa. 423, 45 L.R.A.(N.S.) 982, note, 86 Atl. 289; Grant v. Independent Order Sons & Daughters of Jacob, 97 Miss. 182, 52 So. 698; Peck v. Washington Life Ins. Co. 87 N. Y. Supp. 210, 91 App. Div. 597. But *compare* §§ 914–919 herein.

[4] See Glendenning v. Church, 3 Caines (N. Y.) 141; Buchanan v. Ocean Ins. Co. 6 Cow. (N. Y.) 318. "It is usually conceived in the terms 'interest or no interest,' or 'without further proof of interest than the policy,' to preclude all inquiry into the interest of the insured. . . . The parties mean to play for the whole stake, and when the underwriter pays a loss, he cannot, as in the case of an insurance upon interest, claim any benefit from what may have been saved, and to preclude all claim of that sort, the words 'free of average' and 'without benefit of salvage' are always introduced into wager policies." 1 Marshall on Ins. (ed. 1810) *121. See § 148 herein.

[5] See Sawyer v. Dodge County Mutual Ins. Co. 37 Wis. 539; Williams v. Smith, 2 Caines (N. Y.) 13; 1 May on Ins. (Parsons') sec. 33;

of fire risks the policies are interest policies.[6]

§ 156. Open or unvalued policy defined.—An open policy is one in which the value is not fixed, but is left to be definitely determined in case of loss.[7] An open policy is frequently necessitated by reason of the character of the subject matter, as in case of an insurance upon a class rather than upon a particular or specific thing, or where the property insured has changed as to specific articles at the time of loss, although the class is of the same character as at

Black's Law Dict. 908, "Policy." 1 Arnould on Marine Ins. (8th ed. Hart & Simey) p. 11, sec. 9.

[6] 1 Wood on Fire Ins. (2d ed.) 95, sec. 39.

[7] See Snell v. Delaware Ins. Co. 4 Dall. (4 U. S.) 430, 1 L. ed. 896; Peninsular & Occidental Steamship Co. v. Atlantic Mutual Ins. Co. (U. S. D. C.) 185 Fed. 172, 40 Ins. L. J. 1274 (in this case there was a valuation clause but the blank for the amount was not filled in); Snowden v. Guion, 101 N. Y. 458, 5 N. E. 322; Lawver v. Globe Mutual Ins. Co. 25 S. Dak. 549, 560, 127 N. W. 615.

"The expression 'open policy' is also sometimes used in reference to one kept open for new subscriptions, or one on cargo kept open for new subjects of insurance, in which latter case the voyage and risks are described in the body of the policy, and additional amounts or new cargoes are afterward entered from time to time at the foot of the instrument, by merely specifying the amount or by naming a different vessel, or specifying whatever circumstance distinguishes the risk or subject from those described in the body of the policy." 1 Phillips on Ins. (3d ed.) 25, sec. 27; Richards on Ins. (2d ed.) sec. 14; 2 Bouvier's Law Dict. 430; 6 Words & Phras. pp. 4987 et seq.

See Comp. Laws Dak. 1887, sec. 4150; Lester, Rowell & Hill's Ga. Code 1882, sec. 2833; S. Dak. Civ. Codes sec. 1846, *considered* in Lawver v. Globe Mutual Ins. Co. 25 S. Dak. 549, 127 N. W. 615, 39 Ins. L. J. 1588.

"An unvalued, or, as it is frequently called, an open policy is one which does not specify the value of the subject-matter but leaves it to be subsequently ascertained." Earl of Halsbury's Laws of England, vol. 17, p. 378 (*citing* marine ins. act 1906 [6 Edw. VII. c. 41] sec. 28). See also Id. p. 336 note.

"An open or unvalued policy is one where the value of the property insured is not settled in the policy, and in case of loss must be agreed upon or proved." Insurance Co. of North America v. Willey, 212 Mass. 75, 77, 98 N. E. 677, *citing* Hemminway v. Eaton, 13 Mass. 107, 108.

English statute adopts term "unvalued policy" instead of "open policy" definition: reason for change. "An *unvalued policy* is defined in sec. 28" (of the marine insurance act, 1906 [6 Edw. VII., c. 41]. Butterworth's 20th Cent. Stat. [1900–1909] p. 406) "as a policy which does not specify the value of the subject-matter insured, but, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained, in the manner specified in the act. Hitherto the policy called an unvalued policy in the Act has usually been called an *open policy*. The reason why the former name has been adopted in the act is that the term *open policy* is sometimes used in mercantile language to denote a floating policy which has not been exhausted by declarations." 1 Arnould on Marine Ins. (8th ed. Hart & Simey) p. 12, sec. 9. The author gives also the definitions of valued and open policies "in the previous editions of this work."

the inception, as is instanced by merchandise in store, or the risk may be fluctuating as to quantity and location.[8] In an open policy it is held that the plaintiff must prove his interest and the value of his property or he cannot recover,[9] but the bill of lading of the outward cargo is no proof of the interest of the plaintiff in the homeward cargo.[10]

§ 156a. Named policy defined.—"Named policy is one in which the adventure is limited to a ship specifically named therein." [11]

§ 157. Running policies: blanket policies: floating policies.—A running policy contemplates successive insurances whereby the object of the policy may from time to time be defined as to the subject, places, and amounts of insurance by additional indorsements as agreed upon by the parties.[12] An open or running policy is also defined as one to insure goods shipped at a distant port where it is impossible to be advised to the particular ship upon which the goods are laden and it cannot be named in the policy.[13] A floating policy applies to goods of a class or kind which from its fluctuating, changing nature differs as to specific articles, as in case of a stock of merchandise or fluctuating goods where the insurance covers to a certain amount goods of the same character and description successively in store,[14] and the goods on hand at the time of loss may not be the

[8] 1 Wood on Fire Ins. sec. 40 p. 95; Richards on Ins. (2d. ed.) sec. 14 (3d ed.) secs. 18, 20, pp. 21, 22, 734; 1 May on Ins. (3d ed.) secs. 30, 31.

[9] Millaudon v. Western Ins. Co. 5 La. (9 La. O. S.) (top page 20) 27, 29 Am. Dec. 433; Beale v. Pettit, 1 Wash. (U. S. C. C.) 241, Fed. Cas. No. 1158.

"Insurable value" of ship in open policy, see Peninsular & Occidental Steamship Co. v. Atlantic Mutual Ins. Co. (U. S. D. C.) 185 Fed. 172, 40 Ins. L. J. 1274.

[10] Beale v. Pettit, 1 Wash. (U. S. C. C.) 241, Fed. Cas. No. 1158.

See, as to averment and proof of interest, the following cases:

Kentucky Life & Accident Ins. Co. v. Hamilton, 63 Fed. 93, 11 C. C. A. 42; Illinois Mutual Fire Ins. Co. v. Marseilles Mfg. Co. 1 Gilm. (Ill.) 236; Gilbert v. North American Ins. Co. 23 Wend. (N. Y.) 43, 35 Am. Dec. 543; Dickerman v. Vermont Mutual Fire Ins. Co. 67 Vt. 99, 30 Atl. 808.

[11] 1 Arnould on Marine Ins. (8th ed. Hart & Simey), p. 14, sec. 9.

[12] See the following cases:

United States.—Orient Mutual Ins. Co. v. Wright, 23 How. (64 U. S.) 401, 16 L. ed. 524.

California.—Wells v. Pacific Ins. Co. 44 Cal. 397.

Maryland.—Schaefer v. Baltimore Marine Ins. Co. 33 Md. 109.

Massachusetts.—Carver Co. v. Manufacturers' Ins. Co. 6 Gray (72 Mass.) 215; Kennebec v. Augusta Ins. Co. 6 Gray (72 Mass.) 204.

New York.—Snowden v. Guion, 101 N. Y. 458, 5 N. E. 322; Arnold v. Pacific Mut. Ins. Co. 78 N. Y. 7.

England.—Stephens v. Australasian Ins. Co. L. R. 8 Com. P. 18.

[13] Orient Mutual Ins. Co. v. Wright, 23 How. (64 U. S.) 401, 16 L. ed. 524; Sun Mutual Ins. Co. v. Wright, 23 How. (64 U. S.) 412, 16 L. ed. 529.

[14] Hoffman v. Ætna Fire Ins. Co. 32 N. Y. 405, 411, 416, 88 Am. Dec. 337. "The policy in question having been issued to a mercantile firm, the

specific ones in stock at the inception of the risk, or it may be applied to goods which cannot be well described, because fluctuating or shifting as to quality or location, as goods in warehouses, etc. Blanket and floating policies are sometimes issued to factors or to warehousemen, intended only to cover margins uninsured by other policies, or to cover nothing more than the limited interest which the factor or warehouseman may have in the property which he has in charge.[15]

§ 157a. Blanket or compound policies: floating policies: distinguished from specific policies.—Blanket policies differ from specific policies in certain particulars. The difference is one which inheres in the nature of the two contracts and has its recognition in the accepted advantages of a blanket policy to the assured and its disadvantages to the insurer, and in the more exacting terms which are customarily demanded for its issue. The very essence of a blanket policy of fire insurance is that it invariably attaches to and covers to its full amount every item of property described in it. If the loss upon one item exhausts the full amount of the policy, the whole insurance must be paid and there can be no apportionment

company must be deemed to have had in view the fluctuating nature of a partnership business, and the changes of relative interest incident to that relation. These might be very important to the assured, though wholly immaterial to the risk." Id. 411. "'It was manifestly the intention of the parties to the policy that it should cover to the amount of the insurance any goods of the character and description specified in the policy which, from time to time during its continuation, might be in the store. A policy for a long period upon goods in a retail shop applies to the goods successively in the shop from time to time. Any other construction of a policy of insurance upon a stock in trade continually changing would render it worthless as an indemnity.' . . . The insurance was intended to cover the mercantile stock of which the assured were proprietors, stored from time to time in the building in which the business was conducted." Id. 415, 416, *citing* Hooper v. Hudson Fire Ins. Co. 17 N. Y. 425.

See Macon Fire Ins. Co. v. Powell, 116 Ga. 703, 43 S. E. 73, 32 Ins. L. J. 283; United Underwriters Ins. Co. v. Powell, 94 Ga. 359, 21 S. E. 565, 26 L. J. 526. See also 17 Earl of Halsbury's Laws of England, p. 362, sec. 713, p. 336, sec. 672.

"*A floating policy* was defined in this work as one in which there is no limitation of the risk to a particular ship, as where goods 'on ship or ships' are insured for the same voyage. In sec. 29 (1) of the marine insurance act it is more broadly defined as 'a policy which describes the insurance in general terms, and leaves either the name of the ship or ships or other particulars to be defined by subsequent declaration.'" 1 Arnould on Marine Ins. (8th ed. Hart & Simey) p. 14, sec. 9.

[15] Home Ins. Co. v. Baltimore Warehouse Co. 93 U. S. 527, 541, 23 L. ed. 868, per Strong, J. See Smith v. Carmack (1901) — Tenn. Ch. App. —, 64 S. W. 372.

of it. In a case in which these principles are asserted thirty-one of the policies were of the kind known as "blanket" or "compound" policies; that is, they insured buildings, machinery and stock as a whole, without distributing the amount of the insurance among the several items. The remaining policies were of the kind known as "specific;" that is, the amount insured thereby was distributed among the several items of property, a specified amount to each item. Each of the specific policies covered in the whole precisely the same property as did the compound insurance, but distributively. This distribution was uniform among the specific policies.[16] So in another case mills and machinery were insured under a number of policies, each specific item being insured for a fixed sum by some of the policies, and all the machinery being insured for a gross sum under other policies.[17] And where cotton was insured in a designated warehouse it was held "specific" insurance as distinguished from "floating" policies insuring cotton in bales, in all or any of the stores, presses, warehouses, sheds, yards, railroad yards and wharves, or while in transit in, or while in any of the streets in, etc., but mentioning no particular warehouse. The loss was also in excess of that covered by the specific policies.[18]

§ 157b. "Drummer floater" policy defined: when risk suspended.—The purpose of a "drummer floater" policy is to cover the goods mentioned while the commercial salesman is on the road selling goods, and the samples and goods carried by him would not be covered by the ordinary insurance carried upon merchandise located in the stores or warehouses of the merchants. And where the goods are insured "while located and contained as described herein and not elsewhere, to wit: Drummer Floater . . . while traveling in any part of the United States," the term "while traveling" etc., implies that where the goods have been returned to the starting point and are in the store and are not traveling, the insurance is suspended and the same goods are then covered by the general insurance carried by the merchant upon all his goods in his store or warehouse.[19]

§ 158. Open or unvalued policies: what are: whether policy open or valued.—Whether a policy is open or valued depends upon the

[16] Schmaelzle v. London & Lancashire Fire Ins. Co. 75 Conn. 397, 96 Am. St. Rep. 233, 60 L.R.A. 536, 53 Atl. 863, 33 Ins. L. J. 632. See §§ 2492, 2493, 3457 herein.

[17] American Central Ins. Co. v. Landau, 62 N. J. Eq. 73, 49 Atl. 738.

[18] United Underwriters Ins. Co. v. Powell, 94 Ga. 359, 21 S. E. 565, 26 Ins. L. J. 526. See also Macon Fire Ins. Co. v. Powell, 116 Ga. 703, 43 S. E. 73, 32 Ins. L. J. 283.

[19] Jacobson v. Liverpool, London & Globe Ins. Co. 135 Ill. App. 20 affd. on point of practice 231 Ill. 61, 83 N. E. 95. See as to location §§ 1742 et seq. 1966, 2068 herein. Suspension of Risk, see § 1473 herein.

intention of the parties to be ascertained by a legal construction of the whole instrument and the question is frequently difficult of determination.[20] It may also depend upon the terms of a valued policy statute without which the policy would be an open one.[1]

Where the value of wheat shipped can be determined, in case of its loss, only by proof of its market price, no value being fixed in the certificate, the policy is an open, not a valued, one.[2] So a policy of insurance for eight hundred dollars on a certain dwelling-house, which sum does not exceed two-thirds of the value of the house, as appears from the application which was made a part of the policy, which also contains a stipulation that the company will pay "all loss or damage" not exceeding the sum named within ninety days after notice and proof of loss, is an open and not a valued policy.[3] A marine policy providing that no risk shall attach to it until the amount and description of the same shall be approved and indorsed thereon by the insurer is not changed into an open and unrestricted policy covering all property which the assured elects to report, even after notice of loss, by the adoption of an agreement fixing a uniform premium, the supplying of the assured with blanks on which to report risks, and the custom, extending over a long period of years, of reporting risks by the assured, when convenient, in due course of business after departure of the vessel, and the uniform acceptance of the risks by the insurer.[4] In a recent Massachusetts case it was held that the policy was in form a valued rather than an

[20] See the following cases:

United States.—McKim v. Phœnix Ins. Co. 2 Wash. (U. S. C. C.) 89, Fed. Cas. No. 8,862.

Connecticut.—Riley v. Hartford Ins. Co. 2 Conn. 368.

Louisiana.—Wallace v. Insurance Co. 4 La. O. S. (2 La. 559) *289.

Maine.—Cushman v. Northwestern Ins. Co. 34 Me. 487.

Massachusetts.—Brown v. Quincy Mutual Fire Ins. Co. 105 Mass. 396, 7 Am. Rep. 538.

New York.—Snowden v. Guion, 101 N. Y. 458, 5 N. E. 322; Ogden v. Columbian Ins. Co. 10 Johns. (N. Y.) 273 (*considered* under § 166 herein); Mellen v. National Ins. Co. 1 Hall (N. Y.) 500; Laurent v. Chatham Ins. Co. 1 Hall (N. Y.) 50, 51.

Pennsylvania.—Lycoming Ins. Co. v. Mitchell, 48 Pa. St. 367.

South Carolina.—Cox v. Charleston Fire & Marine Ins. Co. 3 Rich. (S. C.) 331, 332, 45 Am. Dec. 771.

[1] Oklahoma Farmers' Mutual Indem. Assoc. v. Corkle, 21 Okla. 606, 97 Pac. 270, 38 Ins. L. J. 108; under 1 Wilson's Rev. & Ann. Stat. Okla. 1903, p. 790, sec. 3204. See this case under § 603, giving statute.

[2] Williams v. Continental Ins. Co. 24 Fed. 767. And see cases in last note.

[3] Farmers' Ins. Co. v. Butler, 38 Ohio St. 128.

[4] Delaware Ins. Co. v. S. S. White Dental Mfg. Co. 109 Fed. 334, 48 C. C. A. 332, 65 L.R.A. 387, writ of certiorari denied (mem.) 183 U. S. 700, 46 L. ed. 396, 22 Sup. Ct. 937.

open policy, but that upon the facts and points under discussion it took effect as an open policy.[5]

[5] Insurance Co. of North America v. Willey, 212 Mass. 75, 98 N. E. 677. The court per Rugg, C. J., said: "The contract in the case at bar provided that 'the said goods and merchandises, hereby insured, are valued (premium included) at as per form attached.' These words, as far as they go, tend to indicate that the parties contemplated a valued rather than an open policy. But as no amount is stated in that immediate connection, they are indecisive. Reference is made to the form attached which contained these words: 'Valued premium included, at $5.50 to the £ sterling and if invoiced in American Gold at invoice and 10%.' The point to be decided is the fair meaning of these words. If after the word 'valued' in this clause only the rate of exchange had appeared, it would not have been a valued policy. It then would not have been a statement of value of the subject of the risk, but only a means of translating into United States money the unit of English money. To this effect is Ogden v. Columbian Insurance Co. 10 Johns. (N. Y.) 273. While the expenses of insurance premiums are added to the true value at the place of shipment in an open policy and are not added to the stipulated value of the property in a valued policy, the use of the words 'premium included' may be in explanation of the high rate of exchange for the English pound and the ten per cent added to the American valuation. Moreover, it is not unusual to state in valued policies of marine insurance whether the stipulated value includes or excludes the premium. Mayo v. Maine Fire & Marine Ins. Co. 12 Mass. 258. But the clause to be interpreted contains something more than the mere rate of exchange, in the words 'at invoice.' If these words were transposed and appeared directly after the word 'valued' the sense would have been plain that the invoice price with the rate of exchange fixed for the English pound and the percentage to be added to the American dollar was the agreed value of the property at risk. While it is not expressed with clearness nor with grammatical accuracy, more of the words can be given a reasonable effect if the clause is interpreted as fixing the value at invoice plus the additions stated than to hold the meaning to be no valuation at all. There was no sufficient occasion for referring to the invoice except for fixing value. This construction receives some confirmation from the clause printed on the side of the policy which required of the insured, 'all risks to be reported as soon as known, the amounts declared as soon as ascertained.' There seems to be no reason for a stipulation for declaration of amount of risk as soon as it is learned except for the purpose of determining valuation. These considerations incline us to the conclusion that this was a valued rather than an open policy, and that the value agreed upon was that given in the invoice. There can be no agreement upon value, however, until the amount is actually known to both parties, the effect of which will be discussed later.

The question then arises as to the meaning of invoice value. The plaintiff alleges that the word as used in a contract of insurance to cover imports alone, as this one did, made in this Commonwealth means such an invoice as is required by U. S. St. of June 10, 1890, c. 407 (26 U. S. Sts. at Large, 131) which governed all importations at the times of the events here in issue. That act provided in brief that no importation of merchandise exceeding $100 in value (with an exception not here material) should be made into this country, except upon an invoice and affidavit, which should show 'the actu-

§ 158a. Same subject: standard policy.—If a standard policy contains no words showing that the property insured is worth or

al cost,' if purchased, or if obtained otherwise, 'the actual market value or wholesale price thereof at the time of exportation to the United States in the principal markets of the country from which' the importation is made, verified by the oath of the owner or his agent. This act is general in its terms and applies to all importations of merchandise of every character. The use of the word 'invoice' in the policy under these circumstances, in the absence of anything to show that there was any other invoice known or commonly employed in importations, must be held to refer to that required by this statute. Apparently this is not in dispute between the parties. The defendants claimed and received their payment upon presentation of a paper which purported to be such an invoice. The defendants contend, however, that the policy takes effect as a valued policy to the same extent by reference to the invoice as it would if the figures of the invoice had been written into the valuation clause. The plaintiff alleges that the reference to the invoice value meant not the figures actually written into the invoice, but such valuation as should have been written into a true and just invoice, which in its statement of value actually conformed to the terms of the federal act. The plaintiff further alleges that the defendants procured the payment to them of loss by presentation to it of an invoice showing values of wool ranging from eight and one quarter to fourteen and one half pence per pound, when in fact it was worth only seven pence per pound in the general markets of England, from which the importation was made, and that it relied upon the truth of this invoice in making the payment, and that the invoice in fact used by the defendants in making the importation was accompanied by that form of affidavit prescribed in sec. 5 of the act, which purported to state a faithful valuation of the merchandise at its 'actual market value or wholesale price' in the principal markets of England whence the importation was made.

A valued policy is ordinarily one where the agreed value in terms of a money standard are written into the contract of insurance. It is still a valued policy, when the agreement by parties is that the value shall be fixed and defined by reference to some other instrument. Such an agreement must be based upon some standard certain in itself or capable of being made certain, and known to and accepted by both parties. It cannot be a valued policy, which by its terms means a value fixed by agreement, when the value is determined wholly by the volition of one party to the contract, and may be invoice based on value at place of lading or on expected value at place of import, including the anticipated profit and all intervening expenses. Where the reference in the policy for the standard of value is to a legal document, which by law has a fixed, definite and unchangeable method of ascertaining value, a value found by that standard, and by that alone, must be held to have been in contemplation of the parties. There could be no value stated in an invoice for importation save market value in the country of export. It is urged by the defendants that although the invoice may not have been in compliance with the federal statute, yet the value as stated in the actual invoice, when ascertained and declared to the plaintiff, because the agreed price for the purpose of the insurance. There is force in the argument. But the stronger reason appears to support the view that invoice meant the invoice required by law, a standard known to all parties. Otherwise, the insured would be enabled

valued at, the amount stated as limiting the loss, but, on the contrary, shows that the intent of the parties is that proof should be offered as to the value of the property in case of loss it is an open and not a valued policy.[6]

§ 159. Valued policy defined.—A valued policy is one wherein the value of the subject matter is agreed upon beforehand at a specified sum.[7] A valued policy is also defined as one where the parties

to fix any value, provided only that he was willing to pay the premium. But this would greatly increase the moral hazard and the actual risk without giving the insurer any real knowledge of true value or of the sense in which value was used upon which to charge premium. Carson v. Marine Ins. Co. 2 Wash. C. C. 468, 470, Fed. Cas. No. 2,465. It would put it in the power of the insured to fix absolutely the value while the whole theory of a valued policy is that parties on an equality have come to an understanding as to value. The declaration alleges that the invoice values did not comply with the federal statute in that they were far too high. Hence the invoice value did not comply with the contract of insurance. The policy was in form a valued one, but to be completed it required a declaration of value in accordance with its terms before the loss. In substance the policy was on goods thereafter to be declared and at the agreed value, namely, that shown upon such an invoice as the federal statute required. In order that such a policy may become effective as a valued policy, the invoice must be notified to the insurer before loss, although such notification is not a condition precedent to the right to recover on the contract of insurance. The policy could not become a valued policy until the information as to the invoice, which of necessity must come from the insured, had been communicated to the insurer. No such invoice price having been furnished by the insured, this policy never became operative as a valued policy. The rights of the parties, therefore, stand on the same footing as though no statement of invoice value had been made before the loss. In that event the policy would have been an open policy. Harman v. Kingston, 3 Camp. 150, 14 Eng. Rul. Cas. 232; Gledstanes v. Royal Exchange Ins. Co. 34 L. J. Q. B. 30, 14 Eng. Rul. Cas. 234; 1 Arnould in Marine Insurance (7th ed.) sec. 360. That is the basis on which the rights of the parties must be settled. The invoice value furnished was not such an invoice as the contract required, and hence no value became known to the parties and fixed by the standard which they had adopted before it was too late to make it a valued policy.

The plaintiff's declaration sets out a cause of action to recover excess of payment of insurance above the amount which should have been paid under an open or unvalued policy of insurance. Demurrer overruled; defendants to answer over."

[6] Ulmer v. Phœnix Fire Ins. Co. 61 S. Car. 459, 39 S. E. 712, 31 Ins. L. J. 38. As to valued policy laws incorporated in standard policy, see Minnesota, New Hampshire and South Dakota *cited* under § 176 herein.

[7] Schaefer v. Baltimore Marine Ins. Co. 33 Md. 109; Cox v. Charleston Fire & Marine Ins. Co. 3 Rich. (S. Car.) 331, 45 Am. Dec. 771; Lawver v. Glove Mutual Ins. Co. 25 S. Dak. 549, 560, 127 N. W. 615, 39 Ins. L. J. 1588; 1 Arnould on Marine Ins. (8th ed. Hart & Simey) p. 12, sec. 9; 8 Words & Phrases p. 7282; Comp. Laws Dak. 1887, sec. 4151; Deering's Anno. Civ. Code,

by the contract of insurance fix for the purpose of the risk the definite value of the property insured so that dispute on that subject is foreclosed for all time thereafter, except in cases of fraud or wager, no matter how high the valuation may be.[8] It estimates not merely the value of the property or interest insured, but values the loss, and is equivalent to an assessment of damages, or is in the nature of liquidated damages in case of loss.[9] And where there is an absolute loss of any article distinctly valued in the policy, the loss is to be estimated according to the valuation, it being in the nature of liquidated damages.[10]

Again, a valued policy is ordinarily one where the agreed value in terms of a money standard are written into the contract of insurance. It is still a valued policy when the agreement by parties is that the value shall be fixed and determined by reference to some other instrument. Such an agreement must be based upon some standard certain in itself of being made certain and known to and accepted by both parties.[11]

Valued policies may be made upon the ship, or on ship and freight and under the same policy, or upon freight or goods, and valuation may be in policies upon profits.[12]

Valued policies are also effected upon fire risks.

Cal. sec. 2596; Levisee's Dak. Code, sec. 1527; Civ. Code S. Dak. sec. 1847, see § 163 herein.

"A valued policy is one which specifies the agreed value of the subject-matter insured." Earl of Halsbury's Laws of England, Vol. 17, p. 378, sec. 748 (*citing* marine ins. act, 1906 [6 Edw. VII., c. 41] sec. 27 [1] [2]); Id. p. 336 and note, sec. 672.

Valuation clause: Lloyd's marine policy. The said ship, etc., goods and merchandise, etc., for so much as concerns the assured by agreement between the assured and assurers in this policy are and shall be valued at [——]. 1 Arnould on Marine Ins. (8th ed. Hart & Simey) p. 31, sec. 19. "This clause is in all the common printed forms of policy, though the blank it contains is not always filled up; if filled up, the policy is called a *valued policy;* if not filled up, an *open or unvalued policy.*" Id.

On conflict of laws as to valued policy, see note in 63 L.R.A. 866.

[8] Insurance Co. of North America v. Willey, 212 Mass. 75, 77, 98 N. E. 677 (*citing* Marine Ins. Co. of Alexandria v. Hodgson, 6 Cranch (10 U. S.) 206, 220; Coolidge v. Gloucester Marine Ins. Co. 15 Mass. 340; Irving v. Manning, 1 H. L. Cas. 287, 307; Barker v. Jansen, L. R. 3 C. P. 303, 14 Eng. Rul. Cas. 222).

[9] Lycoming Ins. Co. v. Mitchell, 48 Pa. St. 367. See Shaw v. Felton, 2 East, 114, 13 Eng. Rul. Cas. 631, per Mr. Justice Laurence.

[10] Harris v. Eagle Fire Co. 5 Johns. (N. Y.) 368.

[11] Insurance Co. of North America v. Willey, 212 Mass. 75, 80, 98 N. E. 677, per Rugg, C. J.

[12] Watson v. Insurance Co. of North America, 3 Wash. (U. S. C. C.) 1, Fed. Cas. No. 17,286 (valued policy on ship, valuation generally conclusive): Coolidge v. Gloucester Mutual Ins. Co. 15 Mass. 341 (insurance of ship and freight each separately valued, and liability for total loss of freight, even though overvalued); Mayo v. Maine Fire & Marine Ins. Co. 12 Mass. 259 (insurance on ship valued, assured mak-

A valued policy does not cover property which is fluctuating or changeable, but applies to that which is fixed or to specific articles,[13] or it is used where it is difficult or impossible to ascertain the amount of interest of the insured in the subject matter, "as where returns are expected from abroad, the exact value and even the nature of which are uncertain. So in case of a prize where the real value of it can only be ascertained when it is brought into port and sold, and in every instance where the owners have been prevented from receiving regular or satisfactory advices from which the true amount of their interest might be ascertained." [14]

§ 160. Valued policy: what the valuation includes.—The valuation determines prima facie the amount of interest of the insured,[15] and a gross valuation should include the premium, unless the manner of valuing or a construction of the policy indicates otherwise.[16] And it is also held that the owner of a ship and cargo may insure in a valued policy to the amount of the prime cost of the goods and the premium and the cost of freight thereon to the first port,

ing no representation as to ownership, and was owner of one-third only, and was held entitled to recover whole loss); Post v. Phœnix Ins. Co. 10 Johns. (N. Y.) 79 (one-quarter of ship valued at sum insured; recovery for whole loss for sum insured; valuation applicable to interest insured and not to whole ship); Minturn v. Columbia Ins. Co. 10 Johns. (N. Y.) 75 (case of valuation on cargo); Mumford v. Hallett, 1 Johns. (N. Y.) 433 (where a printed blank policy on cargo was used, and the blank filled up for an insurance on profits, and the valuation in writing, when taken in connection with the printed words, was a valuation of the goods and not of the profits; every policy on profits must of necessity be a valued, and not an open policy); Davy v. Hallett, 3 Caines (N. Y.) 16 (on a valued policy on freight; if there be an inchoate right to save, and the transaction bona fide, the value cannot be inquired into); Crauford v. Hunter, 8 Term. Rep. 10, n. 13 (case of value to be declared upon ship and goods; loss happened before any declaration of value could be made).

[13] 1 Wood on Fire Ins. (2d ed.) 96, sec. 41.

[14] 1 Marshall on Ins. (ed. 1810) *288.

[15] Feise v. Aguilar, 3 Taunt. 506, per Mansfield, J.; Shaw v. Felton, 2 East, 109, 115, 13 Eng. Rul. Cas. 631; 1 Marshall on Ins. (ed. 1810) *290; 1 Arnould on Marine Ins. (Perkins' ed. 1850), 317, sec. 125; 2 Id. (Maclachlan's ed. 1887) 303, et seq.

[16] Brooks v. Oriental Ins. Co. 7 Pick. (24 Mass.) 259 (premium included); Insurance Co. of North America v. Willey, 212 Mass. 75, 98 N. E. 677 ("are valued [premium included] at" and "valued, premium included, at," but held an open and not a valued policy); Mayo v. Maine Fire & Marine Ins. Co. 12 Mass. 259, where premium was held included; Ogden v. Columbian Ins. Co. 10 Johns. (N. Y.) 273 (premium included but held an open policy); Minturn v. Columbian Ins. Co. 10 Johns. (N. Y.) 75 (premium, prime cost, and charges included); 2 Phillips on Ins. (3d ed.) 16, 1200, 1201; 1 Marshall on Ins. (ed. 1810) *288, 2 Id. 621, who says: "The value in the policy being always considered

the insurance being to two ports in the West Indies.[17] Though in estimating the value of the vessel the valuation in the policy, exclusive of the premium, is, it is held, to be taken as the value of the vessel.[18]

§ 161. Valued policy: how far valuation conclusive.—As a general rule a valued policy is conclusive of the value of the subject covered and the assured is entitled to recover the whole amount of the valuation in the policy in case of total loss by the perils insured against, unless the valuation is fraudulent or enormously excessive,[19] or unless the policy be a wager.[20] And neither party will be heard to claim a different valuation of a vessel than that stated in the policy; nor, after loss by collision, and the full payment of the policy valuation by the insurer, can a larger valuation be claimed by the owner.[1] And the value stated in the application is also binding upon the parties, and after a loss the assured is not at liberty to show that in fact the property was worth a much larger sum.[2]

But the rule only applies as between parties to the same policy. Thus, where a portion of the insured's interest in the ship was valued at six thousand pounds, and insured six hundred pounds,

as the fair amount of the prime cost and charges."

[17] Pritchett v. Insurance Co. of North America, 3 Yeates (Pa.) 458. It is said in Lewis v. Rucker, 2 Burr. 1167, 1171, 14 Eng. Rul. Cas. 215, that the effect of the valuation is to fix conclusively the prime cost. Prime cost and charges included: McKim v. Phœnix Ins. Co. 2 Wash. (U. S. C. C.) 94; Id. 189.

[18] Orrok v. Commonwealth Ins. Co. 21 Pick. (38 Mass.) 456, 32 Am. Dec. 271. In Lewis v. Rucker, 2 Burr. 1167, 1169, 14 Eng. Rul. Cas. 215, the valuation was considered the prime cost.

[19] *United States.*—Griswold v. Union Ins. Co. 3 Blatchf. (U. S. C. C.) 231; Fed. Cas. No. 5840; Watson v. Insurance Co. of North America, 3 Wash. (U. S. C. C.) 1.

Louisiana.—Howes v. Union Ins. Co. 16 La. Ann. 235; Millaudon v. Western Ins. Co. 9 La. O. S. (5 La. 20), 27, 29 Am. Dec. 433.

Maryland.—Patapsco Ins. Co. v. Biscoe, 7 Gill & J. (Md.) 293, 28 Am. Dec. 219.

Missouri.—Lockwood v. Sangamo Ins. Co. 46 Mo. 71.

New York.—Kane v. Commercial Ins. Co. 8 Johns. (N. Y.) 229; American Ins. Co. v. Whitney, 5 Cow. (N. Y.) 712; Whitney v. American Ins. Co. 3 Cow. (N. Y.) 210.

Pennsylvania.—Commonwealth Ins. Co. v. Sennett, 37 Pa. St. 205, 78 Am. Dec. 418.

Valued policy: Evidence of value, see § 3771 herein.

Indemnity: Stipulation as to value in policy, see § 25 herein.

[20] See § 151 herein.

"As long as the contract of insurance is unimpeached the valuation is binding on the parties." 17 Earl of Halsbury's Laws of England, p. 379, sec. 749.

[1] St. Johns, The (U. S. D. C.) 101 Fed. 469; Central Railroad Co. of N. J. In re, Id.; Sea Ins. Co. v. Intervenors, Id.

[2] Holmes v. Charlestown Mutual Fire Ins. Co. 10 Mete. (51 Mass.) 211, 43 Am. Dec. 428.

and in another policy upon another portion of his interest in the ship the valuation was fixed at eight thousand pounds, and she was insured six thousand pounds, the valuation in the first policy does not limit the insured to the sum he may recover on the other, for the policy upon which the suit is brought is conclusive between the parties thereto, and transactions between the insured and third parties cannot be considered unless the sum received amounts to a complete indemnity. In this case the insured showed that the ship was worth over eight thousand pounds.[3] The rule as to conclusiveness is also further qualified by the question of what was intended to be valued, and the underwriter may show that only part of the subject-matter was actually at risk, so that valuation is declared to be binding only as far as it goes.[4]

Where a policy of fire insurance was issued to plaintiff, "the amount insured being not more than three-fourths of the value of the property as stated by the applicant," it was held that this valuation was conclusive, in the absence of fraud, although a subsequent proviso restricted the whole amount of insurance, if an additional policy was obtained, to "three-fourths of the actual value of the property at the time of loss," and although there was a covenant in the application (but not in the policy) that such valuation should not be conclusive.[5]

If the same valuation is fixed under two policies upon the same subject, the insured is conclusively bound and cannot show a greater value. Even though the subject insured be in fact worth more than the sum fixed, the valuation limits the recovery.[6]

§ 162. Valued policy: effect of overvaluation: fraudulent valuation.—When the insured has some interest at risk, and there is no fraud, a valuation of the subject insured in the policy is held conclusive upon the parties in law and equity notwithstanding an overvaluation,[7] unless such overvaluation be grossly excessive, but this

[3] Bousfield v. Barnes, 4 Camp. 228, 229, per Lord Ellenborough.

[4] Substantially so declared in 17 Earl of Halsbury's Laws of England, p. 379, sec. 750, *quoting* marine ins. act 1906 (6 Edw. VII., c. 41), sec. 75 (2), which is also given in Butterworth's 20th Cent. Stat. (1900–1909), p. 418.

[5] Luce v. Dorchester Mutual Fire Ins. Co. 105 Mass. 297, 7 Am. Rep. 522. See §§ 163a, 3461 herein.

[6] Irving v. Richardson, 1 Moody & R. 153.

[7] *United States.*—Gardner v. Columbian Ins. Co. 2 Cranch (U. S. C. C.) 550; Carson v. Marine Ins. Co. 2 Wash. (U. S. C. C.) 468, Fed. Cas. No. 2465.

Iowa.—Behren v. Germania Fire Ins. Co. 64 Iowa, 19.

Kentucky.—Teutonic Ins. Co. v. Howell, 21 Ky. L. Rep. 1245, 54 S. W. 852, 29 Ins. L. J. 356.

is in itself presumptive evidence of fraud,[8] although not sufficient.[9] And fraud is not established by the fact that the property is considerably overvalued.[10] But it is held that a gross exaggeration of the value prevents a recovery,[11] and fraudulent overvaluation avoids.[12] And if the owner of property insured knowingly exaggerates the value of the property to an amount far beyond the cost price and the market value, and the insurer relies upon the statement of such excessive value in entering into the contract, such overvaluation is a conclusive presumption of fraud, sufficient to

Maine.—Cushman v. Northwestern Ins. Co. 34 Me. 487.

Maryland.—Patapsco Ins. Co. v. Biscoe, 7 Gill & J. (Md.) 293, 28 Am. Dec. 219.

Massachusetts.—Phœnix Ins. Co. v. McLoon, 100 Mass. 475.

Missouri.—Lockwood v. Sangamo Ins. Co. 46 Mo. 71.

New York.—Davy v. Hallett, 3 Caines (N. Y.) 16, 2 Am. Dec. 241; Mumford v. Hallett, 1 Johns. (N. Y.) 434.

Virginia.—Morostock Ins. Co. v. Fostoria Novelty Glass Co. 94 Va. 361, 26 S. E. 850; Lynchburg Fire Ins. Co. v. West, 76 Va. 575, 44 Am. Rep. 177.

Indemnity: Stipulation as to value in policy, see § 25 herein.

Valued policy laws: overvaluation, see § 163c herein.

Overvaluation: Proofs of loss, see § 3320 herein.

Overinsurance defined, see § 2456 herein.

Valued policy: double insurance, see 17 Earl of Halsbury's Laws of England, pp. 380 et seq.

It is no ground for mitigating damages that the value of the insured vessel is less than that stated in a valued policy, as the policy is conclusive on that point in the absence of fraud and false representations. Marine Ins. Co. v. Hodgson, 6 Cranch (10 U. S.) 206, 3 L. ed. 200. *Cited* in Livingstone, The, 122 Fed. 281; St. Johns, The, 101 Fed. 475; International Navigation Co. v. Atlantic Mutual Ins. Co. 100 Fed. 316; Griswold v. Union Mutual Ins. Co. 3 Blatchf. (U. S. C. C.) 233, Fed. Cas. No. 5840; Alsop v. Commercial Ins. Co. 1 Sumn. (U. S. C. C.) 471, Fed. Cas. No. 262; Phœnix Ins. Co. v. McLoon, 100 Mass. 476; Michael v. Prussian National Ins. Co. 171 N. Y. 33, 63 N. E. 810; Whitney v. American Ins. Co. 3 Cow. (N. Y.) 219; Milwaukee Mechanics Ins. Co. v. Russell, 65 Ohio State 258, 56 L.R.A. 161, 62 N. E. 338.

[8] Sturm v. Atlantic Ins. Co. 63 N. Y. 77.

[9] See § 25 herein.

[10] Insurance Co. of North America v. Coombs, 19 Ind. App. 331, 49 N. E. 471.

[11] Whittle v. Farmville Ins. Co. 3 Hughes (U. S. C. C.) 421, Fed. Cas. 17603.

[12] Hersey v. Merrimack Co. Ins. Co. 7 Fost. (27 N. H.) 149; Gerhauser v. North British & Mercantile Ins. Co. 7 Nev. 174. See the following cases:

United States.—Oshkosh Packing & Provision Co. v. Mercantile Ins. Co. 31 Fed. 200.

Kentucky.—Protection Ins. Co. v. Hall, 15 B. Mon. (54 Ky.) 411.

Maine.—Williams v. Phœnix Fire Ins. Co. 61 Me. 67.

North Carolina.—Dupree v. Virginia Home Ins. Co. 92 N. C. 417.

England.—Chapman v. Pole, 22 L. T. R. N. S. 306.

"Overvaluation may be a ground for avoiding the contract. Thus, if the overvaluation be part of a scheme for defrauding the underwriters, the policy will be voidable (*citing* Haigh v. De la Cour (1812) 3 Camp. 319;

annul the contract.[13] The fact that the assured was an ignorant German, and did not understand English, is held no excuse for his rating his house at double its value in effecting insurance on it.[14]

The courts, however, are little disposed to permit the insurer to object to a valuation which has been deliberately fixed upon in good faith,[15] and in order to avoid a policy for overvaluation, it must appear that such overvaluation was intentional, fraudulent, and not an honest expression of opinion.[16] So an honest representation of the value of a building does not avoid the policy, even though it is somewhat in excess of the actual value;[17] and an overestimate by the insured of the value of his property and the amount of the loss, if unintentional and with no purpose of defrauding the company, will not preclude a recovery.[18] So where there is a slight over-

marine ins. act. 1906 [6 Edw. VII., c. 41], sec. 27 [3]). Similarly an overvaluation made in order to cover a gambling transaction will avoid the whole contract. . . . Thirdly, an overvaluation, although not fraudulent, may be so great as to constitute a material fact, the concealment of which will enable the underwriter to avoid the policy." 17 Earl of Halsbury's Laws of England, p. 379, sec. 749.

[13] Sturm v. Great Western Ins. Co. 40 How. Pr. (N. Y.) 423.

[14] Nassauer v. Susquehanna Mutual Fire Ins. Co. 100 Pa. St. 507.

[15] Miller v. Alliance Ins. Co. 7 Fed. 649; Brooke v. Louisiana State Ins. Co. 8 Mart. (La.) 322 (4 N. S. 640); Fuller v. Boston Mutual Ins. Co. 4 Met. (45 Mass.) 206. See National Bank v. Hartford Fire Ins. Co. 95 U. S. 673, 24 L. ed. 563; Franklin Fire Ins. Co. v. Vaughan, 92 U. S. 516, 23 L. ed. 740; Helbig v. Svea Ins. Co. 54 Cal. 156, 35 Am. Rep. 72; Cox v. Ætna Ins. Co. 29 Ind. 586; Huth v. New York Mutual Ins. Co. 8 Bosw. (N. Y.) 538.

[16] Wheaton v. North British & Mercantile Ins. Co. 76 Cal. 415, 9 Am. St. Rep. 216, 18 Pac. 758.

[17] Susquehanna Mutual Fire Ins. Co. v. Staats, 102 Pa. 529.

"The honest representation of the value of the property to be insured, although somewhat in excess of its true valuation, will not invalidate a policy of fire insurance, notwithstanding a provision that any overvaluation of the property or interest to be insured shall render absolutely void any policy issued upon such description or valuation." Susquehanna Mutual Fire Ins. Co. v. Staats, 102 Pa. 529, *quoted* in Post v. American Central Ins. Co. 51 Pa. Super. Ct. 352, 360, per Jones, J.

[18] *United States.*—Rochester German Ins. Co. v. Schmidt (U. S. C. C.) 151 Fed. 681, 36 Ins. L. J. 726, rev'd 162 Fed. 447, 89 C. C. A. 333; 175 Fed. 720, 99 C. C. A. 296, 37 Ins. L. J. 1044, on ground that insured was not sole, etc., owner.

Illinois.—Merchants' & Mechanics' Ins. Co. v. Schroeder, 18 Ill. App. 216.

Indiana.—Insurance Co. of North America v. Coombs, 19 Ind. App. 331, 49 N. E. 471.

Iowa.—Behrens v. Germania Fire Ins. Co. 64 Iowa, 19, 19 N. W. 838.

Kentucky.—Protection Ins. Co. v. Hall, 15 B. Mon. (54 Ky.) 411.

Massachusetts.—Phillips v. Merrimack Mutual Fire Ins. Co. 10 Cush. (64 Mass.) 350.

Virginia.—Lynchburg Fire Ins. Co. v. West, 76 Va. 575, 44 Am. Rep. 177.

Wisconsin.—Vergeront v. German Ins. Co. 86 Wis. 425, 56 N. W. 1096.

estimate which may be accounted for by a difference of opinion, and the amount of the policy is within the actual value, and the property was examined by the agent before the risk was accepted, the fact that there is a warranty as to value does not make such overestimate a sufficient ground for avoiding the policy.[19] And when the sum slightly exceeds the value of the thing insured and the freight added to the point of destination, the valuation is conclusive,[20] and where the excess of a bona fide valuation of the ship was twelve thousand five hundred dollars and that of the freight and outfits ten thousand three hundred dollars, such overvaluation was held not fraudulent, and the valuation was recovered.[1]

An overvaluation of property in an application for insurance will not avoid policy, where the policy contains no condition to that effect, and where the agent of the insurance company knows or can judge of the value of the property, and accepts the application without objection; although an overvaluation is a circumstance which may be considered, in connection with others, in determining whether the insured destroyed the property for the purpose of defrauding the company, where that is relied upon as a defense.[2] And if an agent of the insurer who negotiates the insurance indorses on the application that he is personally acquainted with the application and the risk and advises its acceptance and the representation of value of the building is honestly made the policy is not avoided even though the stated value somewhat exceeds the

[19] Hubbard v. North British & Mercantile Ins. Co. 57 Mo. App. 197. See also Laird v. Piedmont Mutual Fire Ins. Co. 82 S. Car. 424, 64 S. E. 404. But see case noted in text at end of this section.

That overvaluation not conclusive, see Miller v. Allianee Ins. Co. 7 Fed. 649; Ocean Ins. Co. v. Fields, 2 Story (U. S. C. C.) 59, Fed. Cas. No. 10,406; Behrens v. Germania Fire Ins. Co. 64 Iowa, 19, 19 N. W. 838; Bonham v. Iowa Cent. Ins. Co. 25 Iowa, 328; Harrington v. Fitchburg Mutual Fire Ins. Co. 124 Mass. 126.

[20] Pritchett v. Insurance Co. of North America, 3 Yeates (Pa.) 463, 464.

[1] Phœnix Ins. Co. v. McLoon, 100 Mass. 475.

[2] Insurance Co. of North America v. McDowell, 50 Ill. 120, 99 Am. Dec. 497. See Rochester German Ins. Co. v. Schmidt (U. S. C. C.) 151 Fed. 681, 36 Ins. L. J. 726, revd. 162 Fed. 447, 89 C. C. A. 333, 175 Fed. 720, 99 C. C. A. 296, 37 Ins. L. J. 1044, on ground that insured was not sole, etc., owner.

As to value stated in application, see:

California.—Wheaton v. North British & Mercantile Ins. Co. 76 Cal. 415, 9 Am. St. Rep. 216, 18 Pac. 758.

Illinois.—Merchants' & Mechanics' Ins. Co. v. Schroeder, 18 Ill. App. 216.

Maine.—Williams v. Phœnix Fire Ins. Co. 61 Me. 67.

Massachusetts.—Holmes v. Charleston Mutual Fire Ins. Co. 10 Met. (51 Mass.) 211, 43 Am. Dec. 428.

New Hampshire.—Hersey v. Merrimack Co. Ins. Co. 7 Fost. (27 N. H.) 149.

North Carolina.—Dupree v. Virginia Home Ins. Co. 92 N. C. 417.

actual value.[3] And an overvaluation of a vessel, upon application for marine insurance, does not necessarily avoid the policy.[4]

The insurer may also be estopped to question the valuation and to set up a wilfully false statement in the application, by the agent's acts in valuing the property with which he is familiar and in making out the application.[5] It is held that except in case of valued policies the contract is not avoided by misrepresentations as to value, even though fraudulent, where the risk is in no manner affected thereby,[6] and where the policy is not a valued one, misrepresentations as to value only go to the question of fraud and false swearing generally, and are not material to the risk.[7] And in case of valued policies a misrepresentation as to value, even if material, to the risk, must, it is held, be more than a mere error in judgment, it must be fraudulently or intentionally made. It is insufficient that the property was not worth the value stated.[8] Again, the rule that to avoid a policy for overvaluation, it must appear that such overvaluation was intentional, fraudulent, and not an honest expression of opinion, prevails although the policy contains the stipulation and condition: "If any false representation is made by the assured of the condition, situation, or occupancy of the property, or any overvaluation, or any misrepresentation whatever, either in a written application or otherwise, this policy is void." [9]

[3] Susquehanna Mutual Fire Ins. Co. v. Staats, 102 Pa. 529.

[4] Hodgson v. Marine Ins. Co. 5 Cranch (9 U. S.) 100, 3 L. ed. 48. *Cited* in Brooke v. Louisiana State Ins. Co. 4 Mart. N. S. (La.) 643; Phœnix Ins. Co. v. McLoon, 100 Mass. 476; Milwaukee Mechanics' Ins. Co. v. Russell, 65 Ohio St. 258, 56 L.R.A. 161, 62 N. E. 338.

[5] Miller v. Fireman's Fund Ins. Co. 6 Cal. App. 395, 92 Pac. 332. See also Teutonic Ins. Co. v. Howell, 21 Ky. L. Rep. 1245, 54 S. W. 852, 29 Ins. L. J. 356 (there being no fraud); Williams v. Bankers & Merchants Town Mutual Fire Ins. Co. 73 Mo. App. 607, 1 Mo. App. Rep. 100. See Laird v. Piedmont Mutual Fire Ins. Co. 82 S. Car. 424, 64 S. E. 404.

As to valued policy laws, misrepresentations and warranties, see § 163b herein.

[6] Rosser v. Georgia Home Ins. Co. 101 Ga. 718, 29 S. E. 286, and so notwithstanding Ga. Civ. Code, secs. 2098, 2099, requiring representations, if material, to be true or the policy is void.

[7] Delaware Ins. Co. v. Hill (1910) — Tex. Civ. App. —, 127 S. W. 283.

Fraud and false swearing: fraudulent statements as to value, see § 3339 herein.

Fraud and false swearing: proofs of loss, see §§ 3319, 3320, 3339–3344.

As to overvaluation in open policy being immaterial, see Aurora F. Ins. Co. v. Johnson, 46 Ind. 315; Cohen v. Charleston Ins. Co. Dudl. L. (S. C.) 147; 31 Am. Dec. 549.

[8] Delaware Ins. Co. v. Hill (1910) — Tex. Civ. App. —, 127 S. W. 283. See Co-Operative Ins. Assoc. of San Angelo v. Ray (1911) — Tex. Civ. App. —, 138 S. W. 1122.

[9] Wheaton v. North British & Mercantile Ins. Co. 76 Cal. 415, 9 Am. St. Rep. 216, 18 Pac. 758.

But if statements as to value are made warranties, the assured is obligated to place a fair and reasonable value upon the property, otherwise the policy may not be enforced;[10] and a false warranty as to value will annul the policy, as where the value is warranted to be the value, it goes beyond the expression of opinion.[11] And an untrue affirmative warranty as to the value of an automobile, made in an application will avoid the policy, the policy stipulation being that statements are material and if untrue will avoid the policy.[12] So statements in an application that the value of the property is estimated by applicant does not prevent a gross overvaluation from avoiding the policy, where the statement of value is warranted. And the valuation at $1,500 in an application for insurance of a building which is worth only $200 cannot be regarded as so approximately correct as to comply with such a warranty.[13] But it is held that there must be a substantial breach to avoid a policy on account of a breach of warranty as to value,[14] and a substantially true statement of the value of a building, in an application is a compliance with a warranty of the statement of value.[15] So it is also held that if a policy of fire insurance is conditioned to be void for overvaluation, it is avoided by any substantial overvaluation, whether fraudulent or innocent.[16]

If the facts are admitted by demurrer the question of overvaluation is for the court, otherwise it is one for the jury.[17]

§ 163. Valued policies: statutory regulations.—Several states have adopted valued policy laws[18] relating to fire risks on real

[10] Sun Fire Office v. Wich, 6 Col. App. 103, 39 Pac. 587.

[11] School District v. State Ins. Co. 61 Mo. App. 597. See Carson v. Jersey City Fire Ins. Co. 43 N. J. L. 300, 39 Am. Rep. 584. But see Wheaton v. North British Ins. Co. 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216.

[12] Miller v. Commercial Union Assur. Co. 69 Wash. 529, 125 Pac. 782.

[13] Duncan v. National Mutual Fire Ins. Co. 44 Colo. 472, 20 L.R.A. (N.S.) 340, 98 Pac. 634.

[14] Phœnix Ins. Co. v. Pickel, 119 Ind. 155, 12 Am. St. Rep. 393, 21 N. E. 546.

[15] Duncan v. National Mutual Fire Ins. Co. 44 Colo. 472, 20 L.R.A. (N.S.) 340, 98 Pac. 634.

[16] Boutelle v. Westchester Fire Ins. Co. 51 Vt. 4, 31 Am. Rep. 666; Shelden v. Michigan Millers' Fire Ins. Co. 124 Mich. 303, 82 N. W. 1068 (not changed by Pub. Acts 1897, act no. 167). See Lycoming Fire Ins. Co. v. Rubin, 79 Ill. 402; Bobbitt v. Liverpool & London & Globe Ins. Co. 66 N. C. 70, 8 Am. Rep. 494; Keeler v. Niagara Ins. Co. 16 Wis. 523, 84 Am. Dec. 714. But *compare* Insurance Co. of North America v. Coombs, 19 Ind. App. 331, 49 N. E. 471.

[17] Slafter v. Concordia Fire Ins. Co. 142 Iowa 116, 120 N. W. 706; Laird v. Piedmont Mutual Fire Ins. Co. 82 S. Car. 424, 64 S. E. 404.

[18] *Arkansas.*—Sandels & Hill's Dig. Stat. Ark. 1894, p. 982, sec. 4140, Laws 1889, p. 57, c. 42; acts 1899, p. 112, no. 61.

property or on buildings, making the value in the policy the measure of damages and conclusive in case of a total loss or a loss within the intent of the statute, notwithstanding there may be stipulations

California.—Civ. Code 1903, secs. 2596, 2756.

Dakota.—Comp. Laws 1887, secs. 4151, 4243; Levisee's Dak. Codes, secs. 1527, 1619.

Delaware.—Laws Del. Rev. Code 1852, as amended 1893, pp. 586, 587, vol. 18, c. 696, vol. 19; Act March 29, 1889, vol. 18 Laws 1889, p. 961, c. 695, secs. 1, 2, am'd vol. 19 Laws p. 889, c. 696.

Florida.—Chap. 4677, p. 33, act approved May 31, 1899; Gen. Stat. 1906, secs. 1528, 2776.

Georgia.—Lester, Rowell & Hills' Ga. Code, 1882, secs. 2814, 2815, 2834; Code 1895, sec. 2110; see Laws 1895, p. 51.

Iowa.—McClain's Ann. Code 1888, p. 434, sec. 1734; Ann. Code 1897, sec. 1742, Supp. 1907, sec. 1742, construed in Zalesky v. Home Ins. Co. 108 Iowa, 341, 79 N. W. 69.

Kansas.—Laws 1893, c. 102; Laws 1897, c. 142; Gen. Stat. 1905, sec. 3538; Gen Stat. 1909, secs. 4260–4263.

Kentucky.—Act 1893, sec. 700 Ky. Stat. (construed in Sachs v. London & Lancashire Fire Ins. Co. 23 Ky. L. Rep. 2397, 67 S. W. 23, 31 Ins. L. J. 426); Stat. 1909, secs. 4307, 4308 (live stock).

Louisiana.—Const. & Rev. Laws 1904, pp. 888, 889; Laws 1906, adopted in 1900, act no. 135.

Maine.—Rev. Stat. 1883, p. 445, c. 49, title IV. sec. 20 (statements of value in application are representations and not warranties).

Minnesota.—Rev. Laws 1905, sec. 1642, see also Minn. Standard policy.

Mississippi.—Pamph. acts 1894, p. 51; Laws 1896, c. 56; Code 1906, sec. 2592.

Missouri.—Rev. Stat. 1889, p. 1401, secs. 5897, 5898, 5899; Laws 1895, p. 194; Ann. Stat. 1896, p. 3793; Rev. Stat. 1899, secs. 7969, 7970, 7979 (last section takes precedence as amendment of secs. 7969, 7970, so far as in conflict, Howerton v. Iowa State Ins. Co. 105 Mo. App. 575, 80 S. W. 27) construed in Williams v. Bankers & Merchants Town Mutual Fire Ins. Co. 73 Mo. App. 607, 1 Mo. App. Rep. 100.

Montana.—Booth's Ann. Civ. Code, 1895, sec. 3553.

Nebraska.—Brown & Wheeler's Comp. Stat. 1893, p. 536, c. 43, sec. 43; Comp. Stat. 1903, sec. 3906.

New Hampshire.—Pub. Stat. 1891, p. 485, c. 170, secs. 1, 5; Pub. Stat. 1901, c. 170, sec. 5, p. 571.

North Dakota.—Rev. Code, secs. 4497, 4593, 4607; Laws 1907, c. 158, p. 253.

Ohio.—Smith & Ben. Ver. Rev. Stat. 6th ed. 1890, sec. 3643; Bates Ann. Stat. 1906, sec. 3643.

Oklahoma.—Stat. 1890, p. 631, sec. 3159. c. 44, art. 3, sec. 4; 1 Wilson's Rev. & Ann. Stat. 1903, p. 790, secs. 3199, 3204.

Oregon.—Ballinger & Cotton's Ann. Codes & Stats. 1902, secs. 3720, 3721.

Pennsylvania.—Laws 1887, p. 186, No. 128, Pepper & Lewis' Dig. p. 2387, par. 101 (boiler insurance).

South Carolina.—Civ. Code, sec. 1816, vol. 1; Code of Laws 1902, p. 695; see act Feb. 28, 1896, 22 Stat. at Large, 113, 114, construed in Home Ins. Co. v. Virginia Carolina Chemical Co. (U. S. C. C.) 109 Fed. 681.

South Dakota.—Laws 1905, c. 126; Civ. Code 1903 (mar.) sec. 1939, (fire) sec. 1953; (life) sec. 1958.

Tennessee.—Shannon's Ann. Code 1896, p. 775, sec. 3348.

Texas.—Civ. Stat. art. 2971, title 53, c. 3; Rev. Stat. 1895, art. 3089; Suppl. Sayle's Rev. Civ. Stat. 1903, art. 3089.

Washington.—Ballinger's Ann.

in the policy that the true value shall be proved, and notwithstanding other clauses inconsistent with the statute. And the actual value of the real estate when destroyed, or the value when insured, and the consequent actual loss to the insured have been held wholly immaterial. The statute is a part of the contract, and the amount written in the policy is regarded as liquidated damages agreed upon by the parties conclusively in such contract.[19] The insured, under

Codes & Stats. 1897 & Suppl. 1899–1903, sec. 2833.

West Virginia.—Acts 1899, p. 120, c. 33; Code 1906, sec. 1108.

Wisconsin.—1 Sanborn & Berr. Ann. Stat. p. 1165, sec. 1943.

[19] *Arkansas.*—Minneapolis Fire & Marine Ins. Co. v. Fultz, 72 Ark. 365, 80 S. W. 576, 33 Ins. L. J. 690; acts 1899, p. 112, no. 61 (insurer bound to pay amount of insurance on house in case of total loss).

Kentucky.—Germania Ins. Co. v. Ashly, 112 Ky. 303, 99 Am. St. Rep. 295, 65 S. W. 611 (all policies covering real estate are valued policies and the value fixed therein on which the premium is paid is conclusive notwithstanding a clause in the policy contra). Continental Ins. Co. v. Moore, 23 Ky. L. Rep. 72, 62 S. W. 517, 30 Ins. L. J. 1021 (amount in policy on dwelling house conclusive). Phœnix Ins. Co. v. Peak, 20 Ky. L. Rep. 1035, 47 S. W. 1089; act 1893, Ky. Stat. sec. 700 (conclusive in case of total loss).

Mississippi.—Western Assur. Co. v. Phelps, 77 Miss. 625, 27 So. 745, 29 Ins. L. J. 506 (amount named in policy and on which the insured pays premiums is practically liquidated damages in case of loss, and valued policy statute is integrated into and made part of policy of insurance; Laws 1896, c. 56. See as to statutory law being part of policy, § 194 herein.

Missouri.—Gragg & Gragg v. Northwestern National Ins. Co. 132 Mo. App. 405, 111 S. W. 1184, Rev. Stat. 1899, sec. 7979 (in case of total loss recovery may be had to value of insured property less depreciation). Siegle & Son v. Phœnix Ins. Co. 107 Mo. App. 456, 81 S. W. 637 (policy conclusively fixes value). Bode v. Firemen's Ins. Co. 103 Mo. App. 289, 77 S. W. 116, Rev. Stat. 1899, sec. 7969 (policy conclusively fixes value). Millis v. Scottish Union & National Ins. Co. 95 Mo. App. 211, 68 S. W. 1066; Rev. Stat. 1899, secs. 7969, 7970 (insurer liable to full value stated in policy, notwithstanding policy provisions contra).

Nebraska.—Lancashire Fire Ins. Co. v. Bush, 60 Neb. 116, 82 N. W. 313, 29 Ins. L. J. 1028 (policy amount conclusive; statute is part of contract). Home Fire Ins. Co. v. Bean, 42 Neb. 537, 47 Am. St. Rep. 711, 60 N. W. 907 (amount in policy conclusive); German Ins. Co. v. Eddy, 36 Neb. 461, 22 Ins. L. J. 468, 19 L.R.A. 707, 54 N. W. 856.

Ohio.—Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 9 L.R.A. 45, 24 N. E. 1072 (value fixed, conclusive). See Sun Mutual Ins. Co. v. Hock, 8 Ohio Cir. Ct. R. 341, 32 Week. L. Bul. 341; United Firemen's Ins. Co. v. Kukral, 7 Ohio Cir. Ct. 356, 30 Week. L. Bull. 356.

Texas.—Co-operative Ins. Assoc. of San Angelo v. Ray (1911) — Tex. Civ. App. —, 138 S. W. 1122; acts Tex. 1903, c. 69 (amount specified in policy conclusive as liquidated demand, in case of total loss irrespective of value of property); Sun Mutual Ins. Co. v. Holland, 2 Tex. App. Civ. Cas. sec. 448.

West Virginia.—Ritchie County Bank v. Firemen's Ins. Co. 55 W. Va. 261, 47 S. E. 94; acts 1899, p. 120, c. 33 (amount stated in policy on real estate conclusive in case of total loss).

an allegation describing the property, need not attempt to show that the property was personal, or that the loss was upon real property and total and so rely upon the valued policy law, but he may prove its value immediately before and after the loss with evidence of its total destruction as a basis for recovery.[20] It is only necessary to show a total loss.[1] But in Washington proof must be given as to the value of insured's special interest in personal property.[2] If, however, the policy contains no words showing that the policy is a valued one, but is an open policy the statutory provision that in case of a total loss the insured can recover the full amount of the insurance does not apply, especially so where the statute prescribes no penalty and contains no provision fixing the amount named in the policy as conclusive evidence of value, so that, in such case, the insurer is only liable for loss not to exceed the amount named in the policy.[3]

So it is held in California that a contract between a life insurance company and the insured, whereby the latter waives his statutory rights, is ultra vires and void.[4] But a submission to arbitra-

Wisconsin.—Bourgeois v. Northwestern National Ins. Co. 86 Wis. 606, 57 N. W. 347; Seyk v. Millers National Ins. Co. 74 Wis. 67, 3 L.R.A. 523n, 41 N. W. 443; Oshkosh Gas Light Co. v. Germania Fire Ins. Co. 71 Wis. 457, 5 Am. St. Rep. 233, 37 N. W. 819; Cayon v. Dwelling-House Ins. Co. 68 Wis. 510, 516, 32 N. W. 772; Baumessel v. Bruners Fire Ins. Co. 43 Wis. 463; Thompson v. St. Louis Ins. Co. 43 Wis. 459; Reilly v. Franklin Ins. Co. 43 Wis. 449; 7 Ins. L. J. 391; 28 Am. Rep. 552.

That policy may contain clause not provided for by statute, see Armstrong v. Western Manufacturers' Mutual Fire Ins. Co. 95 Mich. 137, 54 N. W. 637, under How. Stat. Mich. 4349.

[20] Granite State Fire Ins. Co. v. Buckstaff Bros. Mfg. Co. 53 Neb. 123, 73 N. W. 544.

[1] Oklahoma Farmers' Mutual Indem. Assoc. v. McCorkle, 21 Okla. 606, 97 Pac. 270, 38 Ins. L. J. 108; 1 Wilson's Rev. & Ann. Stat. Okla. 1903, p. 790, sec. 3204.

[2] Bright v. Hanover Fire Ins. Co. 48 Wash. 60, 92 Pac. 779.

[3] Ulmer v. Phenix Ins. Co. 61 S. Car. 459, 39 S. E. 712, 31 Ins. L. J. 38.

[4] In this case the condition related to forfeiture: Griffith v. New York Life Ins. Co. 101 Cal. 627, 40 Am. St. Rep. 96, 36 Pac. 113.

As to right to fix conditions as to the cancellation under sections 3664 to 3667 of Revised Statutes of Ohio, and obligation to comply with statute, see Phœnix Mutual Fire Ins. Co. v. Brecheisen, 50 Ohio St. 542, 23 Ins. L. J. 56, 35 N. E. 53. Insured cannot waive statutory provision requiring insurer to fix the insurable value of the property conclusively in the policy as the measure of recovery in case of total loss. Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 9 L.R.A. 45, 24 N. E. 1072; Ohio Rev. Stat. sec. 3643, 3644.

That condition as to limitation of action (Rev. Stat. Ind. 1881, sec. 3770) controls condition in policy, see Small v. Westchester Fire Ins. Co. (U. S. C. C.) 51 Fed. 789.

That statute relating to statements in application controls, see Hermany v. Fidelity Mutual Life Assn. 151 Pa. St. 17, 24 Atl. 1064.

tion of the amount of loss on an insured building does not constitute a waiver of the benefits of the statute [5] nor is the statute waived by accepting a policy prescribing a different rule for fixing the amount of the loss to be paid, nor does it exclude the operation of the statute.[6]

These laws have been declared valid and founded upon considerations of public policy, being intended to guard against overinsurance and against carelessness, and every other incentive to destroy property or permit its destruction for the purpose of gain on the part of the insured.[7] So it is held in the Federal Supreme Court that the Missouri valued policy law is constitutional; that it does not present the alternative of wager policies to indemnity policies but changes open policies into valued policies; and the court declares that it makes no contract for the parties, but permits absolute freedom in this, and leaves them to fix the valuation upon such prudence and inquiry as they choose.[8] So, under a Florida decision, a statute requiring insurer to fix the insurable value of the property insured and to state such value in the policy, the measure

Where policies are not signed as required by statute, and the policy failed to specify that funds alone are liable, a deed of settlement is required, and the policy has no validity: Hambro v. Hull & London Fire Ins. Co. 3 Hurl. & N. 789. See Prince of Wales L. Assur. Co. v. Harding, El. B. & E. 183.

The fact that a statutory condition is not inserted does not, it is held, prevent its being read as a condition in the contract, even though there are other conditions not printed as variations: Findley v. Fire Ins. Co. of North America (1894) 14 Can. L. T. 340.

[5] Seyk v. Millers National Ins. Co. 74 Wis. 67, 3 L.R.A. 523, 41 N. W. 443.

On effect of valued policy statutes on agreements for arbitration, see note in 47 L.R.A.(N.S.) 433.

[6] Western Assur. Co. v. Phelps, 77 Miss. 625, 27 So. 745, 29 Ins. L. J. 506. ("Public policy declared by the statute cannot thus be contracted away," per Whitfield, J.)

[7] See Reilly v. Franklin Ins. Co. 43 Wis. 449, 7 Ins. L. J. 391, 28 Am. Rep. 552; Ostrander on Fire Ins. (ed. 1892) secs. 243, 505 et seq.; New Orleans Real Estate Mortgage & Security Co. v. Teutonia Ins. Co. 128 La. 45, 54 So. 466, 40 Ins. L. J. 998 (valued policy "is a measure in public interest and in order to secure greater certainty in the contract of insurance," per Breaux, C. J.); Lancashire Fire Ins. Co. v. Bush, 60 Neb. 116, 82 N. W. 313, 29 Ins. L. J. 1028; Comp. Stat. Neb. 1899, c. 43, sec. 43. ("This statute is grounded on public policy. It is designed to prevent overinsurance, and to avoid the evils resulting therefrom." *Citing* Oshkosh Gaslight Co. v. Germania Fire Ins. Co. 71 Wis. 454, 37 N. W. 819, 5 Am. St. Rep. 233; Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 9 L.R.A. 45, 24 N. E. 1072.)

[8] Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. ed. 552, 28 Ins. L. J. 97, 48 Cent. L. J. 228, aff'g Daggs v. Orient Ins. Co. 136 Mo. 382, 35 L.R.A. 227, 38 S. W. 85, 26 Ins. L. J. 67, see list of valued policy laws at beginning of this section. See also Word v. Southern Mutual Ins. Co. 112 Ga. 585, 37 S. E. 897 (valued policy laws are constitutional).

of damages in case of total loss to be the amount so fixed, and in case of partial loss, such proportion of the amount upon which premiums are paid as the damage sustained is of the insurable value as fixed by the agent, and providing that the insurer shall be estopped to deny that the property insured was worth at the time of insuring the amount so fixed, and that the agent soliciting the insurance shall be held the agent of the insurer,—is not repugnant to either the state or Federal Constitution.[9] So it is held in Georgia that the statute does not make an arbitrary or unreasonable classification because it is limited to insurance companies, and because it excludes from its operation losses sustained by reason of the destruction of specified kinds of personal property.[10]

[9] Hartford Fire Ins. Co. v. Redding, 47 Fla. 228, 67 L.R.A. 518, 37 So. 62; act approved May 31, 1899, c. 4677, p. 33.

See article on "Effect of Fixing the Face of a Policy of Insurance as a Liquidated Demand." Concluding that it is authoritatively settled "that these valued policies are effective and binding," by W. C. Rogers in 53 Cent. L. Journ. (1901) 106.

[10] Ætna Ins. Co. v. Brigham, 120 Ga. 925, 48 S. E. 348, 33 Ins. L. J. 941. The court, per Cobb, J., said: "What is familiarly known as the 'Dodson Law,' contained in Civ. Code 1895, sec. 2110, is attacked in this case as being unconstitutional, upon the ground that it impairs and restricts the right of contract, which is one of the privileges and immunities guaranteed to citizens by the Fourteenth Amendment to the Constitution of the United States. The act in question is as follows: 'All insurance companies shall pay the full amount of loss sustained upon the property insured by them; provided, said amount of loss does not exceed the amount of insurance expressed in the policy; and all stipulations in such policies to the contrary shall be null and void; provided, that in cases of loss on stocks of goods and merchandise and other species of personal property changing in specifics and quantity by the usual customs of trade, only the actual value of the property at the time of loss may be recovered; provided, the loss does not exceed the amount expressed in the policy.' The point raised in the assignment of error is without merit, for, even if it be conceded that the section quoted abridges some privilege or immunity of citizens of the United States protected by the Fourteenth Amendment to the Constitution of the United States, it has been definitely settled by the decisions of the Supreme Court of the United States that a corporation is not a citizen, within the meaning of that provision of the amendment. See Orient Insurance Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. ed. 552, 28 Ins. L. J. 97, 48 Cent. L. J. 228, and citations. It was argued that the law also infringes those clauses of the Fourteenth Amendment which prohibit the states from passing any law which deprives 'any person' of life, liberty or property without due process of law, or which deny to any person within their jurisdiction the equal protection of the laws. The assignments of error in the record are not broad enough to cover these questions; but, even if they had been, they would seem to be without merit, under the decision in Orient Insurance Co. v. Daggs, supra, affirming Daggs v. Orient Ins. Co. 136 Mo. 382, 35 L.R.A. 227, 38 S. W. 85, 26 Ins. L. J. 67, where a similar law was

Notwithstanding the rule stare decisis, we are inclined to the belief that the system is open to serious objections, for the reason that the assured can gain nothing in case of undervaluation, and the same inducement to incendiarism exists in case of overvaluation. Nor can such legislation protect against overinsurance even though the insurer incurs a great expense and loss of time in determining the actual value of property. Again, the legislation is restrictive, and abridges the rights of parties to freely enter into contracts, and it would seem that it would best conform to the doctrine of indemnity that the value of the property at the time of loss should be proved.[11]

held not to be violative of these clauses of the Fourteenth Amendment. Various attacks have been made upon laws similar to the one now under discussion, and in almost every instance they have been held to be constitutional and valid. See Reilly v. Franklin Insurance Co. 43 Wis. 449, 28 Am. Rep. 552; Phœnix Ins. Co. v. Levy, 12 Tex. Civ. App. 45, 33 S. W. 992; Dugger v. Mechanics & Traders Ins. Co. 95 Tenn. 245, 28 L.R.A. 796, 32 S. W. 5; Insurance Co. of North America v. Bachler, 44 Neb. 549, 62 N. W. 911, 915. Our decision is, however, necessarily confined to the one ground of attack raised by the assignment of error. 4. One of the assignments of error is that the law above quoted is 'unconstitutional, in that it is special legislation affecting the rights of contract on the part of insurance companies, without the consent of said companies, which is prohibited by paragraph 1, sec. 4, art. 1, of the Constitution of the state of Georgia, which provides that laws of a general nature shall have uniform operation throughout the state, and no general law affecting private rights shall be varied in any particular case by special legislation, except with the consent in writing of all persons to be affected thereby.' Civ. Code 1895, sec. 5732. Under this assignment of error, it is argued that the act makes fire insurance companies writing policies upon houses and personal property other than specified kinds the subject of an arbitrary classification, and that especially is the classification arbitrary when it is kept in mind that the legislation does not apply at all to private individuals engaged in the business of writing fire insurance. While the General Assembly is permitted to classify subjects for legislation, the courts will restrain them from making arbitrary and unreasonable classifications. At the same time the law-making power is allowed a wide latitude in respect of such matters. Without undertaking to discuss the question at length, we hold that the legislation under consideration is not subject to the objection made. See majority opinion in Union Savings Bank & Trust Co. v. Dottenheim, 107 Ga. 606, 34 S. E. 217; Dugger v. Mechanics & Traders Ins. Co. 95 Tenn. 246, 28 L.R.A. 796, 32 S. W. 5."

[11] It is said by Mr. Richards that "these laws are not to be commended, because they impose too arbitrary a standard and may be used as an instrument of fraud:" (Richards on Ins. ed. 1892, sec. 20 "and encourage fraudulent overvaluation and arson" Id. 3rd ed. note p. 31); and another author, while maintaining their validity, admits that the policy of these laws "contemplates an abridgment of the natural rights of the parties to make contracts:" Ostrander on Fire Ins. sec. 245, p. 510.

The system of "valued policies" is open to "grave objections, for apart from the labor and cost of valuing a thousand properties in

§ 163a. Same subject: conflicting clauses.—The rule above stated that the value specified in a valued policy is conclusive in case of a total loss, or a loss within the intent of the statute, notwithstanding stipulations or clauses inconsistent or in conflict with the express terms of the statute applies to and makes invalid a clause which limits recovery to an amount less than that fixed in the policy;[12] the rule also applies to and voids a condition that insurer shall not be liable beyond the actual cash value at the time of any loss;[13] to a condition limiting the amount of recovery to the sum or sums itemized, and to the actual cash value at the time of loss;[14] that appraisal

preparation for the total destruction of four or five, it is obvious, if the value fixed is less than the real value, there is no advantage to the insured, but the contrary; and if it is greater than the real value, then no doubt the insured might make a profit by a fire, but this would offer an inducement to carelessness, if not to incendiarism. In the United States, however, several state legislatures have been so imprudent as to force the issue of 'valued policies:'" 13 Ency. Britt. 164.

It is worthy of note that at the 30th annual meeting of the American Bar Assoc. held at Portland Me. in Aug. 1907, the committee on Insurance Law recommended the adoption of certain resolutions one of which was the repeal of the valued policy laws. And this recommendation was one of those adopted. Vol. 31 Reports of American Bar Association 1907, pp. 11, 654–659. "In 19 or 20 of the states are statutes known as valued policy laws, which require insurance companies to pay their assured in the event of the total destruction of real or personal property insured, the full amount of the insurance on said property without regard to the value thereof at the time of the loss. These laws have increased both the cost of insurance and the fire waste; they invite fraud, perjury, and arson; they present before every evilly-disposed person the temptation to over-insure and then to burn his property for the gain there is in it. . . . Society at large is directly concerned in preventing the recovery on any fire insurance policy of more than the actual value of the property destroyed." Id. pp. 654, 655.

Compare Editorial, entitled "Fire Insurance—Adjustment of Loss." urging enactment of valued policy law, in 19 Canadian Law Times (1899) 124.

[12] Daggs v. Orient Ins. Co. 136 Mo. 382, 35 L.R.A. 227, 38 S. W. 85, 26 Ins. L. J. 67, aff'd Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. 281, 28 Ins. L. J. 97, 48 Cent. L. J. 228 (clause limiting insurer's liability in case of loss contrary to express provisions of valued policy law will not be sustained); Home Fire Ins. Co. v. Weed, 55 Neb. 146, 75 N. W. 539; Comp. Stat. 1893, c. 43, sec. 43, see Comp. Stat. 1903, sec. 3906; Home Fire Ins. Co. v. Bean, 42 Neb. 537, 47 Am. St. Rep. 711, 60 N. W. 907.

[13] Hartford Fire Ins. Co. v. Bourbon County Court, 24 Ky. L. Rep. 1850, 72 S. W. 739, 32 Ins. L. J. 481 (act 1893, Ky. Stat. 700); Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 9 L.R.A. 45, 24 N. E. 1072. But *compare* Burkett v. Georgia Home Ins. Co. 105 Tenn. 548, 58 S. W. 848; act 1893.

[14] Oklahoma Farmers Mutual Indem. Assoc. v. McCorkle, 21 Okla. 606, 97 Pac. 270, 38 Ins. L. J. 108; 1 Wilson's Rev. & Ann. Stat. Okla. 1903, p. 790, sec. 3204, providing that "if there is no valuation in the policy, the measure of indemnity in an in-

fix the cash value of the loss with proper deduction for depreciation, however caused;[15] an agreement to submit the question to arbitration;[16] that the loss or damage shall in no event exceed what it would cost insured to repair or replace the same.[17] But, under a Tennessee decision, a policy provision that the amount of loss or damage should be based upon the actual cash value of the property at the time of the fire, not to exceed the cost of replacing the build-

surance against fire is the full amount stated in the policy, but the effect of a valuation in a policy of fire insurance is the same as in a policy of marine insurance."

[15] Hartford Fire Ins. Co. v. Bourbon County Court, 24 Ky. L. Rep. 1850, 72 S. W. 739, 32 Ins. L. J. 481. *Examine* Stevens v. Norwich Union Fire Ins. Co. 120 Mo. App. 88, 96 S. W. 684, as to allowing depreciation in value under Rev. Stat. 1899, sec. 7969; Siegle & Son v. Phœnix Ins. Co. 107 Mo. App. 456, 81 S. W. 637. Rev. Stat. 1899, sec. 7979.

But *compare* Zalesky v. Home Ins. Co. 108 Iowa, 341, 79 N. W. 69 (Iowa Code sec. 1742, does not preclude making appraisement a condition precedent to action on policy, as the statute does not fix the value of the property destroyed but makes it necessary for assured to prove the loss, as the amount stated is only prima facie evidence of insurable value).

[16] Hartford Fire Ins. Co. v. Bourbon County Court, 24 Ky. L. Rep. 1850, 72 S. W. 739, 32 Ins. L. J. 481; act 1893, Ky. Stat. 700; Merchants Ins. Co. v. Stephens, 22 Ky. L. Rep. 999, 59 S. W. 511 (agreement to arbitrate or arbitration not valid under act 1893, Ky. Stat. 700); Lancashire Ins. Co. v. Bush, 60 Neb. 116, 82 N. W. 313, 29 Ins. L. J. 1028; Comp. Stat. Neb. 1899, c. 43, sec. 43. ("The statute, which is to be regarded as part of the contract, fixes conclusively the worth of the building which is the subject of insurance. If the property is wholly destroyed, its actual value is not to be determined by evidence, agreement or arbitration. The damages are liquidated and the measure of recovery already ascertained. . . . To receive evidence for the purpose of ascertaining the amount of the loss . . . would violate the policy of the law, which is to make the insurer pay the amount of the risk on which he has taken premiums. . . . It is believed that it" (the insurer) "could have made no bargain by which, in the event of a total loss of the insured property, it could escape from its obligation to pay the full amount of the indemnity for which the policy was written. As before remarked, the statute rests on considerations of public policy, and it is probable that the insured could not, even by express contract, relinquish the benefit of its provisions. Reilly v. Franklin Ins. Co. 43 Wis. 449, 28 Am. Rep. 552; Emery v. Piscataqua Fire & Marine Ins. Co. 52 Me. 322." Per Sullivan, J.) Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 9 L.R.A. 45, 24 N. E. 1079. *Examine* Stevens v. Norwich Union Fire Ins. Co. 120 Mo. App. 88, 96 S. W. 684, under Rev. Stat. 1899, sec. 7964; Seyk v. Millers National Ins. Co. 74 Wis. 67, 3 L.R.A. 523, 41 N. W. 443.

[17] Hartford Fire Ins. Co. v. Bourbon County Court, 24 Ky. L. Rep. 1850, 72 S. W. 739, 32 Ins. L. J. 481; act 1893, Ky. Stat. 700; Milwaukee Mechanics' Ins. Co. v. Russell, 65 Ohio St. 230, 56 L.R.A. 159, 62 N. E. 388; Rev. Stat. sec. 3643 (condition void which gives insurer option to rebuild in case of total loss).

ing is held valid.[18] Again, a policy stipulation requiring insured if required to furnish verified plans and specifications of the destroyed or damaged property is of no binding force.[19] So a three-quarters clause whereby insured is made a coinsurer and reducing the insurer's liability below the amount specified in the policy is nugatory.[20] So where a policy was issued after the enactment of a valued policy law the insurers, whether foreign or domestic companies, cannot deny that the value of the property was that upon which the insurance was calculated, nor can they deny that the amount of the policy was but three-fourths the valuation.[1] And under a statute making the amount of insurance written on real property conclusive as to its value, insurance companies cannot avoid their fixed liability for losses on such property by agreeing with the owner to denominate it personal property.[2]

The valued policy law of Louisiana, adopted in 1900,[3] *conflicts with the standard policy,* borrowed from the New York standard policy and made a law in 1898,[4] and repeals it. A valued policy statute does not confer a personal privilege which may be renounced. The statute was adopted as a measure of policy, and it controls as a measure of public interest and to secure greater certainty so that an attempt to limit the insurer's liability by exempting them from liability for loss occasioned by ordinance or law regulating construction or repair of buildings in conflict with the valued policy statute cannot avail the insurer.[5] And the same limitation of liability clause is held void in Mississippi.[6]

[18] Burkett v. Georgia Home Ins. Co. 105 Tenn. 548, 58 S. W. 848; act 1893.

[19] Mississippi Home Ins. Co. v. Barron, 91 Miss. 722, 45 So. 875, Code Miss. 1906, sec. 2592.

[20] Western Assurance Co. v. Phelps, 77 Miss. 625, 27 So. 745, 29 Ins. L. J. 506; Sachs v. London & Lancashire Fire Ins. Co. 23 Ky. L. Rep. 2397, 67 S. W. 23, 31 Ins. L. J. 426 (coinsurance clause void as contra to act 1893, Ky. Stat. 700); Phœnix Ins. Co. v. Peak, 20 Ky. L. Rep. 1035, 47 S. W. 1089 (Insurer cannot limit liability to three-fourths value where total loss. *Compare* Hudson v. Scottish Union & National Ins. Co. 110 Ky. 722, 23 Ky. L. Rep. 116, 62 S. W. 513, 30 Ins. L. J. 1023, an insurance on personal property).

[1] Scottish Union & National Ins. Co. v. Enslie, 78 Miss. 157, 28 So. 822, 30 Ins. L. J. 181, under act 1894, Pamph. acts Miss. 1894, p. 51; Code sec. 2592. See also Mitchell v. Potomac Ins. Co. 16 App. D. C. 241 (under Mo. Laws 1895, p. 194), affd. on other points 183 U. S. 42, 46 L. ed. 74, 22 Sup. Ct. 22, 31 Ins. L. J. 570.

[2] Havens v. Germania Fire Ins. Co. 123 Mo. 403, 45 Am. St. Rep. 570, 27 S. W. 718, 26 L.R.A. 107.

[3] Act no. 135.

[4] Act no. 105, of 1898, art. 3, sec. 22.

[5] New Orleans Real Estate Mortgage & Securities Co. v. Teutonia Ins. Co. 128 La. 45, 54 So. 466, 40 Ins. L. J. 999. *Compare* Melancon v. Phœnix Ins. Co. 116 La. 324, 40 So. 718.

As to legislature adopting standard form so as not to conflict with valued policy law, see opinion of Elliott, J., in Wild Rice Lumber Co.

§ 163b. Valued policy laws: three-fourths value.—A policy fixing the amount at risk not in excess of three-fourths the value of the property as required by statute constitutes a valued policy and the amount so fixed cannot be questioned.[7] So a statute which prohibits an insurer from taking a risk at a ratio greater than three-fourths of the value of the property, and precludes questioning such value, does not estop the insurer from proving the value of insured mercantile stock at the time of loss, but only precludes denying their specified value at the time the insurance was taken.[8] And the same rule applies where the policy covers an engine and dynamo on a power house, so attached as to be part of the realty and not personal property, the items not being separately insured but insured together as a lump sum.[9] And the amount fixed may be reduced by showing depreciation, decay or salvage;[10] and a policy clause limiting recovery to the cash value at the time of loss, is valid, and an arbitration clause is a condition precedent;[11] such a statute does not conflict with an enactment which prohibits requiring insured

v. Royal Ins. Co. 99 Minn. 190, 108 N. W. 871, 35 Ins. L. J. 824.

Standard policy in South Dakota is a strictly valued one as to real property when wholly destroyed. Lawver v. Globe Mutual Ins. Co. 25 S. Dak. 549, 127 N. W. 615, 39 Ins. L. J. 1588.

[6] Palatine Ins. Co. Ltd. v. Nunn, 99 Miss. 493, 55 So. 44; Code 1906, sec. 2592.

[7] Gibson v. Missouri Town Mutual Ins. Co. 82 Mo. App. 515, Mo. Laws 1895, p. 194. See §§ 3461 et seq. herein.

[8] Surface v. Northwestern National Insurance Co. 157 Mo. App. 570, 139 S. W. 262; Rev. Stat. 1909, sec. 7030.

[9] Rogers v. Connecticut Fire Ins. Co. 157 Mo. App. 671, 139 S. W. 265, 40 Ins. L. J. 1776. The company under the statute "estopped itself from afterwards asserting that the total insurance exceeded 75 per cent of the value of the property at the time the policy was issued" per Johnson, J. Statute fixes value of property at time of contract and is conclusive. Gragg & Gragg v. Northwestern National Ins. Co. 132 Mo. App. 405, 111 S. W. 1184; Rev. Stat. 1899, sec. 7979; Stevens v. Norwich Union Fire Ins. Co. 120 Mo. App. 88, 96 S. W. 684; City of De Soto v. American Guaranty Fund Mut. Fire Ins. Co. 102 Mo. App. 1, 74 S. W. 1. And it is unnecessary to prove such value. Hilburn v. Phœnix Ins. Co. 140 Mo. App. 355, 124 S. W. 63; Mo. Rev. Stat. 1899, sec. 7969; Howerton v. Iowa State Ins. Co. 105 Mo. App. 575, 80 S. W. 27; Rev. Stat. 1899, sec. 7979. And it is sufficient to allege, in an action, the amount so fixed by the policy. Bode v. Firemens Ins. Co. 103 Mo. App. 287, 77 S. W. 116. *Compare* Farmers' Bank v. Manchester Assur. Co. 106 Mo. App. 114, 80 S. W. 299.

[10] Mitchell v. Potomac Ins. Co. 16 App. D. C. 241 (Mo. Laws 1895, p. 194). Aff'd on other points, 183 U. S. 42, 46 L. ed. 74, 22 Sup. Ct. 22, 31 Ins. L. J. 570; Stevens v. Norwich Union Fire Ins. Co. 120 Mo. App. 88, 96 S. W. 684; Rev. Stat. 1899, sec. 7979; Gibson v. Missouri Town Mutual Ins. Co. 82 Mo. App. 515; Laws 1895, p. 194.

[11] Stevens v. Norwich Union Fire Ins. Co. 120 Mo. App. 88, 96 S. W. 684; Mo. Rev. Stat. 1899, sec. 7979.

becoming a coinsurer;[12] nor preclude other insurance up to the amount limited.[13]

§ 163c. Valued policy laws: overvaluation: fraudulent valuation.—Even in case of policies under the valued policy law where another statute provides that misrepresentations must be material to the risk or contribute to the loss to avoid the policy it is no defense that insured misrepresented the value.[14] And a policy is valid though the property is overinsured, under the valued policy law of Mississippi.[15] But subsequent insurance to a larger value than under a prior policy contrary to the express terms of a statute voids the policy.[16] So a statute requiring insurer to state in the policy the insurable value of the property insured and that the sum so fixed shall constitute the measure of damages in case of loss, and providing also that the insurer shall thereby be estopped that the value of the property at the time of insuring was worth the amount so fixed, does not take away from the insurer the right to plead that the insured by fraud procured the insurable value to be fixed at an excessive amount.[17] And gross overvaluation, fraudulent misrepresentation, and concealment may be alleged as a ground for contesting the valuation notwithstanding an incontestable clause of a valued policy law.[18]

§ 163d. Valued policy law: property destroyed by more than one fire.—The statute applies none the less because the property is destroyed by two fires instead of one, and if the actual damages for the partial loss occasioned by the first fire are paid, and the property is thereafter wholly destroyed, the amount fixed in the policy is conclusive and the value of the remainder is the policy valuation less the actual amount paid for loss by the first fire.[19]

§ 163e. Valued policy law: real and personal property.—The Delaware act confines the valuation to real property but if realty and

[12] Surface v. Northwestern Ins. Co. 157 Mo. App. 570, 139 S. W. 262; Mo. Rev. Stat. 1909, sec. 7030.

[13] Bush v. Missouri Town Mutual Ins. Co. 85 Mo. App. 155.

[14] Co-Operative Ins. Assoc. of San Angelo v. Ray (1911) — Tex. Civ. App. —, 138 S. W. 1122; acts Tex. 1903, c. 69. See § 162 herein

[15] Mississippi Home Ins. Co. v. Barron, 91 Miss. 722, 45 So. 875. See § 162 herein.

[16] Thurber v. Royal Ins. Co. 1 Marv. (Del.) 251, 46 Atl. 1111.

[17] Hartford Fire Ins. Co. v. Redding, 47 Fla. 228, 67 L.R.A. 518, 37 So. 62; act approved May 31, 1899, c. 4677, p. 33.

[18] Home Ins. Co. v. Virginia-Carolina Chemical Co. (U. S. C. C.) 109 Fed. 681. See § 162 herein.

[19] Lancashire Fire Ins. Co. v. Bush, 60 Neb. 116, 82 N. W. 313, 29 Ins. L. J. 1028; Comp. Stat. Neb. 1899, c. 43, sec. 43.

Total loss under policy issued after loss by fire and before building repaired. See § 3030 herein.

Total loss subsequent to partial loss; marine risk. See § 3016 herein.

personalty are valued specifically the contract is so far divisible as not to be invalid as to the personal property.[20] The Kentucky valued policy law of 1893, act 1893, sec. 700, Ky. Stat., applies only to real estate and has no reference to a policy upon personal property.[1] But a valued policy law as to real estate does not apply to a three-fourths value stipulation in a policy on personal property.[2] In Louisiana it is decided that only property immovable by nature is within the valued policy law of that state.[3] In Missouri it is held that the direct provisions of the statute [4] apply only to real property and not to personal property,[5] and also, that a stipulation that property insured shall be considered personal property cannot change the nature of the property so as to take it out of a statute making the amount of insurance written on such property conclusive as to its value.[6] and that buildings and machinery placed on a mining lease are not real property within the statute.[7] But an engine and dynamo in a power house are covered when so attached as to be part of the realty and not personal property.[8] And an uncompleted structure may be regarded as a building.[9] But it is also held that the statute of 1899 applies to personal as well as to real property [10] and the valued policy law of that state applies in favor of a builder, who, as such has insured a building being constructed by him under a contract with the owners of real property in which real estate said builder

[20] Thurber v. Royal Ins. Co. 1 Marv. (Del.) 251, 40 Atl. 1111.

[1] Hudson v. Scottish Union & National Ins. Co. 110 Ky. 722, 23 Ky. L. Rep. 116, 62 S. W. 513, 30 Ins. L. J. 1023; Germania Ins. Co. v. Ashby, 112 Ky. 303, 99 Am. St. Rep. 295, 65 S. W. 611.

[2] Hudson v. Scottish Union & National Ins. Co. 110 Ky. 722, 23 Ky. L. Rep. 116, 62 S. W. 513, 30 Ins. L. J. 1023; Ky. Stat. sec. 700; case decided 1901.

[3] Melancon v. Phœnix Ins. Co. 116 La. 324, 40 So. 718; Act No. 135, of 1900, p. 209. But *compare* as to effect in relation to standard policy law (act no. 105, of 1908, art. 3, sec. 22); New Orleans Real Estate Mortgage & Securities Co. v. Teutonia Ins. Co. 128 La. 45, 54 So. 466, 40 Ins. L. J. 999.

[4] Rev. Stat. 1899, secs. 7969, 7970.

[5] City of De Sota v. American Guaranty Fund Mutual Fire Ins. Co. 102 Mo. App. 1, 74 S. W. 1; Millis v. Scottish Union & National Ins. Co. 95 Mo. App. 211, 68 S. W. 1066.

[6] Havens v. Germania Fire Ins. Co. 123 Mo. 403, 26 L.R.A. 107, 45 Am. St. Rep. 570, 27 S. W. 718.

[7] Millis v. Scottish Union & National Ins. Co. 95 Mo. App. 211, 68 So. 1066.

[8] Rogers v. Connecticut Fire Ins. Co. 157 Mo. App. 671, 139 S. W. 265, 40 Ins. L. J. 1776.

[9] Bode v. Firemen's Ins. Co. 103 Mo. App. 287, 77 S. W. 116.

[10] Hilburn v. Phœnix Ins. Co. 140 Mo. App. 355, 124 S. W. 63; Rev. Stat. 1899, sec. 7969; Gragg & Gragg v. Northwestern National Ins. Co. 132 Mo. App. 405, 111 S. W. 1184, Rev. Stat. 1899, sec. 7979 (Ann. Stat. 1896, p. 3973), prohibiting taking risks on any property at a rate greater than three-fourths its value. See also Rev. Stat. 1909, sec. 7030.

has no interest.[11] Again, under an Ohio decision, the rule as to the conclusiveness of the amount stated in a policy under the valued policy law has been applied to an insurance of a life estate in a building, even though the policy amount was greater than the life estate was worth.[12] It is held in Texas that property will be prima facie regarded as realty where the description in the policy shows that it was so considered under a statute making the amount stated in the policy conclusive except insurance on personal property.[13] In Washington the valued policy law does not apply to insurance on personal property,[14] and the West Virginia statute applies to real estate.[15]

§ 163f. Valued policy law: improvements upon real property: loss of rents not covered.—A valued policy law providing that the amount of insurance written in a policy insuring improvements upon real property shall, in case of a total loss, be taken conclusively to be the true value of the property insured, does not apply to a policy which insured against the loss of rents through the destruction of such improvements, even though such a policy insures real property within the meaning of that term as used in the statute.[16]

§ 163g. Valued policy laws: mutual companies: mutual benefit societies.—A statute limiting the amount of risk which the insurer may take to a ratio not greater than three fourths of the value of the property applies to mutual insurance companies even though such companies are by another statute exempt from the operation of the general insurance laws.[17] And the valued policy law of

"Property" under said statute includes both real and personal. Howerton v. Iowa State Ins. Co. 105 Mo. App. 575, 80 S. W. 27, and Rev. Stat. 1899, sec. 7979, takes precedence over secs. 7969, 7970 so far as in conflict therewith. But see § 163b herein.

[11] King v. Phœnix Ins. Co. 195 Mo. 290, 113 Am. St. Rep. 678, 92 S. W. 892.

[12] Hubbard v. Winshel's Exetr. 6 Ohio Nisi P. Rep. (41 Wkly. Law Bull.) 249, Rev. Stat. sec. 3643 (Rev. Stat. 1906, sec. 3643).

[13] Co-operative Assoc. v. Hubbs, 53 Tex. Civ. App. 68, 115 S. W. 670; Tex. Rev. Stat. 1895, art. 3089.

[14] Bright v. Hanover Fire Ins. Co. 48 Wash. 60, 92 Pac. 779; Laws 1899, p. 332, c. 145, sec. 2.

[15] Ritchie County Bank v. Firemen's Ins. Co. 55 W. Va. 261, 47 S. E. 94.

[16] Amusement Syndicate Co. v. Prussian National Ins. Co. 85 Kan. 97, 116 Pac. 620, 40 Ins. L. J. 1882. (Under Laws 1897, c. 142, sec. 1; Gen. Stat. 1909, secs. 4260–4263; Laws 1893, c. 102.) See §§ 13a, 168 herein.

[17] Mitchell v. Potomac Ins. Co. 16 App. D. C. 241 (Laws Mo. 1895, p. 194; Laws Mo. 1895, p. 200) aff'd on other points 183 U. S. 42, 46 L. ed. 74, 22 Sup. Ct. 22, 31 Ins. L. J. 570; Gibson v. Missouri Town Mutual Ins. Co. 82 Mo. App. 515; Laws 1895, p. 194.

Under the Missouri statute of 1889, Mo. Rev. Stat. secs. 5897, 5898, town mutual insurance companies have been exempt from the provisions of the statute which fixes liability for

1895, of Georgia [18] requiring "all insurance companies to pay the full amount of loss" etc., applies to purely mutual fire insurance companies as they are not exempted.[19] So the valued policy law of Nebraska applies to mutual companies even though incorporated under a special act of later date.[20]

Under the Missouri statute of 1899 [1] the insurer is required to specify in the policy or certificate the exact amount which it promises to pay and it becomes thereby obligated to pay the beneficiary the specified amount unless the contract shall have become void.[2]

§ 164. Valued policies: partial loss.—In the case of a partial loss under a valued policy the valuation may be inquired into to a certain extent [3] merely for the purpose of ascertaining how it may be applied, rather than for the purpose of setting it aside.[4] So in a case in Mississippi,[5] the partial loss was estimated upon the basis of the valuation in the policy, the loss there being held to be the difference between the agreed value and the damaged value, adding the costs and expenses.[6] That the loss should be adjusted so far as practicable upon the basis of the valuation seems to be the settled doctrine.[7] It is held that in case of a partial loss under a valued policy on a vessel the insurer pays that proportion of the

property destroyed at the amount stated in the policy. Warren v. Bankers & Merchants Town Mutual Ins. Co. 72 Mo. App. 188.

[18] Ga. Civ. Code sec. 2100 (act Nov. 23, 1895).

[19] Word v. Southern Mutual Ins. Co. 112 Ga. 585, 37 S. E. 897.

[20] Farmers Mutual Ins. Co. v. Cole, 4 Neb. (Unof.) 130, 93 N. W. 730, Comp. Stat. Neb. 1899, c. 43, sec. 43.

[1] Rev. Stat. 1899, sec. 7903.

[2] See Kroge v. Modern Brotherhood of America, 126 Mo. App. 693, 105 S. W. 685 (amount due from assessment company a question for court).

[3] Watson v. Insurance Co. of North America, 3 Wash. (U. S. C. C.) 1, Fed. Cas. 17,286; Forbes v. Manufacturers' Ins. Co. 1 Gray (67 Mass.) 375; Clark v. United Fire & Marine Ins. Co. 7 Mass. 365, 5 Am. Dec. 50; Murray v. Ins. Co. of Pennsylvania 2 Wash. (U. S. C. C.) 186, Fed. Cas. No. 9,961; Harris v. Eagle Fire Co. 5 Johns. (N. Y.) 368; Lewis v. Rucker, 2 Burr. 1170, 14 Eng. Rul. Cas. 215; Forbes v. Aspinall, 13 East, 327, 13 Eng. Rul Cas. 673; per Lord Ellenborough.

[4] Forbes v. Aspinall, 13 East, 327, 13 Eng. Rul. Cas. 673, per Lord Ellenborough. See Howell v. Protection Ins. Co. 7 Ohio, 287.

[5] Natchez Ins. Co. v. Buckner, 4 How. (5 Miss.) 63.

[6] See Stanton v. Natchez Ins. Co. 5 How. (6 Miss.) 744 Le Pyre v. Farr, 2 Vern. 716.

[7] 2 Phillips on Ins. sec. 1203, who says: "The valuation is to be adhered to and applied, so far as it is practicable, in settling partial as well as total losses."

See Forbes v. Manufacturers' Ins. Co. 1 Gray (67 Mass.) 371; Lewis v. Rucker, 2 Burr. 1167, 14 Eng. Rul. Cas. 215.

Mr. Marshall says (2 Marshall on Ins. [ed. 1810] *631): "Where there is a partial loss upon a valued policy, but the value in the policy exceeds the interest of the assured, it is the constant usage to adjust a partial loss in the same manner as if the policy were an open one, and

actual loss as the sum insured sustains to the value of the vessel.[8] If a valued policy law provides that in cases of partial loss the insurer's liability shall not exceed the actual loss of the party insured the insured is obligated to pay insured the actual damage he sustains.[9]

§ 165. Valued policy: pro rata recovery.—Although a valued policy fixes the price, this is not an admission that so much is at risk,[10] as where by mistake or design only a part of the goods have been shipped, a recovery can only be had of such proportion of the valuation as the goods at risk bear to the whole value.[11] So the amount of a bottomry bond may be deducted from the real value,[12] and if one insures property expected to be on board ship to a certain amount upon a valued policy, and much less is in fact shipped, he is entitled to recover, in case of loss, a proportion pro rata notwithstanding the valuation.[13]

§ 166. Valued policies: "valued at" not conclusive.—Usually in a valued policy the phrase appears "valued at ——," and the blank being filled, the agreed value is settled. But the policy remains open if this blank is unfilled and no valuation of the subject insured is specified in the indorsement;[14] and since the question of intention controls, the policy must disclose an intent to make it a valued one.[15] for the words "valued at" are not in themselves conclusive. So in a case where the policy contained this clause: "The said goods and merchandise hereby insured are valued at —— as indorsed;"

the computation must therefore be by the real interest on board, and not by the value in the policy."

Under a Massachusetts decision it seems that the valuation may be opened: Clark v. United Fire & Marine Ins. Co. 7 Mass. 365; Brewer v. American Ins. Co. 123 Mass. 78.

[8] Western Assur. Co. v. Southwestern Transp. Co. 68 Fed. 923, 16 C. C. A. 65. See §§ 3452, 3075, 3077 et seq. herein.

[9] Sachs v. London & Lancashire Fire Ins. Co. 23 Ky. L. Rep. 2397, 67 S. W. 23, 31 Ins. L. J. 426; Lancashire Fire Ins. Co. v. Bush, 60 Neb. 116, 82 N. W. 313, 29 Ins. L. J. 1028 (if a partial loss occurs under a valued policy the insured is entitled to actual damages only, because the statute has not fixed the value of any part of the insured property).

[10] Haven v. Gray, 12 Mass. 76.

[11] Wolcott v. Eagle Ins. Co. 4 Pick. (21 Mass.) 429; Tobin v. Hartford, 17 Com. B. N. S. 528. See Brook v. Louisiana Ins. Co. 4 Mart. N. S. (La.) 640, 681; Atlantic Ins. Co. v. Lunar, 1 Sand. Ch. (N. Y.) 91; Patrick v. Eames, 3 Camp. 441; Forbes v. Aspinall, 13 East, 327, 13 Eng. Rul. Cas. 673; Denoon v. Home & Colonial Assur. Co. L. R. 7 C. P. 341.

[12] Watson Ins. Co. of North America, 3 Wash. (U. S. C. C.) 1, Fed. Cas. 17,286.

[13] Alsop v. Insurance Co. 1 Sumn. (U. S. C. C.) 451, Fed. Cas. 262.

[14] Snowden v. Guion, 101 N. Y. 458, 467, 5 N. E. 322, case reverses 18 Jones & S. (N. Y.) 137. See Hemmenway v. Eaton, 13 Mass. 108.

[15] Cox v. Charleston Ins. Co. 4 La. O. S. (2 La. 559) 289.

the blank was not filled up. It was stipulated therein as follows: "No shipment to be considered as insured until approved and indorsed on this policy by the assurer. . . . Indorsements valued at the same, provided they do not vary from the cost more than —— per cent," and it was held that the policy was an open, not a valued one; that the statement in the indorsement of the sum insured was not a valuation.[16] And where the policy contained the following words: "The said goods and merchandise are valued at eighteen francs, valued at four dollars and forty-four cents," it was held to be an open policy, these words merely ascertaining at what rate the value of the cargo paid for in francs was to be reduced into our money.[17] And a policy enumerating certain articles with figures indicating dollars placed opposite to each, does not constitute a valued policy.[18]

§ 167. Valued policies: prior insurance.—Where insurance was effected on a vessel, valuing her at the amount insured, being four thousand dollars, and afterward another policy was effected to the amount of four thousand dollars, without notice of the prior insurance, and a partial loss occurred which the plaintiffs claimed as a charge upon the whole amount insured in the second policy, it was held that defendants were liable for as much of the agreed value of the vessel as was not covered by the prior insurance, being to the extent of two thousand dollars, and that it was not necessary to give notice of the first insurance to the defendants.[19] In another case it is held that on a double insurance, if the first policy be open and the other valued, and the insured cedes to the insurers on the open policy as much as they insured, and obtains payment as for a total loss, and he has short property on board, he can only recover on the valued policy for the loss of the property he could cede on the same.[20] In a Massachusetts case the question arose whether the goods were covered by a valued policy or an open one. Under the valued policy goods were included which were shipped between the first day of February and the fifteenth day of July, the second policy to cover goods shipped subsequently to July 14th and prior to October 15th. The goods in question were shipped on the 15th of July, and the court held that they were not within the protec-

[16] Snowden v. Guion, 101 N. Y. 458, 5 N. E. 322. See § 158 herein.

[17] Ogden v. Columbia Ins. Co. 10 Johns. (N. Y.) 273. See § 158 herein.

[18] Luce v. Springfield Fire & Marine Ins. Co. 1 Flip. (U. S. C. C.) 281, Fed. Cas. 8,589.

[19] Murray v. Insurance Co. of Pennsylvania, 2 Wash. (U. S. C. C.) 186, Fed. Cas. 9961. See § 2489 herein.

[20] Craig v. Murgatroyd, 4 Yeates (Pa.) 161.

tion of the first policy.[1] Where a cargo is insured by diverse policies, in some of which the rate of exchange is fixed at which the prime cost of the cargo shall be valued, in ascertaining the amount of the interest of the insured, upon settlement of those policies in which the rate of exchange is fixed, the whole cargo is to be valued at that rate, without regard to the rate by which the values were ascertained in the other policy.[2]

§ 168. Valued policies: what are.—Life insurance policies are valued in that the amount is fixed as the sum to be paid, without deduction, in case of loss, or the happening of the specified contingency,[3] and in so far as mutual benefit certificates resemble life policies, the same rule applies as it does also in accident policies where a certain amount is to be paid in case of death resulting from injury. So every policy on profits is necessarily a valued policy,[4] and policies on ships are generally valued.[5] When a policy recites that the amount insured is not more than three fourths of the value of the property, "as appears by the proposal of the insured," and the application of the insured contains a valuation of the property, the policy is a valued one.[6] Where a running policy of marine insurance contained a stipulation, "No shipments to be considered as insured until approved and indorsed on this policy by this company," the valuation to be fixed by the indorsement, it was held that the policy was not an open, but a valued one: that each indorsement of a shipment and the valuation thereof constituted a separate and distinct contract of insurance, and that the contract was not complete, as to any specific shipment, until the indorsement of value on the policy.[7]

A policy covering loss caused by lightning is held not to be within a valued policy law.[8]

[1] Atkins v. Boylston Fire & Marine Ins. Co. 5 Metc. (46 Mass.) 439.

[2] Pleasants v. Maryland Ins. Co. 8 Cranch (12 U. S.) 55, 3 L. ed. 486. (This was not a valued policy.)

[3] Connecticut Mutual Life Ins. Co. v. Schaefer, 94 U. S. 457, 463, 24 L. ed. 251; per Bradley, J.; Cammack v. Lewis, 15 Wall. (82 U. S.) 643, 21 L. ed. 244; Chisholm v. National Capital Life Ins. Co. 52 Mo. 213, 215, 14 Am. Rep. 414, 416, per Wagner, J.; St. John v. American Life Ins. Co. 2 Duer (N. Y.) 419, 13 N. Y. 38, 64 Am. Dec. 529, per Crippen, J.; Miller v. Eagle Life & Health Ins. Co. 2 E. D. Smith (N. Y.) 268.

[4] Patapsco Ins. Co. v. Coulter, 3 Pet. (28 U. S.) 222, 239, 7 L. ed. 659; Riley v. Hartford Ins. Co. 2 Conn. 368; Mumford v. Hallett, 1 Johns. (N. Y.) 433. See Eyre v. Glover, 16 East, 218; Barclay v. Cousins, 2 East, 544; 2 Phillips on Ins. (3d ed.) 1209.

[5] *Examine* 14 Am. & Eng. Ency. of Law, 340.

[6] Nichols v. Fayette Mutual Fire Ins. Co. 1 Allen (83 Mass.) 63.

[7] Schaefer v. Baltimore Marine Ins. Co. 33 Md. 109.

[8] Kattleman v. Fire Assoc. of Phila. 79 Mo. App. 447, 2 Mo. App. Repr. 487.

§ 168a. Rent insurance policy analogous to valued policy.—A policy insuring against loss of rent may validly stipulate for a method of ascertaining and computing the loss without violating in any way the principle that insurance shall furnish only indemnity against loss. And where it is stipulated that the loss of rents shall be deemed to be the amount of rentals that would be collected by the insured during the period required to restore the building to a tenantable condition, assuming that the rentals would have continued to be the same in amount as at the time of fire, excluding all elements except those of actual rentals at the time of fire and the time required for repair, in such a case the policy is analogous to a valued policy in so far as it prescribes a method of determining as between the parties the amount of loss.[9]

§ 169. Mixed policy defined.—Sometimes a policy may be open as to certain property and valued as to other property, as where a policy is for ten thousand dollars, being on a vessel and freight, and the vessel is valued at eight thousand dollars, but the blank for valuation of the freight is not filled. It is a mixed policy, open as to the freight, and valued as to the vessel;[10] or as in case of a house and furniture, the house being valued and the furniture not,[11] although in this case the valuation was held not conclusive; or a policy may be mixed as to the duration, as where it sets out the termini but limits the risk by time.[12] Where a policy insured a vessel for a specified time for a particular voyage outward, after the voyage was made but before the time had expired the same underwriter insured the vessel for the return voyage, by a certificate made "under and subject to the conditions of the existing policy," it was held that no liability accrued for a loss occurring after the time specified in the original policy.[13]

§ 170. Time policy defined.—A time policy limits the duration of the risk by definite periods of time by fixing its beginning and end;[14] as where a policy was effected December 17, 1845, for one

[9] Whitney Estate Co. v. Northern Assurance Co. 155 Cal. 521, 23 L.R.A.(N.S.) 123, 101 Pac. 911, 18 Am. & Eng. Ann. Cas. 512. See §§ 13a, 163f herein.

On construction of policy or contract insuring against loss of rents, see notes in 16 L.R.A.(N.S.) 1055; 23 L.R.A.(N.S.) 123; 47 L.R.A.(N.S.) 296, and L.R.A.1916F, 694.

[10] Riley v. Hartford Ins. Co. 2 Conn. 368.

[11] Post v. Hampshire Mutual Ins. Co. 12 Met. (53 Mass.) 555, 46 Am. Dec. 702.

[12] 14 Am. & Eng. Ency. of Law, 335. See Manly v. United Marine & Fire Ins. Co. 9 Mass. 85; Martin v. Fishing Ins. Co. 20 Pick. (37 Mass. 389; 1 Arnould on Marine Ins. (6th ed.) 373; Id. (8th ed. Hart & Simey) p. 13, sec. 9; 17 Earl of Halsbury's Laws of England, p. 383, sec. 759.

Attachment and duration of risk: mixed policy. See § 1490 herein.

[13] Pitt v. Phœnix Ins. Co. 10 Daly (N. Y.) 281.

[14] Grousett v. Sea Ins. Co. 24 Wend. (N. Y.) 209; 1 Arnould on Marine Ins. (6th ed. Maclachlan) p.

year commencing and ending at 12 o'clock noon.[15] In the case here instanced it was held that the meridian of the place where the contract was made determined the parties' rights.[16] "Sometimes attempts are made to construe time policies as voyage policies, but the courts have not encouraged them." [17]

§ 171. Time policy: computation of time.—It is held that "from the day of the date" excludes the day, while "from the date" includes it;[18] while in Pugh v. Leeds[19] it was determined that no distinction exists between those terms.[20] In Perry v. Provident Life Insurance & Investment Company,[1] the rule of computation was that time computed from the act done includes the day, but computed from the day of the act excludes the day. In this case the policy was from noon to noon where the injury should "occasion death within ninety days from the happening thereof," and it was held that an accident happening at nine o'clock A. M., causing death at the same hour, on the ninty-first day, was not within the policy,[2] although in a later case in the same state[3] concerning a deposit of a copy of the writ and of the return of the attachment in the town clerk's office, it was held that in computing time from the date or from the day of the date or from a certain act or event, the day of the date is to be excluded, unless a different intention is manifested by the instrument or statute under which the question arises.[4] So in a South Carolina case the day of passage of an act laying an embargo for a specified time from its passage was ex-

371; 1d. (8th ed. Hart & Simey) p. 13, sec. 9; 17 Earl of Halsbury's Laws of England, p. 336 and note, sec. 170; Id. pp. 381, 382, secs. 754, 755.

[15] Walker v. Protection Ins. Co. 29 Me. 317.

[16] Walker v. Protection Ins. Co. 29 Me. 317.

[17] Porter's Law of Ins. (2d ed.) 100, citing Crowley v. Cohen, 3 Barn. & Adol. 478, 13 Eng. Rul. Cas. 314; Joyce v. Kennard, L. R. 7 Q. B. 78.

[18] Sir Robert Howard's case, 2 Salk. 625; Holt, K. B. 195 (case of policy of assurance on H.'s life for a year. He died on the last day, and insurer was held liable). See Weeks v. Hull, 19 Conn. 376, 1 Am. Dec. 249; Blake v. Crowninshield, 9 N. H. 304; Isaacs v. Royal Ins. Co. 39 L. J. Ex. 189, 22 L. J. Q. B. 681; Cornell v. Moulton, 3 Denio (N. Y.) 12.

Where the goods were to be shipped between February 1 and July 15, 1840, it was held that the policy did not cover shipments made on the fifteenth day of July, 1840: Atkins v. Boylston Fire & Marine Ins. Co. 5 Met. (46 Mass.) 439.

Computation of time: attachment and duration of risk, see § 1446.

Time policy: attachment and duration of risk, see § 1489 herein.

[19] Cowp. 714.

[20] See Atkins v. Boylston Fire & M. Ins. Co. 5 Mete. (46 Mass.) 440.

[1] 99 Mass. 162.

[2] See also Perry v. Provident Life Ins. & Investment Co. 103 Mass. 242.

[3] Bemis v. Leonard, 118 Mass. 502, 19 Am. Rep. 470. This is a leading case, reviewing the authorities at length.

[4] Case cited with approval in Lane v. Holman, 145 Mass. 222, 13 N. E. 602.

cluded, and a policy made on that day was held valid.[5] Again, in case of insurances in mutual benefit societies, where the member is required to pay an assessment within a specified number of days from the date of notice or from the time notice is "served on" or "sent to" the assured, that day is excluded.[6] The intent of the parties as to the commencement and end of the risk, however, governs if it can be ascertained from the policy or subject matter.[7] Where a policy of insurance is expressed to be "from August 1, 1854, to August 1, 1854," it may be shown by reference to the indorsements made by the insurers on the back of the policy, to the application, which is made a part of the policy, and to the amount of the premium and deposit note, to be an insurance for five years from August 1, 1854.[8] In conclusion, the general rule on the question of exclusion or inclusion of the day, so far as it is possible to formulate one, seems to be that the question is, in the absence of some governing statute, one of construction, dependent upon the intent of the parties evidenced and deducible from the contract and attendant circumstances, so far as the latter are admissible in evidence. "If, however," says Mr. Parsons, "there is nothing in the language which clearly indicates the intention of the parties, time should be computed exclusive of the day when the contract was made." [9] Mr. May says: "The circumstances and intent of the parties are to control; and such construction should be given as will operate most to the ease of the party entitled to favor, and by which rights will be secured and forfeitures avoided." [10] We are inclined, however, to the opinion that time computed from the date or day of date, or from some certain act or event, excludes the day or event,[11] particularly so when such a construction would come with-

[5] Lorent v. South Carolina Ins. Co. 1 Nott. & McC. (S. C.) 505.

[6] Protection Life Ins. Co. v. Palmer, 81 Ill. 88. See § 1339 herein.

[7] O'Connor v. Towns, 1 Tex. 107; 1 Phillips on Ins. (3d ed.) 918 et seq. p. 499 et seq.; 2 May on Ins. (Parsons') sec. 400, see also Id. (4th ed. Gould's) sec. 400, p. 919.

[8] Liberty Hall Assoc. v. Housatonic Mutual Fire Ins. Co. 7 Gray (73 Mass.) 261.

[9] 2 Parsons on Contracts (7th ed.) bottom p. 796, *p. 663.

[10] 2 May on Insurance (3d ed.) sec. 400, Id. (4th ed. Gould's) sec. 400, p. 919.

[11] *Connecticut.*—Blackman v. Nearing, 43 Conn. 56, 21 Am. Rep. 634 (see 48 Vt. 201, given below).

Kentucky.—Chiles v. Smith, 13 B. Mon. (Ky.) 460.

Michigan.—Warren v. Slade, 23 Mich. 1, 9 Am. Rep. 70 (here judgment was barred by statute ten years after judgment was entered. The day of entry was held excluded).

Missouri.—Baumeister v. Continental Casualty Co. 124 Mo. App. 38, 101 S. W. 152 (notice of disability sufficient when given within time specified after beginning of disability: accident policy).

Rhode Island.—Carrol v. Salisbury, 28 R. I. 16, 65 Atl. 274 (day of date on which act was done ex-

in the rule contra proferentem, whereby in insurance policies the construction is against the insurer and most favorable to the assured, or where such a rule would operate to save forfeitures.[12]

§ 172. Time policy: trading voyage: nature of contract.—A policy, on time simply, where no ports are mentioned or goods laden or to be laden, the risk to commence from the loading on board the vessel, necessarily implies a trading voyage with liberty to dispose of the goods insured; and the policy attaches, however often the goods may be changed;[13] and it is held that a time policy, upon the cargo, on a trading voyage is in the nature of a new insurance upon the new cargo or the goods remaining at risk, every time the cargo is increased or diminished otherwise than by the perils insured against, but the total amount for which the underwriters are to be made liable during the whole time or voyage cannot be an amount exceeding his subscription, except for general average and expenses incurred in preserving or attempting to recover the property for his benefit. If after the delivery of a portion of the first cargo, the residue, to an amount equal to or exceeding the subscription, be lost on a voyage to another port, the insurer is liable to the amount of his subscription.[14]

cluded: levying execution so as to prevent discharge of attachment).

Vermont.—Beeman v. Cook, 48 Vt. 201, 21 Am. Rep. 123 (it was held in this and the 43 Conn. 56, case given above, that in computing the time of the limitation of an action on a promissory note the day on which it matures is to be excluded.)

See as to general rule:

United States.—Pearpoint v. Graham, 4 Wash. (U. S. C. C.) 232, Fed. Cas. 10,877.

Alabama.—Boyett v. Frankfort Chair Co. 152 Ala. 317, 44 So. 546 (first day excluded and last day included for taking appeal); Lang v. Phillips, 27 Ala. 311.

California.—Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 Pac. 936 (first day excluded, last day included: notice of tax sale).

Louisiana.—Wetmore v. Mutual Aid & Ben. Life Assoc. 23 La. Ann. 770.

New Hampshire.—Blake v. Crowninshield, 9 N. H. 304.

New York.—Judd v. Fulton, 10 Barb. (N. Y.) 118.

England.—Mercantile Marine Ins. Co. v. Titherington, 5 Best & S. 765.

See also 2 Parsons on Contracts (7th ed.) bottom p. 635, n. A. *p. 504, bottom pp. 795–98, *pp. 662–65, where the authorities are exhaustively considered; 7 Wait's Actions & Defenses, 231.

General rule as to first and last days in computation of time, see notes 49 L.R.A. 193, 15 L.R.A.(N.S.) 686; 78 Am. St. Rep. 370 et seq.; notes 7 Am. Dec. 250; 46 Am. Rep. 410.

The codes of many states make special provisions governing the matter.

[12] See c. viii. herein, and §§ 220–24.

[13] Grousset v. Louisiana Ins. Co. 24 Wend. (N. Y.) 209; Coggeshall v. American Ins. Co. 3 Wend. (N. Y.) 283.

[14] American Ins. Co. v. Griswold, 14 Wend. (N. Y.) 399, 479.

§ 173. Time policy: continuance after expiration of time.—A time policy may also be made to be continued in force from the date of its expiration until notice of discontinuance, as where a marine policy provided that it should "continue in force from the date of expiration until notice is given to this company of its discontinuance, the assured to pay for such privilege pro rata for the time used," and the term of the policy expired October 5th. The assured sent on October 9th a month's premium, stating that it was "one monthly premium from October 5th to November 5th" on the insurance "as specified in the policy," and it was determined that the company was liable for a loss occurring November 6th, and that the payment was not notice to discontinue the policy, nor an election to continue it another month, and no longer, but that the policy continued in force by its own terms until notice given by assured of discontinuance.[15]

§ 174. Voyage policy defined.—A voyage policy is one which establishes the duration of the risk and specifies the voyage by setting out the termini, as where the words are used "at and from New York to San Francisco" they describe the voyage during which the risk is to continue.[16] It may cover risks of transportation by land and may also include a voyage out and home, as a single risk.[17]

§ 175. Voyage policy: voyage must conform to course fixed by usage.—It is a well-settled rule of law that the underwriters are bound to know the usages of trade in which they are insurers, and to make their contracts in reference thereto,[18] and the insurer in estimating the premium is presumed to have considered the usual course of the voyage as fixed by mercantile usage between the termini, and describing the voyage in the policy is an express reference

[15] Greenwich Ins. Co. v. Providence & Stonington Steamship Co. 119 U. S. 481, 7 Sup. Ct. 292, 30 L. ed. 473.

See § 1506 herein, as to extending the time where the ship is "on a passage," etc.

[16] Melcher v. Ocean Ins. Co. 59 Me. 217; 17 Earl of Halsbury's Laws of England, p. 336, sec. 174. See § 2365 herein.

[17] Patapsco Ins. Co. v. Biscoe, 7 Gill & J. (Md.) 293; Bermon v. Woodbridge, 2 Doug. 781, 14 Eng. Rul. Cas. 507. "Voyage policies against land risks are sometimes taken out, but are not so common as time policies. They cover the things insured between certain geographical limits. Practically, they impose upon the insurer the liability of the common carrier between the two ends of the journey. The risk begins in such policies when the goods start or get into the carrier's hands, and continues from thence until arrival in the hands of the consignee or other specified determination of the transit, but it will not continue during a deviation. In some cases the carrier makes himself the insurer. Thus, railway companies will grant insurances on goods carried by them for the safe carriage of which they are not liable under the carriers' act." Porter's Law of Ins. (2d ed.) 100.

[18] Grant v. Lexington Fire, Life & Marine Ins. Co. 5 Ind. 23, 61 Am.

to the usual manner of making it as much as if every circumstance were mentioned.[19] Therefore, the voyage must conform to the usual course of sailing prescribed by mercantile usage between the places designated as the termini;[20] but if no usual course be fixed by usage, then the way should be that which the master, if of ordinary skill and discretion and acting according to his best judgment, shall determine to be the safest and most direct, and which shall conduct the adventure in the most advantageous and expeditious manner consistent with safety.[1] This subject of description of the voyage will, however, be more fully considered hereafter.[2]

§ 176. The form of the policy: statutory provisions: standard policy.—A policy of insurance is the contract reduced to writing. It is a simple or parol contract, since it need not be under seal,[3] and is of very ancient date. But slight changes had been made therein prior to 1785, when the statute 25 George III., chapter 44, requiring the insertion of names in certain policies, was enacted.[4] Pol-

Dec. 74; Wall v. Howard Ins. Co. 14 Barb. (N. Y.) 383; Wadsworth v. Pacific Ins. Co. 4 Wend. (N. Y.) 33; Noble v. Kennoway, 2 Doug. 511; Salvador v. Hopkins, 3 Burr. 1707.

[19] Pelly v. Royal Ex. Assur. 1 Burr. 341, 14 Eng. Rul. Cas. 30; 1 Arnould on Ins. 340.

[20] See Deering's Annot. Civ. Code, Cal. secs. 2692, 2693.

[1] See Deering's Annot. Civ. Code, Cal. sec. 2693.

[2] See § 2365 herein.

[3] Viele v. Germania Ins. Co. 26 Iowa, 9, 96 Am. Dec. 83; Sanborn v. Fireman's Ins. Co. 16 Gray (82 Mass.) 448, 77 Am. Dec. 419.

[4] Changes were made some years prior to 1785 by inserting a memorandum at the foot of the policy, and the words "as well in his own name as for and in the name and names of all and every person or persons to whom the same doth, may, or shall appertain in part or in all," and the words "as interest may appear:" See stat. 25 Geo. III. c. 56 (1788).

"One of the first improvements in the mode of effecting marine insurance was the introduction of a printed form of policy. Hitherto various forms had been in use; and, to avoid numerous disputes, the committee of Lloyds proposed a general form which was adopted by the members on the 12th of January, 1779, and remains in use, with few slight alterations to this day." 16th. Ency. Britannica (11th ed.) "Lloyds" pp. 833, 834. See also 14th Id. "Insurance" (subhead "Lloyds") p. 661.

For forms of policies of insurance, sued on in early English cases, in the originals and in their translations, see 11 Publicat. Seldon Soc. pp. 45 et seq. in Cavalchant v. Maynard, 1548; Broke v. Maynard, 1547; De Salizar (or Salazar) v. Blackman, 1555; Braschett v. Smithe, 1559; Ravens v. Hopton, 1558; Ridolploye v. Nunez, 1562; Whyte v. Beeswicke, 1563 De Moucheron v. Sadler, 1565; Dutch policy, 1638.

For statutory form of marine policy in England, see 1 Arnould's Marine Ins. (Perkins' ed. 1850) 20, *21; 1 Id. (Maclachlan's ed. 1887) 231, 232, who says it was printed in schedule 35 George III. c. 63, and reprinted in schedule 30 Vict. c. 23, Consolidated Stat. Ins. Law; Gorman v. Lineating, 2 Saund. 201, n. c.; Wolfe v. Horncastle, 1 Bos. & P. 316, 320, 13 Eng. Rul. Cas. 265,

icies have been, however, very inaccurately and loosely drawn instruments, although it would necessarily follow that some degree of certainty would have been attained through usage, lengthened experience, and frequent constructions thereof by the courts.[5] An examination of the numerous cases arising upon the construction of policies in the United States shows a lack of uniformity in form of policies written in this country, and owing to attempted modifications and introduction of new features, the policies here are varied, and this applies even to standard fire policies.

Buller, J. See also as to form or copy of Lloyds policy, 17 Earl of Halsbury's Laws of England, p. 340; 15 Chitty's Stat. England, p. 906.

Almost all insurances in England are framed on model of form given in 17 Earl of Halsbury's Laws of England, p. 340. In an English case Lord Alverstone, C. J., says: "It is necessary, in the first place, to point out that we must not attach any special importance to the fact that the form of policy which has been adopted in this case is that of a Lloyd's policy, for it is well known that that form of policy is no longer confined to the marine risks to which it is more strictly applicable but is now used to cover many other kinds of risks." Tannebaum & Co. v. Heath, 77 L. J. K. B. 634, [1908] 1 K. B. 1032, 99 L. T. 237, 13 Ann. Cas. 264, 24 T. L. R. 450–C. A. a case where an order for discovery of ships papers was refused, such discovery being peculiar to marine insurance. The policy was in the form of Lloyd's marine policy insuring goods against risk of fire on land and risks of transportation on shipments.

For forms of policies in use in the commercial world in 1834, see Vancher's Guide to Marine Ins. (ed. 1834).

Form of Philadelphia Marine policy of 1749. See History of Ins. Co. of North America, published 1885 in Philadelphia.

Form of fire policy, England. See 17 Earl of Halsbury's Laws of England, p. 527.

Form of casualty insurance contract. See Henderson (ed. 1911) p. 339.

For form of clause, insuring against loss or damage to property and also against loss of human life or injury to person whether to assured, to employees or to any other person caused by the explosion or rupture of steam boilers, under policy issued prior to New York act of 1892, c. 690, sec. 55, expressly authorizing employer to take an accident insurance covering his employees collectively for the benefit of such as should be injured. See Embler v. Hartford Steam Boiler Ins. Co. 158 N. Y. 431, 44 L.R.A. 512, 53 N. E. 212.

For form of certification of benefit association and of its by-laws and rules, see Lawler v. Murphy, 58 Conn. 294, 8 L.R.A. 113.

[5] In 1791 Lord Kenyon, in Brough v. Whitmore, 4 Term Rep. 208, says: "I remember it was said many years ago that if Lombard street had not given a construction to policies of insurance, a declaration on a policy would have been bad on a general demurrer, but that the uniform practice of merchants and underwriters had rendered them intelligible;" and Buller, J., in the same case, adds "that a policy of assurance has at all times been considered in courts of law as an absurd and incoherent instrument." See also Maryland Ins. Co. v. Woods, 6 Cranch (10 U. S.) 29, 45, 3 L. ed. 143; Yeaton v. Fry, 5 Cranch (9 U. S.) 335, 342, 3 L. ed. 117; Simond v. Boydell, 1 Doug. 270; Marsden v. Reid, 3 East, 578.

The form, however, is not essential unless required by statute. Statutes, however, have been passed in a number of states adopting standard fire policies.[6]

Statutory provisions also exist in New York for forms of life, accident and health policies.[7] So the statute may authorize forms

[6] *Connecticut.*—Comp. Ins. Laws 1905, p. 18, secs. 3497, 3499, Genl. Stat. 1902, secs. 3497, 3499.

Iowa.—Acts 1907, pp. 79–83, c. 76, additional to c. 4, title IX. of Code. See also acts 1911, p. 13, amdg. sec. 1758-b of Suppl. to Code 1907, secs. 1758a, 1758b.

Louisiana.—Act No. 105 of 1908, art. 3, sec. 22; Const. & Rev. Laws 1904, p. 864. N. Y. form was adopted by sec. 22 of act no. 105 of 1898, p. 151.

Maine.—Laws 1905, c. 18, Rev. Stat. c. 49, sec. 4, Laws 1895, p. 14 c. 18, expressly repealed all inconsistent prior laws. See Knowlton v. Patrons Androscoggin Mut. Fire Ins. Co. 100 Me. 481, 2 L.R.A. (N.S.) 517n, 62 Atl. 289, 35 Ins. L. J. 81.

Massachusetts.—Acts 1907, c. 576, sec. 60, pp. 882–886; Rev. Laws c. 118, sec 60; Stat. 1894, c. 522, sec. 59, Pub. Stat. c. 119, sec. 138; acts 1887, c. 214, sec. 60; St. 1881, c. 166; Stat. 1873, c. 331.

Michigan.—Pub. acts 1905, p. 423, act No. 277, Howell's Annot. Stat. 1882, secs. 4344–53.

Minnesota.—Rev. Laws 1905, sec. 1640, Genl. Laws 1897, c. 254; Genl. Laws 1895, c. 175; Stat. 1891, vol. 1, secs. 2973–77; Gen. Laws 1889, c. 217.

New Hampshire.—Pub. Stat. 1901, c. 170; Laws 1885, c. 93, sec. 3. For history of New Hampshire laws as to standard policy, see Franklin v. New Hampshire Fire Ins. Co. 70 N. H. 251, 47 Atl. 91, 30 Ins. L. J. 73 (decided in 1900).

New Jersey.—1902, p. 437, c. 134, par. 77; Laws 1892, c. 231.

New York.—Laws 1903, c. 106, amd'g Laws 1901, c. 513, amd'g Laws 1887, c. 429, amd'g Laws 1886, c. 488.

North Carolina.—Rev. Stat. 1905, secs. 4759, 4760.

North Dakota.—Civ. Code 1899, sec. 4608; Laws 1890, p. 253, c. 74.

Oregon.—Laws 1907, c. 137.

Rhode Island.—Genl. Laws 1896, pp. 570, 580, secs. 4, 5.

South Dakota.—Laws 1907, c. 170, amdg. Sess. Laws 1905, c. 126, repealing Rev. Codes 1903, p. 682, secs. 664–666.

West Virginia.—Acts 1907, c. 77, sec. 68, p. 313, amending and re-enacting c. 34, Code.

Wisconsin.—Laws 1907, c. 525; Laws 1905, c. 102, 108; Laws 1895, c. 387, Rev. Stat. 1898, sec. 1941, subsecs. 43–65; (Sand. & Berr. Ann. Stat. 1898); Laws 1891, vol. 1, c. 195, last law invalid. See Vorous v. Phœnix Ins. Co. 102 Wis. 76, 78 N. W. 162.

England.—In Canada the statutes regulate the form of the policy: See Hartney v. North British Fire Ins. Co. 13 Ont. R. 581; Citizens' Ins. Co. v. Parsons, 4 Can. Sup. Ct. R. 215.

Reasons for adoption of standard policy considered. Gazzam v. German Union Fire Ins. Co. 155 N. Car. 330, 336, Ann. Cas. 1913E, 282, 71 S. E. 434.

Marshall, however, in his work on Insurances (vol. 1, ed. 1810), says: "There does not seem to be any reason for prescribing by law the contents of a policy of insurance any more than those of any other species of contract. . . . The common course appears to be the better one, namely, to leave parties to make such stipulations and in such terms as they may choose."

[7] Laws N. Y. 1910, sec. 107 (in

of life policies which provide for payment of fixed premiums or assessments at certain times for a term of years or during life.[8]

§ 176a. Standard policy: constitutional law: power of legislature and of commission: review by court: injunction.—That a state has the right or power to prescribe by legislative enactment one standard form of fire insurance policy and to limit incorporated insurance companies, domestic or foreign, to the issuance thereof upon property within its borders, is undoubted, and such statutes are constitutional.[9]

effect, Jan. 1, 1911) amdg. art 2, c. 33. Laws 1909, constituting c. 636 of Consol. Laws. Laws N. Y. 1907, c. 623, am'd'g Laws 1906, c. 326, sec. 101. See Conn. Pub. Laws 1909–11, p. 1297, for form of accident policy; Mich. Pub. acts 1907, no. 187, Minn. Laws 1907, c. 220; N. Dak. act March 19, 1907. Ohio act approved May 21, 1910, am'd'g and repealing sec. 9419, Genl. Code; Laws 1908, pp. 139 et seq.

In New York, single policy may embrace life, health, accident and disablement from sickness. Laws N. Y. 1912, p. 446, c. 232, sec. 70, subd. 10. But in Massachusetts the form of policy cannot, under the statute combine classes of insurance such as life, accident and health in the same policy, or health and accident as incidental to life insurance. Ætna Life Ins. Co. v. Hardison (Travelers Life Ins. Co. v. Hardison) 199 Mass. 181, 85 N. E. 410, 37 Ins. L. J. 818.

[8] Home Life Assur. Co. v. Maynard, 112 Mich. 497, 4 Det. L. N. 96, 70 N. W. 103; Mich. Pub. acts 1895, act No. 58, sec. 11, am'd'g Pub. acts 1887, act no. 187. See Franklin Life Ins. Co. v. Commissioner of Ins. 159 Mich. 636, 16 Det. L. N. 994, 39 Ins. L. J. 468 construing Pub. acts 1907, no. 187, sec. 1, subd. 1 and 2.

[9] Opinion of Justices, In re, 97 Me. 590, 55 Atl. 828, 33 Ins. L. J. 44. It was declared in this case that: "We do not find in either Constitution, Federal or State, any section or clause in terms inhibiting such an exercise of the legislative power over fire insurance companies. While the individual has existence and consequent rights independent of the legislature, the corporation or incorporated company derived its existence and rights solely from legislative action. The legislature may refuse to grant any corporate rights or powers whatever, and even existence, or it may grant one only. Until the legislature acts, these do not and cannot exist. So the legislature may by general law or special act 'amend, alter, or repeal' any corporate charter or corporate right or existence once granted (except, of course, where it has stipulated not to do so), and in so doing it may cut away the powers of a corporation one after another, and from time to time, and finally destroy the last one and the corporation itself. It cannot, of course, confiscate the property of the corporation once lawfully acquired. It cannot impair the obligation of a contract once lawfully made by a corporation. So far the legislature is restrained by the State and Federal Constitutions. But it can prohibit the acquisition of any more property by the corporation. It can prohibit the making of any new contracts whatever by the corporation, or any new contract except one of a particular prescribed kind and form with prescribed stipulations therein. This power, sweeping as it is in its scope, is necessarily implied and included in the reserved power to amend, alter, or repeal the very legislative acts which gave life powers and rights to the corporation. This

But a delegation of power to a commission to draft, etc., a standard form of fire insurance policy is unconstitutional as conferring

power is inherent in the legislature, unlimited by any section or clause in the Federal or state Constitution which we have been able to find. Head v. Providence Insurance Co. 2 Cranch (6 U. S.) 127, 2 L. ed. 229; Bank of Augusta v. Earle, 13 Pet. (38 U. S.) 519, 10 L. ed. 274; Miller v. New York, 15 Wall. (82 U. S.) 478, 21 L. ed. 98; Greenwood v. Union Freight Co. 105 U. S. 13, 26 L. ed. 961; Spring Valley Water Works v. Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. 48; Norfolk & Western Railroad Company v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 10 Sup. Ct. 958; State v. Brown & Sharpe Manufacturing Co. 18 R. I. 16, 17 L.R.A. 856, 25 Atl. 246; Schaffer v. Union Mining Co. 55 Md. 74; State v. Maine Central R. Co. 60 Me. 490, affirmed in Maine Cent. R. Co. v. Maine, 96 U. S. 499, 2 L. ed. 836.

"As to foreign fire insurance companies, those incorporated in other states and countries, they, of course, are equally subject to the legislative power of this state so far as the exercise of their rights or powers, and their presence or existence within this state, are concerned. They are not protected by the interstate commerce clause of the Federal Constitution. Hooper v. California, 155 U. S. 648, 39 L. ed. 247, 15 Sup. Ct. 207. The legislature can wholly exclude them from the state, and hence can impose such conditions and limitations upon the exercise of any rights and powers and business, and even presence, in this State, as it sees fit. Norfolk & Western Railroad Company v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 10 Sup. Ct. 958; Hooper v. California, 155 U. S. 648, 39 L. ed. 247, 15 Sup. Ct. 207; Dryden v. Grand Trunk Ry. of Canada, 60 Me. 512.

"The statute does not offend against the 14th Amendment to the Constitution of the United States, since it bears equally upon all fire insurance companies, domestic and foreign, without attempting any discriminations, and does not deprive any person of life, liberty, or property without due process of law. . . . But the broad question of the constitutional right of the individual to make and enforce contracts for the acquirement, possession, and protection of property, by insurance or otherwise, free from legislative interference, is not presented here. Whatever the extent of the constitutional right of the individual to make insurance contracts with other individuals, or unincorporated associations of individuals, we think it clear from the principles above stated that he has no constitutional right to make any particular insurance contract with a corporation. True, the complete power of the legislature to limit or destroy the right of a corporation to make contracts necessarily includes the power to limit or destroy the right of the individual to make contracts with it, but this incidental result cannot be held to limit the power of the legislature over its own creature, the corporation. The legislature is not required by the Constitution to create corporations for individuals to make contracts with, nor is it prohibited from limiting or dissolving corporations with which individuals may wish to contract.

"It follows that the statute cited and inquired about is constitutional, being within the legislative cognizance, and not forbidden by any section or clause of the Constitution, state or Federal."

As to the power of the legislature to regulate the insurance business, see also opinion of the court, per Knowlton, C. J., in New York Life Ins. Co. v. Hardison, 199 Mass. 190, 127 Am. St. Rep. 478, 85 N. E. 410,

legislative power.[10] So in Pennsylvania it is held that, whether or not, the legislature itself may prescribe a form of contract of insurance, it cannot delegate the power to an insurance commissioner to prescribe a standard policy of insurance; and that a statute providing "for a uniform contract or policy of insurance to be made and issued by all insurance companies taking fire risks on property within the state," directing the insurance commissioner to prescribe a standard policy of insurance, and forbidding the use of any other, is unconstitutional, as an unauthorized delegation of legislative power.[11] So in Minnesota a statute directing the insurance commissioner of the state to prepare and adopt a blank policy, together with such provisions and conditions as may be added thereto or indorsed thereon to form a part thereof, such form to conform as near as the same can be made practicable to the form known as the New York standard life insurance policy, and requiring all insurance corporations, after the adoption of such form, to use it in all policies for fire insurance, and all renewals thereof, does not, of itself, adopt the form referred to as in use in New York, but leaves the commissioner a discretion to add to, or omit from, the provisions of such policy, and is therefore void, because it delegates to the commissioner legislative power, which can be exercised only by the legislative department of the state.[12] In Massachusetts the legislature has power to prescribe requirements controlling or regulating the forms of life insurance policies and to give to the insurance commissioner authority to pass upon forms of policies issued and to provide that the insurance companies shall be liable criminally for issuing policies in a form not approved by him. And it may not only prescribe such requirements and confer on such commissioner

37 Ins. L. J. 848, see §§ 327, 328 herein.

[10] King v. Concordia Fire Ins. Co. 140 Mich. 258, 12 Det. L. N. 160. See Phenix Ins. Co. v. Perkins, 19 S. Dak. 59, 101 N. W. 1110.

[11] O'Neil v. American Fire Ins. Co. 166 Pa. St. 72, 45 Am. St. Rep. 650, 26 L.R.A. 715, 30 Atl. 943.

[12] Anderson v. Manchester Fire Assur. Co. 59 Minn. 182, 50 Am. St. Rep. 400, 28 L.R.A. 609, 60 N. W. 1095.

As to statute delegating power to commissioner and subsequent enactments under the New Hampshire standard policy act, see Franklin v. New Hampshire Fire Ins. Co. 70 N. H. 251, 47 Atl. 91, 30 Ins. L. J. 73, per Peaslee, J. (historical statement in opinion).

That standard policy law invalid as delegating power to insurance commissioner, see Vorous v. Phenix Ins. Co. 102 Wis. 76, 78 N. W. 162, so declared as to Laws 1891, c. 195, sec. 1, and under Laws of 1895, p. 778, sec. 5, the form of policy was prescribed by the legislature. See also Dowling v. Lancashire Ins. Co. 92 Wis. 63, 31 L.R.A. 112, 65 N. W. 738.

Secretary of State has power to approve reinsurance contracts of life risks; statute conferring such power constitutional. Iowa Life Ins. Co. v. Eastern Mutual Life Ins. Co. 64 N. J. L. 340, 45 Atl. 762.

authority to see that said requirements are complied with, but it may also authorize a court, where there is a question between the commissioner and the companies concerning the point whether the forms used by them comply with the statute, to determine the question.[13] In Missouri it is held that an injunction against the ap-

[13] New York Life Ins. Co. v. Hardison, 199 Mass. 190, 127 Am. St. Rep. 478, 85 N. E. 410, 37 Ins. L. J. 848 (Stat. 1907, p. 895, c. 576, sec. 75). The court, per Knowlton, C. J., said: "The first suggestion is that the legislature could not give the insurance commissioner power to pass upon the forms of policies to be issued, and, especially, could not provide that an insurance company should be liable criminally for issuing a policy in a form not approved by him. Secondly, it is suggested that jurisdiction could not be given to this court to review the action of the insurance commissioner in a case of this kind.

"The insurance commissioner is an administrative officer. The legislature prescribed the requirements in the forms of policies. It did not see fit to prescribe a standard form for life insurance companies, but stopped with an enactment of substantive provisions for all policies. It was proper to leave to the insurance commissioner the management of details in the administration of the law. It was proper to prohibit the use of policies that did not conform to the law, and to punish disobedience on the part of an insurance company. It was a reasonable regulation to require companies to submit the forms of policies to the insurance commissioner before using them, so that he could see whether the law was being obeyed. His duty was to approve of every form of policy that seemed to him correct. The insurance companies, after submitting their forms to him, had nothing to do but to go on with their business, unless he made objection within thirty days. If he made such objection, they were given a right to bring suit in this court for the determination of the question whether their proposed action was within the law.

"With the power of regulation of the business of insurance, and of the conduct of corporations, domestic and foreign, belonging to the legislature, it seems to us that such companies may be forbidden to issue policies that are deemed contrary to law by an administrative officer, until the court can determine the legal questions involved. The insurance commissioner cannot decide finally, nor exercise any judicial power in the premises. In these cases, the companies failed to satisfy an administrative officer, acting for the protection of the public, that they were proceeding legally. The statute declares that, thereupon, they shall do no more business until there is a judicial determination of their rights by this court. This part of the case is covered by the decision in Provident Savings Life Assur. Soc. v. Cutting, 181 Mass. 261, 92 Am. St. Rep. 415, 63 N. E. 433, and there are many other cases in which authority somewhat like this is held to have been rightly exercised by public officers: Dwelling House Ins. Co. v. Wilder, 40 Kan. 561, 20 Pac. 265; State ex rel. v. Moore, 42 Ohio St. 103; Brodbine v. Revere, 182 Mass. 598, 66 N. E. 607; Commonwealth v. Sisson, 189 Mass. 247, 109 Am. St. Rep. 630, 1 L.R.A.(N.S.) 752n, 75 N. E. 71.

"The authority for a so-called review by this court is simply a provision for an original judicial proceeding which an insurance company may bring before a court of law, to ascertain whether its action in establishing the form of its policy is legal. The party on one side is the com-

proval by the superintendent of insurance of a uniform policy of insurance, under a statute which is alleged to be unconstitutional as an attempt to delegate to him legislative powers, cannot be granted on behalf of individuals in order to protect them in the right to make contracts of insurance to suit their varying needs and circumstances, as the statute if unconstitutional cannot stand in the way of any contracts that may be made. And the mere possibility of injury by an unconstitutional statute which may prevent insurance companies from making such contracts as persons might otherwise procure them to make will not authorize injunctive relief in behalf of those who wish such contracts.[14]

§ 176b. Standard policy: stipulations contra, additions, changes, etc.—Emerigon, in considering whether it is "permitted to stipulate agreements contrary to the dispositions of the Ordonnance," says: "One may not derogate from the prohibitory dispositions of the Ordonnance" or "from the directions of the Ordonnance in points that are of essence of the contract. But it is permitted to vary from them in all points which not being prohibited by any express text concern neither the essence of the contract nor good morals nor public law, and such is the doctrine of the common law." [15] And where a statute authorizes the attachment to the policy of separate slips or riders upon which the insurer may write or print in type, not smaller than long primer, provisions adding to

pany, the party on the other side is the insurance commissioner, representing the public. It is a convenient and proper method of settling the rights of the company and of the people, by a regular trial of the disputed question whether the company, in its plan for conducting its business, is within the statute. There is no reason why the legislature should not provide such a judicial tribunal for such a purpose. See Stat. 1890, p. 258, c. 304. Employers' Liability Assur. Corp. v. Merrill, 155 Mass. 404, 29 N. E. 529; Janvrin, In re, 174 Mass. 514, 47 L.R.A. 319, 55 N. E. 381; Moynihan, Appeal of, 75 Conn. 358, 53 Atl. 903. We see no constitutional objection to this part of the act."

[14] Business Men's League v. Waddill, 143 Mo. 495, 40 L.R.A. 501, 45 S. W. 262.

[15] Emerigon on Insurance (Meredith's ed. 1850) c. ii. sec. 8, p. 48. The Ordonnance de la Marine, art. 3 des Assur., makes certain provisions as to what the policy shall contain. Emerigon (id.) also says: "The Reglement of Barcelona and the Reglement of Amsterdam declare null and of no value all contracts of assurance made and passed in their prejudice, though the parties have stipulated and contracted to the contrary. This principle is too general;" then follows what we have above quoted in the text.

As to effect of variations from statutory provisions concerning policy in Canada, see Hartney v. North British Fire Ins. Co. 13 Ont. R. 581; Parsons v. Queen Ins. Co. 2 Ont. R. 45.

As to statutory provisions see Connecticut, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Dakota.

or modifying those contained in the standard form of policy, more than one such modifying provisions may be written or printed on the same slip of paper, and the words "separate" and "to be attached thereto," used in the statute, expresses the idea of something not originally a part of the policy, but distinct therefrom.[16] But the Minnesota statute of 1895 did not authorize the parties to modify or add to the statutory form, and the enactment of 1897 in express terms prohibited the making of any changes except such as were specifically enumerated in the statute; and the purpose of the law required that all conditions should appear in one written instrument.[17] In New Hampshire every policy stipulation in con-

[16] Rolfe v. Patrons' Androscoggin Mutual Fire Ins. Co. 105 Me. 58, 76 Atl. 879, Rev. Stat. c. 49, sec. 4.

[17] Wild Rice Lumber Co. v. Royal Ins. Co. 99 Minn. 190, 108 N. W. 871, 35 Ins. L. J. 824. The court, per Elliott, J., said: "The lumber company contends that the provision injects forbidden conditions into the standard policy, and the insurance companies that it merely determines one of the 'conditions of insurance' authorized by sec. 52, c. 175, p. 417, Gen. Laws 1895, and is also expressly authorized by sec. 1, subd. 2, c. 254, p. 468, Gen. Laws 1897. A glance at the history of the standard form of policy makes it very clear that the legislature of this state intended to deprive fire insurance companies of the right to add to or change the terms and conditions of the prescribed form. The right to make such changes and additions is one of the principal distinguishing characteristics of the two classes of standard forms. The Massachusetts and New York standard policies went into effect about the same time, and have formed the models for the legislation in other states. Both states were seeking uniformity of insurance contracts, but Massachusetts did not attempt to deprive the parties of the liberty of making their own contracts. It merely adopted a model which the parties were at liberty to modify at will. But New York went further, and determined the form which all must use, with the privilege of adopting certain prescribed clauses to cover particular conditions. The Minnesota act of 1889 imposed upon the insurance commissioner the duty of preparing a standard form of policy which should be obligatory after that year. The New York form was prepared and went into use, but the act was declared unconstitutional because it attempted to delegate legislative powers to the insurance commissioner. In 1895 the legislature adopted the Massachusetts form, with such modifications as were necessary to avoid conflict with the valued policy law. Section 53 provided that a company may write upon the margin or across the face of the policy, or write or print in type not smaller than long primer, upon separate slips or riders to be attached thereto, provisions adding to or modifying those contained in the standard form. The insurance companies then adopted a general rider which embraced substantially all the provisions of the New York form. But the legislature of 1897, amending sec. 53, c. 175, p. 417, Gen. Laws 1895, in express terms prohibited the making of any changes except such as were specifically enumerated in the statute. The conclusion is inevitable that the legislature intended to deprive the parties of the right to make insurance contracts in any form except as prescribed by the statute." The court

flict with the statutory form is void.[18] Under the Massachusetts statute, which requires every life insurance company to file with the insurance commissioner for his approval a copy of any form of policy that it purposes to issue,[19] it is his duty to determine whether the policy contains the substantive provisions of the law called for by statute, in such a form as to give the contract proper effect. In other words, it is the commissioner's duty to consider matters of substance called for by the statute, and he is not confined in his examination to merely matters of form, such as the size or shape of the paper on which the contract appears, or to the size of type, or the order in which the different parts of the contract are set forth. And provisions inserted in the policy need not be identical with those provided for by statute: it is sufficient if they are contained in substance in the policy, and their form may be varied, and additional provisions beneficial to insured may be inserted, provided they satisfy the statutory requirements, and do not diminish them by such added policy provisions.[20] Under another case in that state it is held that no departure from the exact provisions of a life policy required by statute should be permitted, unless the substituted provision is plainly as advantageous in every way to the insured as the prescribed one.[1]

§ 176c. Standard policy: waiver.—In New Hampshire the standard policy act is a part of every contract of insurance. No waiver of any part of it can be set up by the insurer, every policy stipulation in conflict therewith is void, and every other form is forbidden.[2]

then gives the statute (sec. 53, c. 254, p. 468, Gen. Laws 1897) and continues: "The prescribed form with the changes thus authorized is the only form of fire insurance contract authorized by the laws of the state. . . . Changes and additions are now forbidden, except as specifically permitted, but the policy must still contain all the conditions of insurance." And it is held that a fire insurance company has no authority to attach to the standard form of policy a clause by which the insured warrants the maintenance of a designated clear space about the insured premises. Such a "space clause," attached as a rider, is void in so far as the warranty is concerned; but, as the statute expressly authorizes an insurance company to print or use in its policies forms of description and specification of the property insured, the so-called "space clause" may contain effective language limiting the general descriptive language of the policy.

[18] Franklin v. New Hampshire Fire Ins. Co. 70 N. H. 251, 47 Atl. 91, 30 Ins. L. J. 73, *considered* in next following section herein.

[19] Mass. Stat. 1907, p. 895, c. 576, sec. 75.

[20] Ætna Life Ins. Co. v. Hardison (Travelers Life Ins. Co. v. Hardison) 199 Mass. 181, 85 N. E. 410, 37 Ins. L. J. 818.

[1] New York Life Ins. Co. v. Hardison, 199 Mass. 190, 127 Am. St. Rep. 478, 85 N. E. 410, 37 Ins. L. J. 848.

[2] Franklin v. New Hampshire Fire Ins. Co. 70 N. H. 251, 47 Atl. 91, 30 Ins. L. J. 73 (decided in 1900); Laws 1879, c. 13 (Pub. Stat.

But although the Maine act of 1895 prescribes the form of a standard policy and the stipulations to be contained therein it does not restrict the right of waiver, and even though the policy requires "assent in writing or in print of the" insurer a waiver of the express terms of the policy may arise from acts done and knowledge on the part of the insurer without "assent in writing or in print."[3] And in North Dakota while the enactment of a standard form of policy law may affect a question of pure waiver it does not abrogate the doctrine of estoppel, especially where policies are by statute such policies are subject to waiver the same as other policies[4] and under a Michigan decision a defense of forfeiture under a standard policy by a mutual company may be waived.[5] In Pennsylvania the provisions of a policy under an unconstitutional statute, providing for a uniform fire policy and directing the insurance commissioner to prescribe a standard form of policy, must be construed as those of a voluntary contract between the parties which may be waived by them in any manner, and not as the requirements of a statute, which can be waived only in the manner prescribed thereby.[6]

§ 176d. Standard policy law: effect as to valued policy law.— In Louisiana the standard policy law has been held to have been repealed by the valued policy law in so far as the latter conflicts with the former.[7] But the Minnesota legislature in 1895 adopted the Massachusetts standard form of policy with such modifications as were necessary to avoid conflict with the valued policy law.[8] In South Dakota the standard form of fire insurance policy is open as

c. 170) enacted immediately after decision that a provision in the policy which conflicted with the statute was a waiver of the latter: Tasker v. Kenton Ins. Co. 58 N. H. 469. See Gleason v. Canterbury Mutual Fire Ins. Co. 73 N. H. 583, 64 Atl. 187, 35 Ins. L. J. 932.

[3] Bigelow v. Granite State Fire Ins. Co. 94 Me. 39, 46 Atl. 808, 30 Ins. L. J. 77; Pub. Laws 1895, c. 18. See also Goodhue v. Hartford Fire Ins. Co. 175 Mass. 187, 55 N. E. 1039, 29 Ins. L. J. 1087. But *compare* Straker v. Phœnix Ins. Co. 101 Wis. 413, 77 N. W. 143, 28 Ins. L. J. 143.

[4] Leisen v. St. Paul Fire & Marine Ins. Co. 20 N. Dak. 316, 30 L.R.A. (N.S.) 539, 127 N. W. 837, 39 Ins. L. J. 1729, the question of waiver by agents is exhaustively considered. One judge dissented. See chaps. 18–21, §§ 432 et seq. herein as to waiver by agents.

[5] First Baptist Church of Jackson v. Citizens' Mutual Fire Ins. Co. 119 Mich. 203, 5 Det. L. N. 767, 77 N. W. 702, 28 Ins. L. J. 165.

[6] O'Neil v. American Fire Ins. Co. 166 Pa. 72, 45 Am. St. Rep. 650, 26 L.R.A. 715, 30 Atl. 945, rev'g 3 D. R. 778 (act April 1891, Pub. L. 22, sec. 1).

[7] New Orleans Real Estate Mortgage & Securities Co. v. Teutonia Ins. Co. 128 La. 45, 54 So. 466, 40 Ins. L. J. 999. *Compare* Melancon v. Phœnix Ins. Co. 116 La. 324, 40 So. 718.

[8] Wild Rice Lumber Co. v. Royal Ins. Co. 99 Minn. 190, 108 N. W. 871, 35 Ins. L. J. 824, per Elliott, J.

to personal property and a strictly valued policy as to real estate where the same is wholly destroyed.[9]

§ 176e. Statutory requirements as to size of type, written conditions, etc.—Statutory provisions requiring conditions or restrictions to be printed in a certain sized type or written in ink in order to constitute a valid defense to the non-performance of such conditions or restrictive provisions, must be complied with.[10] And this applies to the application as well as to the policy,[11] but does not apply to conditions concerning risks insured which impose no burden on the insured.[12] In an action against an "old-line company" it is held error to instruct the jury that, under the Kentucky statute,[13] such parts of an application as were printed in type smaller than brevier were not to be considered by them as constituting any part of the application, as the statute does not apply to such companies, but only to co-operative insurance companies.[14]

§ 176f. Standard policy: mutual companies or associations: "special regulations" as part of policy.—Where a standard form of fire policy is prescribed and the statute is subsequently amended so as to enable mutual companies or associations incorporated under the law of the same state, having special regulations to embody them in the policy as a part thereof, such companies cannot, by merely designating some regulations as "special," overthrow the provisions of the law otherwise binding upon all insurance companies. It was the intent of the legislature by the amendment to limit such regulations to those lawful regulations which are special or peculiar to such mutual organizations; to those specially applicable to its organization, etc., as distinguished from other kinds of insurance companies.[15]

§ 177. The policy: what it usually contains: policy to contain entire contract: statutes.—Although the form is not essential unless

[9] Lawver v. Globe Mutual Ins. Co. 25 S. Dak. 549, 127 N. W. 615, 39 Ins. L. J. 1588.

[10] Equitable Life Assur. Soc. of U. S. v. Wilson, 110 Va. 571, 2 Va. App. 943, 46 S. E. 836, Va. Code 1904, sec. 3252. See National Life Assoc. v. Berkeley, 97 Va. 571, 34 S. E. 469. See 2514 herein.

[11] Burruss v. National Life Assoc. 96 Va. 543, 1 Va. S. C. Rep. 57, 32 S. E. 49.

[12] Cline v. Western Assur. Co. 101 Va. 496, 44 S. E. 100; Code 1887, sec. 3252.

[13] Ky. Stat. 1903, sec. 679.

[14] Provident Savings Life Assur. Soc. v. Elliott, 29 Ky. L. Rep. 552, 93 S. W. 659, 35 Ins. L. J. 713.

[15] Nielsen v. Merchants' Mutual Ins. Co. 26 S. Dak. 405, 128 N. W. 491, 40 Ins. L. J. 65; Laws 1905, c. 126, sec. 2 (standard policy law), amd. Laws 1907, c. 170, sec. 1 (mutual companies: "Special regulations"). See Gleason v. Canterbury Mutual Fire Ins. Co. 73 N. H. 583, 64 Atl. 187, 35 Ins. L. J. 932; Commonwealth Mutual Fire Ins. Co. v. Edwards, 124 N. Car. 116, 32 S. E. 404.

required by statute, and although the parties may enter into whatever legal and valid contract they choose, yet the policy usually contains, either in itself or by express reference to the application or other papers, (1) the names of the parties, (2) the consideration or premium, (3) duration or term insured, (4) the peril or risk or voyage insured, (5) the amount insured, (6) the subject matter or the description of the interest when necessary, (7) the warranties and conditions, (8) the attestation clause, signatures, dates, etc., and, if necessary, the seal.[16] This rule, however, is subject to many

[16] The 30 Viet. c. 23 (1867), sec. 7, provides that no contract for sea insurance, other than that referred to in the merchant shipping act 1862 sec. 55, shall be valid unless expressed in the policy, and that every policy shall specify the particular risk or adventure, the names of the subscriber, or underwriter, and the sum or sums insured, and the omission of any of them shall avoid the policy; and see statute 25 & 26 Viet. c. 63, sec. 64; 28 Geo. III. c. 56, sec. 2.

Mr. Marshall (Marshall on Insurance, ed. 1810, 305–43), says "the usual requisites of a policy are ten," they relate to marine insurance, and are: 1. The name of the insured, his agent, or trustee; 2. The name of the ship and the master; 3. The subject matter of the insurance; 4. A description of the voyage with the commencement and end of the risk; 5. The perils insured against; 6. The powers of the insured in case of a misfortune; 7. The promise of the insurers and their receipt for the premium; 8. The common memorandum; 9. The date and subscription; 10. The stamp. This first requirement arose from the statutes 25 Geo. III. c. 44, and 28 Geo. III. c. 56. The second depends upon usage, since it is very ancient and exists in the forms of foreign policies.

Mr. Maclachlan (1 Arnould on Marine Ins. [ed. 1887] 251) states the following as substantial requisites of a marine policy in England: 1. The name of some party, either really or nominally insured; 2. A description of the voyage or risk insured; 3. Of the subject insured; 4. Of the perils insured against; 5. The name of the ship and master (except where the insurance is on goods by ship or ships); 6. The premium or consideration of the contract; 7. The sums insured; 8. The subscription of the underwriter; 9. Dated; 10. Stamped before execution;" and he states the statutory requisites to be: 1. The insertion of the name of some party really or nominally assured; 2. The stamp; 3. The risk or adventure; 4. The names of the underwriters; 5. The sums insured; 6. At common law, the premium. This author also inserts what is known as the running down clause: Id. 251. This differs slightly from those given by Mr. Arnould (Perkins' ed. 1850) page 40. And also from 1 Arnould on Marine Ins. (8th Ed. Hart & Simey) p. 41, sec. 28. See 17 Earl of Halsbury's Laws of England, pp. 337, 338. By sec. 23 of the marine ins. act. "'A marine policy must specify (1) the name of the assured or of some person who effects the insurance in his behalf; (2) the subject-matter insured and the risk insured against; (3) the voyage, or period of time, or both, as the case may be, covered by the insurance; (4) the sum or sums insured; (5) the name or names of the subscribers, and sec. 24 (1) declares that a 'marine policy must be signed by or on behalf of the insurer.'" 1 Arnould on Marine Ins. (8th ed. Hart & Simey) sec. 8, p. 11; Id. sec. 11, p. 20. And in case of a corporation the corporate seal may be sufficient. 17

qualifications. Thus, it is not absolutely necessary to the validity of the policy in all cases that the name should appear,[17] nor need the nature and extent of the interest be specifically set out in every case,[18] and the valuation is sometimes not written in the policy. Thus, a cargo policy may provide in the blank form that if no valu-

Earl of Halsbury's Laws of England, pp. 337, 338.

Although a contract may be one of sea insurance within Stamp Act 1891 (54 & 55 Vict. c. 39) sec. 93, subsec. 1, still it will be invalid as such policy which cannot be stamped or sued on as such or as a contract to issue a policy where it does not specify, as required by subsec. 3 of said act, the sum or sums insured. Home Marine Ins. Co. Ltd. v. Smith, [1898] 2 Q. B. D. Law R. 351, 67 L. J. Q. B. N. S. 777, 78 Law T. Rep. 734, affg. [1898] 1 Q. B. 829, 78 Law T. Rep. 465, 67 L. J. Q. B. N. S. 554.

Stamp tax on policies (marine, inland, fire); war revenue act constitutional: whether insurance policies as documents are exports. See Thames & Mersey Marine Ins. Co. Ltd. v. United States (U. S. D. C.) 217 Fed. 683, war revenue act 1898, act June 13, 1898, c. 448, sec. 25, Sched. A, 30 Stat. 461.

The "sum at risk," in a marine policy, is the valuation placed upon the property by the policy itself. Standard Marine Ins. Co. v. Nome Beach Lighterage & Transp. Co. 133 Fed. 636, 67 C. C. A. 602, 1 L.R.A. (N.S.) 1095.

"The thing or property insured is called the subject matter of insurance (Marine insurance) 17 Earl of Halsbury's Laws of England, p. 336.

[17] See §§ 310, 1689 herein.

See Weed v. London & Lancashire Fire Ins. Co. 116 N. Y. 106, 112, 22 N. E. 231, where the defendant by the policy in suit undertook to insure the "Estate of O. Richards" against loss or damage by fire, and the referee found as a fact that defendant intended to insure such persons and their interests in said premises as were or might be represented under said name or title. But see 30 Vict. c. 23, sec. 7; Lee v. Massachusetts Fire & Marine Ins. Co. 6 Mass. 215, 216.

A policy issued in the adopted name of the applicant, rather than in that given him by his parents is valid. Smith v. United States Casualty Co. 197 N. Y. 420, 26 L.R.A. (N.S.) 1167, 18 Am. & Eng. Ann. Cas. 631, 90 N. E. 947.

A policy issued to one in his own name as "receiver for" a firm on their "one-half interest" in a certain building evidences clearly an intent to insure the receiver as the representative of the interest: Steel v. Phœnix Ins. Co. 51 Fed. 715; 2 C. C. A. 463, 154 U. S. 518, 14 Sup. Ct. 1153, 38 L. ed. 1064 (court divided). See also Thompson v. Phenix Ins. Co. 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. 1019, 19 Ins. L. J. 481.

As to policy to corporations in their name, see Holbrook v. St. Paul Ins. Co. 25 Minn. 229; Clark v. German Mutual Fire Ins. Co. 7 Mo. App. 77; Bon Aqua Imp. Co. v. Standard Fire Ins. Co. 34 W. Va. 764, 12 S. E. 771. And an insurance company cannot escape liability for a fire loss because the deed to the plaintiff corporation was made before it received its charter, and the name used in the deed was slightly different from that subsequently given it. Sumter Tobacco Warehouse Co. v. Phœnix Ins. Co. 76 S. Car. 76, 10 L.R.A. 736, 121 Am. St. Rep. 941, 56 S. E. 654.

[18] Vannatta v. Mutual Security Ins. Co. 2 Sand. (N. Y.) 490, 494. See §§ 1691 et seq. herein.

ation be written herein then the property inserted is hereby valued at invoice cost on board. Nor is a written date essential,[19] except possibly in case of marine policies in England subscribed by Lloyds underwriters,[20] and stipulations relating to signing and countersigning are sometimes dispensed with.[1]

Where a statute prohibits unjust discrimination between insurants of the same class and makes it unlawful for any life insurance company to promise to give any advantage or valuable consideration whatever, not expressed or specified in the policy and requires the contract to be wholly expressed therein, an option to purchase shares of the insurers stock, not expressed in the policy, violates the statute, as any act which is a benefit to one party and a disadvantage to the other is a valuable consideration.[2]

Under the statutes of several states a life policy must contain the entire contract,[3] and what must or must not be specified in a policy is provided for by statute in many states.[4]

[19] Lee v. Massachusetts Ins. Co. 6 Mass. 218, 219. See § 157 herein. If oral agreement mentions no date, the risk begins immediately: Potter v. Phœnix Ins. Co. 63 Fed. 382.

[20] 1 Arnould on Marine Ins. (Maclachlan's ed. 1887) 249, 250.

[1] Myers v. Keystone Mutual Life Ins. Co. 27 Pa. St. 268, 67 Am. Dec. 462. See §§ 33-35, 528, 530-532 herein.

[2] People v. Commercial Life Ins. Co. 247 Ill. 92, 93 N. E. 60, 40 Ins. L. J. 163; act June 19, 1891, Laws 1891, p. 148.

[3] *Colorado.*—Sess. Laws 1907, c. 193, sec. 36, p. 455.

Delaware.—Laws 1907, c. 106, p. 190.

Illinois.—Laws 1891, p. 148, discrimination as to rates etc. requires contracts to be wholly expressed in the application and policy construed in People v. Commercial Life Ins. Co. 247 Ill. 92, 93 N. E. 90, 40 Ins. L. J. 163; Rev. Stat. sec. 208n, clause 3, & sec. 209, c. 73, Rev. Stat. construed in McCarthy v. Pacific Mutual Life Ins. Co. 178 Ill. App. 502.

Kentucky.—Stat. 1909, sec. 4400.

Louisiana.—Acts 1906, act no. 52, p. 86.

Massachusetts.—Acts and Res. 1907, c. 576, sec. 75, pp. 895 et seq. providing that life policy and application must contain entire contract. Construed in New York Life Ins. Co. v. Hardisen, 199 Mass. 190, 127 Am. St. Rep. 478, 85 N. E. 410, 37 Ins. L. J. 848; Ætna Life Ins. Co. v. Hardison (Travelers Life Ins. Co. v. Hardison) 199 Mass. 181, 85 N. E. 407, 37 Ins. L. J. 818. See §§ 186, 187 herein.

Michigan.—Pub. acts 1907, p. 243.

Minnesota.—Laws 1907, c. 44, p. 49.

Montana.—Rev. Codes 1907, sec. 5593.

New Hampshire.—Laws 1907, c. 110, p. 109.

New York.—Ins. Law 1892, c. 690, sec. 58, and 1906, c. 326, construed, in connection with non-attachment of medical examination to policy, in Becker v. Colonial Life Ins. Co. 138 N. Y. Supp. 491, 153 App. Div. 382, affg. 133 N. Y. Supp. 481, 75 Misc. 213.

North Dakota.—Laws 1907, c. 155, p. 246.

Tennessee.—Acts 1907, p. 1530.

See §§ 190, 190a herein.

[4] *Alabama.*—Code 1907, sec. 4579, provides that no life, nor any other

§ 178. Execution of the policy.—The policy is executed by the insurer, and although it is not signed by the assured, except where certificates of membership in certain mutual benefit societies are required to be signed by the assured, and although the promise is by the assurer and not by the assured, except in cases where the premium is not presumed to have been prepaid, he is bound to an observance of all its valid conditions if he intends to claim the indemnity, or as in life policies, the sum specified, his right to recover depends upon a performance by the insured of the valid conditions of the policy, since the violation of conditions of any policy constitutes a valid defense by the insurer. A policy may be subscribed by the

insurance company, nor any agent thereof, shall make any contract of insurance or agreement other than is plainly expressed in the policy. *"Plainly expressed"* construed in Hunt v. Preferred Accdt. Ins. Co. 172 Ala. 442, 55 So. 201, sec. 2602, Code 1896, is same, and is construed in Manhattan Life Ins. Co. v. Verneuille, 156 Ala. 592, 47 So. 72, 37 Ins. L. J. 892. When application and policy one contract under code. See §§ 186, 187, 190 herein. When documents are part of policy under code, see § 191 herein.

Arizona.—Civ. Code, par. 809, and act March 21, 1907, Sess. L. 1907, p. 162.

California.—Civ. Code, secs. 450, 2587, sec. 2587 covers parties, rate of premium; property or life insured; interest of insured in property, if not absolute owner; risks insured against; period during which insurance to continue. *Cited* in Davis v. Phœnix Ins. Co. 111 Cal. 409, 411, 412, 43 Pac. 1115. *Quoted* in part in Union Mutual Ins. Co. v. American Fire Ins. Co. 107 Cal. 327, 330, 28 L.R.A. 692, 40 Pac. 431.

Colorado.—Sess. Laws 1907, p. 455, secs. 36, 37, c. 193.

Illinois.—Rev. Stat. 1908, pp. 1248–1250, secs. 208u, 208v.

Indiana.—See Burns Ann. Stat. Rev. 1908, secs. 4725, 4752.

Massachusetts.—Stat. 1894, c. 522, sec. 59, requring conditions of fire insurance to be stated in full. Construed, in connection with Pub. Stat. c. 119, sec. 138 (standard policy) so as not to preclude certain temporary oral agreement in Goodhue v. Hartford Fire Ins. Co. 175 Mass. 187, 29 Ins. L. J. 207, 55 N. E. 1039.

Michigan.—Pub. acts 1907, p. 252.

Minnesota.—Genl. Laws 1895, c. 175, p. 417, as am'd Genl. Laws 1897, c. 254, p. 468, all conditions of fire policy to appear in one written instrument. So construed in Wild Rice Lumber Co. v. Royal Ins. Co. 99 Minn. 190, 108 N. W. 871, 35 Ins. L. J. 824. See § 176b herein.

Missouri.—Rev. Stat. 1899, sec. 7903. Exact sum of money which insurer promises to pay must be specified in policy or certificate. Construed in Courtney v. Fidelity Mutual Aid Assoc. 120 Mo. App. 110, 94 S. W. 768, 101 S. W. 1098. Goodson v. National Masonic Accident Assoc. 91 Mo. App. 339.

Montana.—Civ. Code (Rev. Codes 1907) sec. 5592 (sec. 3451).

New Jersey.—Laws 1907, c. 72, p. 133.

North Carolina.—See Rev. of 1905, sec. 4773.

North Dakota.—Rev. Codes, 1899, sec. 4488 (same as Cal.).

Ohio.—Laws 1908, pp. 171–174.

Porto Rico.—Rev. Codes (Civ.) 1902, sec. 1695.

South Dakota.—Rev. Codes 1903, sec. 1837 (same as Cal.).

Tennessee.—Acts 1907, c. 457, p. 1529. See c. 441, p. 1496.

underwriter or by his duly authorized agent or attorney,[5] and the statute may require that the contract be signed by the insurer or some authorized person.[6]. But in this country the business of insurance is carried on principally by chartered or incorporated companies or associations, and the policy or certificate is generally subscribed by the executive officers of the company, although the act of incorporation, charter, articles of association, or by-laws may designate certain officers or agents to attest the policy, and the policy may also provide for the countersignature of a certain agent as a condition precedent to its validity.[7] And it is held that a provi-

[5] Guthrie v. Armstrong, 5 Barn. & Ald. 628; 1 D. & K. 248.

[6] Delaware Ins. Co. v. Pennsylvania Fire Ins. Co. 126 Ga. 380, 55 S. E. 330.

[7] See §§ 528, 530–532 herein. See also §§ 39–41 herein; Commercial Mutual Ins. Co. v. Union Marine Ins. Co. 19 How. (60 U. S.) 318, 15 L. ed. 636, 2 Curt. (U. S. C. C.) 524; Head v. Providence Ins. Co. 2 Cranch (6 U. S.) 127, 150, 2 L. ed. 229; Peoria Fire & Marine Ins. Co. v. Walser, 22 Ind. 73; Myers v. Keystone Mutual Life Ins. Co. 27 Pa. St. 268, 67 Am. Dec. 462.

Form of execution of marine and fire policy: "In witness whereof, the —— Insurance Company has caused these presents to be signed by its duly authorized officers in the —— state of —— this — day of ——, one thousand —— hundred and ——, ——— secretary, ——— president."

Another marine form of execution is: "In witness whereof, the president or vice-president of the said —— Insurance Company hath hereunto subscribed his name and the sum insured, and caused the same to be attested by the secretary in —— the — day of ——, one thousand," etc. Memorandum clause: "———, secretary, ———, president."

Another form of execution; fire policy: "In witness whereof, this company has executed and attested these presents this — day of ——, 189—. ——— secretary, ——— president."

Form of execution; standard fire policy of Massachusetts: "In witness whereof, the said —— company has caused this policy to be signed by its president, and attested by its secretary (or by such proper officers as may be designated), at their office in —— (date)."

Form of execution; New York Standard fire policy: "In witness whereof, this company has executed and attested these presents, but this policy shall not be valid unless countersigned by the duly authorized agent of the company at —— this —— day of —— 19—."

Form of execution; certificate of membership of mutual company: "In witness whereof, the said —— company of —— have caused this certificate to be signed by their president, and attested by their secretary in the city of ——, state of ——, this —— day of ——, A. D. 18—. ——— president, ——, secretary. Countersigned at —— this —day of ——, 18—. ———, agent."

Form of execution; certificate in mutual benefit or beneficiary association: "In witness whereof, the said —— association of ——, state of ——, has by its president and secretary signed, sealed, and delivered this certificate at its office in ——, state of ——, this day of ——, 18—. ———, president, ———, secretary," affixing corporation seal.

Form of execution of New York standard life policy: "In witness whereof, the company has caused this

sion requiring the policy to be countersigned must be complied with.[8] Again, that a policy of life insurance shall be countersigned by the agent of the company before it shall become a valid obligation is a stipulation that the company has a right to make, and the completion of the contract with the signature of such agent during the lifetime of the insured is essential to the existence of an obligation which can be enforced against the company.[9] A mutual benefit certificate is not properly and completely executed where it is not countersigned by the protector and secretary of the subordinate lodge as provided by said certificate although the seal of such lodge is impressed thereon, and the mere possession of the certificate is not a waiver of such requirement.[10] The validity of a policy or certificate constituting a contract between a benefit society and a member thereof is not destroyed by the adoption of some impracticable scheme for execution of the contract.[11] So it is held that if the company's charter requires that contracts shall be signed by the president and countersigned by the secretary the subscription to be valid must be made in that way.[12] The statute of Massachusetts, however, which provides that insurance corporations can make valid policies only by having them signed by their president and secretary only directs the formal mode of signing policies, and has no application to agreements for insurance.[13] Again, it is held that it does not constitute subscribing a policy where the insurer's name appears only at the beginning but not at the end of the instrument.[14] In Nebraska the statute of 1903 requiring all policies and contracts of whatever kind for life insurance to be signed by cer-

policy to be executed this ——— day of ———.

Form of execution; life policy: "In witness whereof, the said ——— Life Insurance Company [or society] has caused this policy to be signed by two of the executive officers at its office in —— this —— day of ——, A. D. one thousand ——. ———, secretary, ——— actuary."

Another form of execution; life policy: "In witness whereof, the said ——— Life Insurance Company has by its president and secretary signed and delivered this contract at the ——, this —— day of ——, one thousand ——, ———, secretary, ———, president."

[8] Badger v. American Popular Life Ins. Co. 103 Mass. 244.

[9] Fidelity & Casualty Co. of N. Y. v. Walton, 24 Okla. 671, 104 Pac. 909.

[10] Caywood v. Supreme Lodge Knights & Ladies of Honor, 171 Ind. 410, 131 Am. St. Rep. 253, 23 L.R.A.(N.S.) 304n, 17 Am. & Eng. Ann. Cas. 503, 86 N. E. 482, 38 Ins. L. J. 147.

As to countersigning by agent or sub-agent, see §§ 530, 531 herein.

[11] Failey v. Fee, 83 Md. 83, 32 L.R.A. 311, 34 Atl. 839.

[12] Spitzer v. St. Marks Ins. Co. 6 Duer (N. Y.) 6. But see §§ 31, 32, 423, 425-27 herein.

[13] Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co. 19 How. (60 U. S.) 318, 15 L. ed. 636.

[14] Globe Accident Ins. Co. v. Reid, 19 Ind. App. 203, 47 N. E. 947, modified 49 N. E. 291, 7 Am. & Eng.

tain officers of the companies is limited to companies formed thereunder.[15] And where a contract for employer's insurance provides for indemnity to the insured in case of liability to employees for damages for accidents and injuries sustained by them in the course of their employment, and also further provides for hospital treatment for sick or disabled employees, in consideration that the insured pays a monthly assessment based on the number of employees, such a contract, being in the name of the corporation as the insurer, may be signed officially by its president, and such subscription is valid.[16]

In case of marine policies in England private insurers underwrite with their own names, and Lloyds' policy is ordinarily executed by individual underwriters, and against each subscription is generally set in words and figures the date and also the sum insured.[17] And in fact the act incorporating the society of Lloyds[18] prohibits subscribing in the name of a partnership or otherwise than in the name

Corp. Cas. N. S. 770; Rev. Stat. 1894, sec. 455. But *compare* Delaware Ins. Co. v. Pennsylvania Fire Ins. Co. 126 Ga. 380, 55 S. E. 330.

[15] Carter v. Bankers Life Ins. Co. 83 Neb. 810, 120 N. W. 455, acts 1903, c. 52, sec. 15, p. 332.

[16] National Protective Assoc. v. Prentice Brown Stone Co. 49 Minn. 220, 51 N. W. 916.

[17] *Form of subscription of English marine policy* as recognized in the marine insurance act as the standard form of policy (Lloyds): "In witness whereof, we, the assurers, have subscribed our names and sums assured in London;" then follows memorandum clause, then signatures and sums affixed as follows: £ [figures]; A B [sum in figures and words], —— day of ——, A. D." for each underwriter the sum subscribed being specified, and date of each subscription affixed. See 1 Arnould on Marine Ins. (8th ed.) Hart & Simey) p. 17, sec. 10; Id. p. 37, sec. 26 (as to club policy, sec. 2 Id. Appendix B.) 17 Earl of Halsbury's Laws of Eng. p. 340, sec. 678, note.

Execution of policy. "Where the policy is underwritten by individuals as, as in clause nineteen of Lloyd's policy, they sign their names at the foot of the policy, writing opposite thereto the sum insured by each; and the effect of this is that each makes a separate contract with the assured for the amount, set opposite to his name, the assured thereby acquiring a right of action against each separately and not against all jointly." 17 Earl of Halsbury's Laws of England, p. 339, *citing* marine ins. act 1906 (6 Edw. VII. c. 41) sec. 24 (2): Tyser v. Ship Owners Syndicate (reassured), [1896] 1 Q. B. 135; Leo Steamship Co. Ltd. v. Corderoy (1896), 1 Com. Cas. 300, 379, C. A.

"The mode employed in effecting an insurance at Lloyds is simple. The business is done entirely by brokers, who write upon a slip of paper the name of the ship and shipmaster, the nature of the voyage, the subject to be insured, and the amount at which it is valued. If the risk is accepted, each underwriter subscribes his name, and the amount he agrees to take or underwrite, the insurance being effected as soon as the total value is made up." 16th Ency. Britannica (11th ed.) "Lloyds," pp. 833, 834. See also 14th Id. "Insurance," subhead "Lloyds," p. 661.

[18] 34 Vict. (1871), c. 21.

of an individual, being an underwriting member of the society for each separate sum subscribed. The policy becomes, therefore, a separate contract with each underwriter obligating him to the extent of his subscription or for some proportionate part thereof in case of a partial or average loss, thereby precluding an action against the subscribers jointly, and necessitating a separate action against each underwriter. Partnerships should subscribe as such, and if there be a separate subscription by individual partners this does not preclude resort to partnership assets. The mode of subscription by companies may depend upon the act of incorporation, charter, or deed of formation. In case of subscription by what were known as insurance clubs in England some question has arisen as to the manner of subscription, and the specification of the sum or sums insured, owing to the principles upon which these organizations were originally formed, and the necessity of conforming with the requirements of the act of 1867, 30 Victoria, chapter 23, section 7, that each policy shall specify the names of the underwriters and the sum or sums insured. These clubs, however, are now registered under the companies act of 1862,[19] still preserving, as far as consistent with existing laws, their mutual features.[20]

[19] 25 & 26 Vict. c. 89. See also 7 & 8 Vict. c. 110. See stamp act 1891. See §§ IV., V. 33, 41d herein.

[20] *Validity of policy where sums not specified.* Policy in the common form by an insurance club, where the members are not responsible for the solvency of each other, is valid, although the sums which they respectively insure are not specified on the face of the policy. Dowell v. Moore, 4 Camp. 166 (1815).

No stamped policy executed and no recovery allowed, under 30 Vict. c. 23, secs. 7, 9: Foster v. Liverpool Marine Ins. Co. 9 L. R. Q. B. 418, 43 L. J. Q. B. 114, affirming 42 L. J. Q. B. 224 (1874). See §§ 33, 41d herein.

As to stamping of policies of marine insurance in the United Kingdom see 1 Arnould on Marine Ins. (8th ed. Hart & Simey) p. 44, sec. 31, stamp act 1891 (54 & 55 Vict. c. 39), repealing all theretofore existing enactments as to stamping policies, as amended by the finance act 1908 (8 Edw. VII. c. 16) sec. 5. As to stamping the policy after execution. See Id. (1 Arnould) p. 47, sec. 32; as to effect of the provision, see Id. p. 46, sec. 32; as to penalties for breach of stamp act see Id. p. 47, sec. 32; as to spoiled stamps see Id. p. 48, sec. 33; as to legal effect of the slips under the stamp act, see Id. p. 48, secs. 34 et seq.

"Policy of sea insurance other than such insurance as is referred to in the merchant shipping act 1894, sec. 506, is not valid unless expressed in a policy, which cannot be given in evidence unless stamped, and this must, except in certain specified cases be done before it is executed; but a policy, although not duly stamped, may for the purpose of production in evidence, be stamped after execution on payment of a penalty of £100." 17 Earl of Halsbury's Laws of England, sec. 676, p. 338.

Unregistered association; Companies act: A mutual marine insurance association was not registered under companies' act. Rules provided that all persons insuring with the

§ 178a. Fidelity bond: necessity of signing by employee: agency: waiver.—The failure of an employee to sign a bond of in-

association should be members. No ship was to be insured for more than three-fourths its value. The person insuring paid a deposit of twenty-five shillings per cent on the amount for which he had insured it, ratably according to the amounts assured to them respectively. There were more than twenty members. An insured vessel was lost, and the amount was referred to arbitration. The insured assigned his claim, judgment was obtained, and a petition presented to wind up the association, as its company consisted of more than twenty members and was not registered. Its formation was forbidden by the companies' act, 1862, sec. 4, and the court discharged an order for winding up, as it could not recognize the association as having any legal existence: Padstow Total Loss Assur. Assn. In re, L. R. 20, Ch. D. 137 (1882); Arthur Average Assn. Ch. & In re, L. R. 10 Ch. 542 (1875).

Contributions; Managing owner; Relations of members; Owners' liability clauses: One T. was the manager and part owner of a steamship, of which N., the defendant, was also part owner. T. became a member of plaintiffs' association and took out a policy with such association in respect to the steamship. T. became bankrupt, and, being unable to pay contributions due to association, action was brought to make N. liable as undisclosed principal. Lord Esher, M. R., said: "The action is brought against the defendant, the part owner of a ship, as the undisclosed principal of Tully, the ship's manager, who had taken out a policy on the ship in his own name, and had become thereby a member of the plaintiffs' association according to its rules. The question, therefore, arises whether the plaintiffs can sue the defendant as Tully's principal. There is much complication and difficulty in connection with these mutual assurance associations. In the case of Lion Mutual Marine Ins. Assn. v. Tucker (49 L. T. 764, 12 Q. B. D. 176), I endeavored to explain the business relation of the members of such an association to each other. It is necessary to consider the form in which the parties have carried out those business relations in order to ascertain what remedies are available for the purpose of enforcing them. The first question which it may be material to consider is, whether the different members of the association have any remedies or rights of action, and if so, what as between themselves. It is obvious, as explained in the case I have referred to, that members cannot sue other members in respect of payments due from the other members as such to the association. Only the association can sue in respect to such payments. Then can members sue other members in respect of claims arising out of the insurance of ships? In the case of Lion Ins. Assn. v. Tucker (ubi sup.), I stated that the business relation between the members was that they were in reality both insurers and insured; but that business relation is carried out by means of a policy given under seal of the association. The members of each class are insurers and insured as between themselves and the other members of the class; they are insured, not by the whole association, but by a part only of the association, viz., the members of the same class. A member who had suffered a loss must, however, sue on the policy given by the association. In order to sue the other members of the class who are really his insurers, he would have to say that they were the principals of the association in giving him a policy under the seal of the corporation. I do not think he could do so. I think that in the case of

demnity renders it entirely inoperative, where such bond declares on its face that it will be invalid unless signed by the employee, and that it is essential to the validity of the bond that his signature be thereto subscribed, and that these are conditions precedent to the right of the employer to recover under the bond. This freedom from liability on the part of the insurer continues notwithstanding

such a contract as this under seal, it is not allowable to go behind the instrument to make undisclosed principals responsible because they are not parties, and have not attached their seals to the contract under seal. Moreover, it is to be observed that in this case the contract is that he is to be paid, in respect of the loss he has suffered, only the amount which the association can collect from the other members of the class. There would be this difficulty in suing the other members, viz., that they might have satisfied their liability by payment of their contributions to the association, and the member is not to receive his payment direct from them, but is to receive the sum collected by the association. There is no contract, as it seems to me, between the member who has suffered the loss and the other members, but only between him and the association, and such member, therefore, cannot sue the other members, although they are really his insurers. If a member could not sue, a person could not sue as his undisclosed principal. Then, as regards any action against the person alleged to be the undisclosed principal of a member by the other members, it would be impossible to allege that a person is an undisclosed principal, in respect of the contract, unless the parties who allege that he is a party to the contract as an undisclosed principal could be sued by him as well as by them. . . . I do not think that a person actually interested in a ship, who has authorized another person to enter into a policy in his own name with the association, is a party to the contract as an undisclosed principal, because, to make him so, it would be necessary to say that he is a member of the association to which he is wholly disclosed and unknown. The association was divided into three different classes, with a separate code of rules for each class, and the agreement in the policy was, 'that the association, under all their policies of insurance of the said class, shall be liable in the whole only to the extent of so much of the funds as the said association is able to recover from the members of the said class, and their respective heirs, executors, and administrators liable for the same, and which, under and by virtue of the rules of said class, are for the time being applicable for the purpose of paying claims under this and other policies issued in respect of the said class.'" United Kingdom Mut. S. S. Assur. Assn. Lim. v. Nevill, 6 Asp. M. C. 226 (1887), *distinguished* in Ocean Iron Steamship Ins. Assn. v. Leslie, 6 Asp. M. C. 226 (1887).

But where insurance was effected by managing owners, "as well in his or their own names as for and in the name or names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all," etc., and contributions were to be paid by "assured," it was held that other part owners were liable as the "assured" for contributions, but it was questioned whether they became members of the association. Great Britain 100A1 Steamship Ins. Assn. v. Wyllie, 6 Asp. Mar. Cas. N. S. 398 (1889), *noting* the last two cases above.

Estoppel of member to deny validity of contract because not stamped or in writing. Barrow-in-Furness Mut. Ship Ins. Co. Lim. v. Ashburner, 5 Asp. M. C. 443, 527.

the receipt of premiums and the issuing of two renewal receipts, if they declare that they are subject to all the conditions contained in the original bond.[1] The conditions of a fidelity bond to indemnify against an employee's dishonesty, and which also contains an undertaking of the employee to the obligor, may require signing by the employee to bind the obligor unless such signing is waived and the employee is not made the obligor's agent to waive such signature by the obligor's signing the bond and delivering it to the employee nor is such signing waived by a retention of the premium paid by the employee.[2]

§ 179. Execution of policy: affixing date.—Although it is customary in this country to affix the date, a policy bearing date the day the premium is paid, but not delivered till after its date, will take effect by relation from its date.[3] So the policy may relate back and take effect so as to cover a loss prior to its date where the contract has been completed;[4] although where the policy was executed and dated but not delivered, because the insured had not called for the same and paid the premium as required, the contract was held not completed.[5] And, as a general rule, the date is not conclusive evidence of the fact, and if the actual date of execution and delivery differs from and is subsequent to that specified, such fact may be shown, although it is questioned whether the error may be corrected in law courts where the execution and delivery precede the date written.[6] And it is not such a material variation, as to in-

[1] Union Central Life Ins. Co. v. United States Fidelity & Guaranty Co. 99 Md. 423, 105 Am. St. Rep. 313, 58 Atl. 437, 33 Ins. L. J. 808. See Blackmore v. Guarantee Co. of North America, 71 Fed. 363, 18 C. C. A. 77; Novak v. Pitlick, 120 Iowa, 286, 94 N. W. 916; Adelberg v. United States Fidelity & Guaranty Co. 90 N. Y. Supp. 465. *Examine* Proctor Coal Co. v. United States Fidelity & Guaranty Co. (U. S. C. C.) 124 Fed. 424. *Compare* Ætna Indemnity Co. v. J. R. Crowe Coal & Mining Co. 154 Fed. 545, 83 C. C. A. 431, certiorari denied (mem.) 207 U. S. 589, 52 L. ed. 354, 28 Sup. Ct. 256; Title Guaranty & Surety Co. v. Bank of Fulton, 89 Ark. 471, 33 L.R.A.(N.S.) 676, 38 Ins. L. J. 722.

[2] United States Fidelity & Guaranty Co. v. Ridgeley, 70 Neb. 622, 97 N. W. 836, signature of employee: omission when not fatal, see 100 Am. St. Rep. 779.

[3] Lightbody v. North American Ins. Co. 23 Wend. (N. Y.) 18. See Potter v. Phœnix Ins. Co. 63 Fed. 382.

[4] Commercial Ins. Co. v. Hallock, 27 N. J. L. 645, 72 Am. Dec. 374, affirming 26 N. J. 268. See § 105 herein.

[5] Flint v. Ohio Ins. Co. 8 Ohio, 502. See §§ 100 et seq. herein.

[6] See Jackson v. Bard, 4 Johns. (N. Y.) 230, 233; Lorent v. South Carolina Ins. Co. 1 Nott & McC. (S. C.) 505; Hall v. Cazenove, 4 East, 477, 14 Eng. Rul. Cas. 737; 1 Duer on Marine Ins. (ed. 1845) 90; 1 Phillips on Ins. (3d ed.) p. 84, sec. 128.

Attachment and duration of risk: date of contract, see § 1441 herein.

validate a life policy that it is of a later date than called for by the application.[7] In a Massachusetts case a policy of fire insurance in the form required by statute[8] purported to insure a building for five years from its date, January 23, 1889. On that day the plaintiff called upon an agent of the defendant company and signed the application, and was told that it would be considered and decided upon later. About two weeks after that time he received notice from the agent that the policy was ready for him, and he did not call for it until about March 13, 1889, when he went to the agent's office, paid the premium, and it was delivered, and it was held that the contract did not take effect till March 13th.[9] But it is held in Ohio that where an application naming the day for the commencement of the risk has been sent to the office of the agent authorized to issue the policy, that the company is liable for a loss occurring after the date named and before the policy issued.[10]

§ 180. Execution of policy: affixing seal.—A seal is not necessary in the absence of a statutory requirement or some provision of the company's or association's charter, act of incorporation, or articles of association.[11] It is decided in Maine that a printed impression of a seal is not a seal, and that upon a contract of insurance having thereon such an impression an action of assumpsit can be maintained, since it is not a sealed instrument.[12] So a scroll with the word "seal" affixed to an instrument not required to be sealed

[7] Porter v. Mutual Life Ins. Co. 70 Vt. 504, 41 Atl. 970. See Halstead v. Ryan (9 Kan. App. 860 not reported in full) 57 Pac. 852 reported in full.

[8] Stat. 1887, c. 214, sec. 60. As to act relating to dating life insurance policy, see acts & res. Mass. 1912, p. 85.

[9] Wainer v. Milford Mutual Fire Ins. Co. 153 Mass. 335, 11 L.R.A. 598, 26 N. E. 877.

[10] Krumm v. Jefferson Fire Ins. Co. 40 Ohio St. 225.

[11] See Bank of United States v. Dandridge, 12 Wheat. (25 U. S.) 64, 67 et seq., 6 L. ed. 552; McCullough v. Talladega Ins. Co. 46 Ala. 376; National Banking & Ins. Co. v. Knaup, 55 Mo. 154; Hamilton v. Lycoming Mutual Ins. Co. 5 Pa. St. (5 Barr.) 344, 345. See also c. iii. § 35 herein. See for general rule, 1 Morawetz on Private Corporations, 2d ed. secs. 338–41. See for exhaustive consideration of the entire subject of execution of corporate contracts, seals, etc., 4 Thompson on Corporations, title 9, c. cv. secs. 5015–39; Id. art. 2; 2 Id. (2d ed.) secs. 1869 et seq., c. 66, pp. 935 et seq. "Manner of executing sealed instruments by corporations:" Id. secs. 5069 et seq.; Id. (2d ed.) sec. 1915.

Execution of policy: seal. Where a policy is underwritten by a company "the corporate seal may be sufficient; but the form of execution may be indefinitely varied by the statute, charter, deed, or memorandum of association under which the company is constituted or the articles by which it is regulated. 17 Earl of Halsbury's Laws of England, pp. 337–339, and note.

[12] Mitchell v. Union Life Ins. Co. 45 Me. 104, 71 Am. Dec. 529; See Freeman's Supp. Stat. Me. 1885–95, p. 271 (5); Laws 1889, c. 163, p. 153.

does not necessarily and conclusively show that a sealed instrument was intended.[13] If a policy is sealed and renewed for another year it is not necessary that the renewal receipt should be sealed, for the policy evidences the contract and covenant lies therein.[14] Even though a seal is impressed upon a mutual benefit certificate still the contract will not be properly executed where the certificate also requires countersigning and it is not done.[15] A presumption, however, is held to exist that the fundamental law of a fraternal benefit order, requiring a seal to a certificate, has not been violated by the officers of such order.[16] In many of the states there are legislative enactments by virtue of which policies of insurance do not require a seal.[17] Under an Indiana decision based upon a statute a policy need not have a seal affixed but it is executed by subscribing and delivering it, so as to be admissible in evidence.[18]

§ 180a. Life annuity: insurance contract: non-necessity of seal.—A contract for a life annuity not issuing out of or charged upon lands, but by which an insurance company, in consideration of a sum certain, agrees to pay the annuitant specified sums annually

[13] Clegg v. Le Messurier, 15 Gratt. (Va.) 108.

[14] Herron v. Peoria Marine & Fire Ins. Co. 28 Ill. 235, 81 Am. Dec. 272.

[15] Caywood v. Supreme Lodge of Knights & Ladies of Honor, 171 Ind. 410, 131 Am. St. Rep. 253, 23 L.R.A. (N.S.) 304n, 17 Am. & Eng. Ann. Cas. 503, 86 N. W. 482, 38 Ins. L. J. 147.

[16] McClure v. Supreme Lodge Knights of Honor, 59 N. Y. Supp. 764, 41 App. Div. 131.

[17] *Arizona.*—Rev. Stat. 1891, sec. 786; Rev. Stat. 1887, sec. 253.

Colorado.—Sess. Laws 1907, p. 453, c. 193, sec. 31; 1 Mills' Annot. Stat. 1891, sec. 2227.

Idaho.—Civ. Code 1901, sec. 2216; Rev. Stat. 1887, sec. 2742.

Indiana.—Burns' Anno. Stat. Rev. 1908, sec. 4652.

Iowa.—Ann. Code, 1897, sec. 1712.

Kansas.—Gen. Stat. 1905, sec. 3528; Gen. Stat. 1889, vol. 1, sec. 3347.

Maine.—Rev. Stat. 1903, p. 476, c. 49, sec. 15; Rev. Stat. 1883, p. 445, c. 49, sec. 12.

Montana.—Rev. Code 1907, sec. 4051; Rev. Stat. 1887, p. 772, sec. 575. See 3 Sanders' Annot. Codes (1895), secs. 3220–25; Id. Civ. Code, secs. 2189–91.

Nebraska.—Comp. Stat. 1903, sec. 3876; Comp. Stat. 1891, p. 529, c. 43, sec. 12. See Laws 1907, p. 282, c. 75, sec. 9.

New Mexico.—Comp. Laws 1897, sec. 2106; Comp. Laws 1884, sec. 1465.

North Dakota.—Rev. Code 1895, secs. 3891, 3892.

Ohio.—Bates Ann. Stat. 1906, sec. 3645; 1 Smith & Ben. Rev. Stat. 1890, sec. 3645.

Pennsylvania.—1 Pepper & Lewis' Dig. Col. 2364, sec. 41; Bright. Pur. Dig. 12th ed. 1700–1894, vol. 1, p. 1046, sec. 63.

Washington.—Hill's Annot. Code, 1891, sec. 2739.

Wyoming.—Rev. Stat. 1899, sec. 2166; Rev. Stat. 1887, p. 223, sec. 614.

[18] Globe Accident Ins. Co. v. Reid, 19 Ind. App. 203, 47 N. E. 947, modified 49 N. E. 291, 7 Am. & Eng. Corp. Cas. N. S. 770; Rev. Stat. 1894, secs. 454, 455. See § 3758 herein.

during life, is a mere chose in action for the payment of money, which need not be made in the form of a deed or under seal. And a charter authorizing an insurance company to grant purchase or dispose of annuities, does not limit the company to the grant of annuities by deed or contract under seal. Nor does the failure to attach the seal of the insurance company to a policy granting an annuity, nor the omission of some other technical requirement constitute a defense to a suit for annuity after the insurer has received the purchase money.[19]

§ 180b. Printed signature is sufficient to satisfy the statute of frauds.—Where the instrument is delivered under circumstances showing an intention to regard the printed name as the person's own, and this applies to the printed signature of insurer's president and secretary to an indorsement on the back of a policy the face of which is signed by the president in his own hand. The court per Hobson C. J., said: "It is insisted that the contract is one not to be performed in a year, and that under our statute a contract, which is required by law to be signed, must be subscribed at the end or close of the writing. The policy is signed by the president in his own hand. The names of the president and secretary are printed at the close of the list of privileges indorsed on the back of the policy. When the president signed his name on the face of the policy, with his name printed under what was on the back of the policy, he made the whole policy the contract of the company. A printed signature is sufficient to satisfy the statute of frauds, where the paper is delivered under circumstances showing an intention to regard the printed name as the person's own." [19a]

§ 181. Requisites of a valid policy.—In case the form of the policy is not prescribed by statute and the contract is reduced to writing, it should contain either by itself or by reference to other papers the exact agreement between the parties set forth therein in clear, precise, and unambiguous terms. The policy should likewise embody all the requirements of a valid insurance contract; [20] for policies of insurance have ever been considered instruments of a solemn nature, though not under seal, and should embody in their terms expressly or by reference the whole contract between the parties.[1] It is upon this contract that the suit must be brought, where

[19] Cahill v. Maryland Life Ins. Co. 90 Md. 333, 47 L.R.A. 614, 45 Atl. 180.

[19a] Equitable Life Assurance Soc. v. Meuth, 145 Ky. 160, 140 S. W. 137, 41 Ins. L. J. 71, 73, case modified 145 Ky. 746, 141 S. W. 37, Annot. Cas. 1913B, 661, and note 663, as to sufficiency of printed signature within statute of frauds.

[20] See §§ 43, 176, 177 herein.

[1] See Merchants' Mutual Ins. Co. v. Lyman, 15 Wall. (82 U. S.) 664, 21 L. ed. 246; Higginson v. Dall, 13 Mass. 96, per Parker, C. J.

there is no fraud, duress, or mistake. All prior negotiations, proposals, and conversations are considered waived or merged in this written contract.[2] And no rule is better settled than that parol evidence is inadmissible to vary or control the plain and unambiguous terms of a written contract of insurance.[3]

[2] Merchants' Mutual Ins. Co. v. Lyman, 15 Wall. (82 U. S.) 664, 21 L. ed. 246; Higginson v. Dall, 13 Mass. 96, per Parker, C. J.

[3] *United States.*—El Dia Home Ins. Co. v. Sinclair, 228 Fed. 833, 143 C. C. A. 231, 47 Ins. L. J. 43.

Missouri.—Keim v. Home Mutual Ins. Co. 42 Mo. 38, 97 Am. Dec. 291.

New York.—Walton v. Agricultural Ins. Co. 116 N. Y. 317, 26 N. Y. S. 780, 22 N. E. 443; Cheriot v. Barker, 2 Johns. (N. Y.) 346, 3 Am. Dec. 437; Vandervoort v. Smith, 2 Caines (N. Y.) 155.

Pennsylvania.—Stacey v. Franklin Fire Ins. Co. 2 Watts & S. (Pa.) 506.

Texas.—Waxahachie Bank v. Lancashire Ins. Co. 62 Tex. 461.

England.—Weston v. Emes, 1 Taunt. 115.

See also 1 Marshall on Ins. (ed. 1810) 345a. See § 160 herein.

CHAPTER VII.

CONSTRUCTION—WHAT IS PART OF THE POLICY.

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§ 186. When application is part of the policy.
§ 186a. Same subject.
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§ 195. Indorsements: marginal references: when part of policy: when not.
§ 195a. Same subject.
§ 196. Indorsements continued: conditions annexed to policy, etc.: when and when not part of same.
(a) Conditions and stipulations when indorsed upon the back of a policy.
§ 197. Whether premium note part of policy.
§ 197a. Same subject: statutory provisions: standard policy.
§ 198. Usage: how far a part of policy.

§ 185. What is part of the policy: general rule: parol evidence.— Whatever is intended to be made a part of the policy should be either inserted therein or be incorporated by proper words of reference, and whether the correspondence or application, or other papers or indorsements on the policy, are a part thereof, are questions that have frequently been before the courts. If parol evidence were admissible to vary a written contract of insurance, then all prior

negotiations, correspondence, proposals, and other acts would become as much a part of the contract as though actually embodied in the policy, and it could never be known exactly what the terms of the contract were, except, perhaps, after extended litigation, and the safeguard which a policy ought to afford would be valueless if its terms could thus be added to or limited. It is, therefore, a general rule that all prior negotiations are considered as waived or merged in the written contract, and that in the absence of fraud, duress, or mistake, parol evidence is inadmissible to contradict or vary its terms. The entire engagement of the parties, with all the conditions upon which its fulfillment can be claimed, must be conclusively presumed to have been stated in the policy, as the terms of the policy when explicit must control.[4] So it cannot be shown that

[4] *United States.*—Union Mutual Life Ins. Co. v. Mowry, 96 U. S. 544, 24 L. ed. 674; El Dia Home Ins. Co. v. Sinclair, 228 Fed. 833, 143 C. C. A. 231, 47 Ins. L. J. 43; United States Casualty Co. v. Charleston South Carolina Mining & Mfg. Co. (U. S. C. C.) 183 Fed. 238; Candee v. Citizens' Ins. Co. 4 Fed. 143; Connecticut Fire Ins. Co. v. Buchanan, 4 L.R.A. (N.S.) 758, 141 Fed. 877, 73 C. C. A. 111, 157 Fed. 604; Payne v. Mutual Life Ins. Co. 141 Fed. 339, 72 C. C. A. 487; Ocean Steamship Co. v. Ætna Ins. Co. (U. S. C. C.) 121 Fed. 882; McMaster v. New York Life Ins. Co. 99 Fed. 856, 40 C. C. A. 119, 35 Ins. L. J. 385, aff'g 90 Fed. 40, rev'd 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. 10.

Alabama.—Blanks v. Moore, 139 Ala. 624, 36 S. E. 783.

California.—Kinney v. Maryland Casualty Co. 15 Cal. App. 571, 115 Pac. 456.

Georgia.—Mutual Benefit Life Ins. Co. v. Reise, 8 Ga. 536.

Illinois.—Davis v. Fidelity Fire Ins. Co. 208 Ill. 375, 70 N. E. 359; Winnesheik Ins. Co. v. Holzgrafe, 53 Ill. 516, 5 Am. Rep. 64.

Iowa.—Kirkpatrick v. London Guarantee & Accdt. Co. 139 Iowa 370, 115 N. W. 1107, 19 L.R.A. (N.S.) 102n.

Louisiana.—Beil v. Western Marine & Fire Ins. Co. 5 Rob. (La.) 423, 39 Am. Dec. 542.

Massachusetts.—Sanborn v. Fireman's Ins. Co. 16 Gray (82 Mass.) 448, 77 Am. Dec. 419; Finney v. Bedford Commercial Ins. Co. 8 Mete. (49 Mass.) 348, 41 Am. Dec. 515.

Michigan.—Hartford Fire Ins. Co. v. Davenport, 37 Mich. 609.

Minnesota.—Calmenson v. Equitable Mutual Fire Ins. Co. 92 Minn. 390, 100 N. W. 88.

New Hampshire.—Gleason v. Canterbury Mutual Fire Ins. Co. 73 N. H. 583, 64 Atl. 187, 35 Ins. L. J. 932.

New Jersey.—Franklin Fire Ins. Co. v. Martin, 40 N. J. L. 568, 29 Am. Rep. 271.

New York.—Ripley v. Ætna Ins. Co. 30 N. Y. 136, 86 Am. Dec. 362; Enthoven v. American Fidelity Co. 128 N. Y. Supp. 805, aff'd (mem.) 135 N. Y. Supp. 1110, 150 App. Div. 928; Black v. New York Life Ins. Co. 69 Misc. 167, 126 N. Y. Supp. 234; Saunders v. Agricultural Ins. Co. 57 N. Y. Supp. 683, 39 App. Div. 631.

Ohio.—Union Central Life Ins. Co. v. Hook, 62 Ohio St. 256, 56 N. E. 906, 29 Ins. L. J. 646.

Oklahoma.—Deming Investment Co. v. Shawnee Fire Ins. Co. 16 Okla. 1, 4 L.R.A.(N.S.) 607n, 83 Pac. 918, 35 Ins. L. J. 241; Liverpool & London & Globe Ins. Co. v. T. M. Richardson Lumber Co. 11 Okla. 579, 69 Pac. 936, 938, 31 Ins. L. J. 993.

only a particular interest, as that of a warehouseman, was intended where the contract is unambiguous;[5] nor can the intention of the parties be explained by parol evidence, although part of the policy is written and part printed, where there is no contradiction between the two parts and there is no ambiguity.[6] Nor is parol evidence admissible to show that the insured did not agree to the conditions;[7] for whatever proposals or negotiations are made or conversations had are to be considered as waived or merged in the written contract.[8] In case the vessel insured be warranted as neutral, it cannot be shown by parol evidence that such warranty was not intended,[9] nor can the intention be shown by parol evidence in contradiction of the terms of the policy,[10] nor is the memorandum admissible to change the intent evidenced by the policy.[11]

And where a writing which assigns a bond and mortgage does not in terms transfer a chose in action, nor the policy of insurance on which it is claimed to rest, and neither party intends that it should, a contract different from that made by the written agreement cannot be read into it to give it a more extensive meaning than that expressed. This applies in an action at law, founded upon a written contract expressed in unambiguous language.[12] Nor can a condition as to the time and place of payment of the premiums be varied by such evidence;[13] nor is it permitted to show that prior

England. — Weston v. Emes, 1 Taunt. 115.

As to parol evidence rule, see note 16 L.R.A.(N.S.) 1165, see also §§ 3802–3809 herein.

"The law is well settled that, in the absence of a plea and showing of fraud or mistake, the intention of the parties to a written contract must be gathered, not from what the parties said or did, or thought they intended, but from the contract itself." Prussian National Ins. Co. v. Terrell, 142 Ky. 732, 135 S. W. 416, 40 Ins. L. J. 944, per Clay, C.

[5] Lancaster Mills v. Merchants' Cotton-Press Co. 89 Tenn. 1, 24 Am. St. Rep. 586, 14 S. W. 317.

[6] Mumford v. Hallett, 1 Johns. (N. Y.) 433.

[7] Liverpool & London & Globe Ins. Co. v. Morris, 79 Ga. 666, 5 S. E. 125.

[8] See opinion of Chief Justice Parker in Higginson v. Dall, 13 Mass. 96, 98, *cited* in Merchants' Mutual Ins. Co. v. Lyman, 15 Wall. (82 U. S.) 664, 21 L. ed. 646; Dewees v. Manhattan Ins. Co. 35 N. J. L. 366, 372; United States Casualty Co. v. Charleston South Carolina Mining & Mfg. Co. (U. S. C. C.) 183 Fed. 238; Union Central Life Ins. Co. v. Hook, 62 Ohio St. 256, 56 N. E. 906, 29 Ins. L. J. 646.

[9] Lewis v. Thatcher, 15 Mass. 431.

[10] Hough v. People's Fire Ins. Co. 36 Md. 398.

[11] Hogan v. Delaware Ins. Co. 1 Wash. (U. S. C. C.) 419, Fed. Cas. 6582; Ewer v. Washington Ins. Co. 16 Pick. (33 Mass.) 502, 28 Am. Dec. 258; Higginson v. Dall, 13 Mass. 96.

[12] Kupferschmidt v. Agricultural Ins. Co. 80 N. J. L. 441, 34 L.R.A. (N.S.) 503 (annotated on admissibility of extrinsic evidence to extend scope of mortgage clause) 78 Atl. 225, 40 Ins. L. J. 1938.

[13] Mobile Life Ins. Co. v. Pruett, 74 Ala. 487.

to issuing the policy an agreement was made and not inserted therein that upon the happening of a certain event the policy should become void;[14] nor that before the contract was executed the parties agreed to insure "outfits" under the term "advances;"[15] nor can a contemporaneous agreement to waive a provision affecting the risk in the policy be shown by parol;[16] nor can it be shown after a loss that the application was for a policy materially different from the one issued;[17] and parol evidence is inadmissible of the contents of an application which is not attached to the policy as required by statute;[18] nor in an action on a fire policy which clearly states the property insured is parol evidence admissible to show a mistake, and that it was the intention to insure other property.[19]

So parol evidence cannot be received to control a warranty in a policy of insurance, and accordingly evidence to prove that the insurer was informed that a watchman was not kept in the building insured from twelve o'clock Saturday night till twelve o'clock Sunday night, there being a warranty for a watchman every night, should be rejected.[20]

§ 185a. Same subject.—A written contract of insurance cannot be altered or varied by parol evidence of what occurred between the insured and the agent of the insurer at the time of effecting the insurance. Such evidence will not be received to raise up an estoppel in pais which shall conclude the insurer from setting up the defense that the policy was forfeited by a breach of the conditions of insurance.[1] Although the better rule is that parol evidence is admissible of the agent's misrepresentations or mistakes in filling out the application where he has knowledge or has been correctly informed as to the facts;[2] and where an application is procured by a soliciting agent through the influence of fraud parol evidence is admissible to show the circumstances evidencing the fraud.[3] And it may be

[14] Candee v. Citizens' Ins. Co. 4 Fed. 143.

[15] Burnham v. Boston Marine Ins. Co. 139 Mass. 399, 1 N. E. 837.

[16] Lamott v. Hudson River Ins. Co. 17 N. Y. 199.

[17] Pindar v. Resolute Ins. Co. 47 N. Y. 114.

[18] Southern States Mutual Life Ins. Co. v. Herlihy, 138 Ky. 359, 128 S. W. 91; Wheelock v. Home Life Ins. Co. 115 Minn. 177, 131 N. W. 1081. See Metropolitan Life Ins. Co. v. Gibbs, 34 Tex. Civ. App. 131, 78 S. W. 398. See also § 190 herein.

[19] Holmes v. Charlestown Mutual Fire Co. 10 Met. (51 Mass.) 211, 43 Am. Dec. 428.

[20] Ripley v. Ætna Ins. Co. 30 N. Y. 136, 86 Am. Dec. 362.

[1] Franklin Fire Ins. Co. v. Martin, 40 N. J. L. 568, 579, 11 Vroom (N. J. L.) 568, 29 Am. Rep. 271; Union Central Life Ins. Co. v. Hook, 62 Ohio St. 256, 56 N. E. 906, 29 Ins. L. J. 646. *Compare* Royal Ins. Co. v. Walrath, 17 Ohio Cir. Ct. Rep. (41 Wkly. L. Bull.) 509.

[2] See chapter on Agents, herein.

[3] Maxson v. Llewelyn, 122 Cal. 195, 54 Pac. 732, Cal. Code Civ. Proc. sec. 1856.

shown that the agent inserted a different date in the application than that agreed upon.[4] So in an action to rescind a contract parol evidence is competent to establish fraud on the part of the medical examiner in writing false statements in the application, and such proof is admissible to show that the contract as written does not express the real contract and intention of the parties.[5] But a policy cannot be changed or altered by parol evidence where the party is named and his interest specified, except fraud or mistake be alleged. The intent as shown by the instrument itself must be sought, since the same principles of construction obtain in this regard as in other written contracts.[6]

In case of fraud or mistake, as where the terms of an order to insure have been materially departed from in the policy by fraud or mistake, the order will be considered as containing the contract between the parties, although it can only be resorted to in so far as it varies from the policy. In all other respects the policy should be considered as the contract.[7] But the order for insurance may be adopted as a part of the policy, and is to be resorted to when construing it.[8]

Where a party made an application in writing, signed by him, for insurance upon certain property, gave his note payable to the insurance company to the agent of the company for the premium, and took from the agent a receipt showing the giving of the note, and stating that, in case the policy should not be issued, the note was to be returned, it was decided that these papers must be regarded as the contract of the parties, and could not be varied or explained by parol evidence.[9]

In another case it appeared that the agent of the company omitted to insert in a policy on general merchandise permission to the assured to keep kerosene oil and powder in the same building with such stock, which permission was in accordance with the actual contract. It was held that parol evidence was admissible to show knowl-

[4] Pacific Mutual Ins. Co. v. Shaffer, 30 Tex. Civ. App. 313, 70 S. W. 566.

[5] Bennett v. Massachusetts Mutual Life Ins. Co. 107 Tenn. 371, 64 S. W. 758, 31 Ins. L. J. 150. The court declared, however, that had the suit been upon the contract and in affirmance thereof the evidence might properly have been rejected as seeking to vary by parol the terms of a written contract.

[6] Bell v. Western Marine & Fire Ins. Co. 5 Rob. (La.) 423, 39 Am. Dec. 542.

[7] Delaware Ins. Co. v. Hogan, 2 Wash. (U. S. C. C.) 4, Fed. Cas. 3765.

[8] Maryland v. Bossiere, 9 Gill. & J. (Md.) 121.

[9] Winnesheik Ins. Co. v. Holzgrafe, 53 Ill. 516, 5 Am. Rep. 64. See also Creditors Union v. Lundy, 16 Cal. App. 567, 117 Pac. 624, 40 Ins. L. J. 1981. *Compare* Maxson v. Llewelyn, 122 Cal. 195, 54 Pac. 732.

edge by the agent both before and at the time of issuing the policy that such goods were to be kept.[10] If the terms of the policy are not clear and unambiguous, parol evidence not inconsistent therewith may be resorted to to explain the same; as in case of a clause, "loss, if any, payable to G. and B. of N."[11] So the words "in full of all claims" in a receipt given in settlement of a loss under a policy may be explained by parol evidence of the agreement under which the receipt was executed;[12] and an additional contemporaneous agreement in writing may be admitted in evidence to explain a release.[13] So parol evidence of the contents of an order verbally communicated by the broker to the insurer is admissible, as this is not evidence of the contents of a writing.[14] So where an insurance was on goods in the D. & Co.'s car factory it may be shown by parol what building was meant,[15] or what property was included where by design or inadvertence certain property was not covered by the policy.[16]

§ 186. When application is part of the policy.—The question whether the application is part of the contract or not is of great importance in construing policies and determining the force and effect of the statements in such application. There is a great want of unanimity in the cases, but it may be stated as a general rule that a clear purpose, unequivocally expressed, manifest from the papers, to make an application a part of the contract will have that effect, and make them one entire contract. But where the reference to the application is expressed to be for another purpose, or where it is not clearly expressed that it is intended to make the application a part of the contract, the courts are not inclined to make it so by construction. This rule accords with the rules of construction regarding the intent of the parties, and that warranties and forfeitures are not favored, as well as with such rules in other respects.[17] So if the policy expressly refers to the application as a part thereof, all the stipulations and conditions in the application

[10] Mobile Fire Department Ins. Co. v. Miller, 58 Ga. 420.

[11] Graham v. Fireman's Ins. Co. 2 Disn. (Ohio) 255. See also Maxson v. Llewelyn, 122 Cal. 195, 54 Pac. 732.

[12] Haas Bros. v. Hamburger-Bremen Fire Ins. Co. 181 Fed. 916, 104 C. C. A. 354, 40 Ins. L. J. 93. See Prussian National Ins. Co. v. Terrell, 142 Ky. 732, 135 S. W. 416, 40 Ins. L. J. 944, and criticism by editor, p. 950.

[13] Farmers Alliance Ins. Co. v. Atchison, Topeka & Santa Fe Ry. Co. (Same v. Hanks) 83 Kan. 96, 110 Pac. 99.

[14] Livingston v. Delafield, 1 Johns. (N. Y.) 522.

[15] Blake v. Exchange Mutual Ins. Co. 12 Gray (78 Mass.) 265.

[16] Royal Ins. Co. v. Walrath, 17 Ohio Cir. Ct. Rep. (41 Wkly. L. Bull.) 509.

[17] See Campbell v. New England Mutual Life Ins. Co. 98 Mass. 380, 391, per the court; Daniels v. Hudson River Ins. Co. 12 Cush. (66 Mass.) 423, 59 Am. Dec. 192; Kelly v. Metropolitan Life Ins. Co. 152 Ill.

are thereby engrafted into it, and made as much a part of the policy as if written in terms therein, and are to be construed together with it.[18] And a written and printed copy of the application on the back of the policy is a part thereof where the latter states that a copy of the former is annexed.[19] And a statement in a writing over assured's signature, attached to a policy and purporting to be an application is a part of the application and the application is a part of the contract where the application is also expressly made a part of the policy by a provision therein.[20] So where a written application calls for insurance for a certain amount, specifying the different items and the sum for which each is insured, the insurance will be for the total amount specified even though one of the items is omitted in the descriptive clause of the policy where such clause is followed by another which refers to and makes the application a copy of which is attached, a part of the policy.[1]

It is also said that the application is in itself collateral merely to the contract of insurance, and to make it a part of the policy there must be an obvious intent so to do;[2] and that the language

App. 179, 39 Nat. Corp. App. 710; Supreme Lodge of Sons & Daughters of Protection v. Underwood, 3 Neb. (Unoff.) 798, 92 N. W. 1051.

On conflict of laws as to necessity of attaching application or copy thereof to policy, see notes in 63 L.R.A. 867; 23 L.R.A.(N.S.) 982; and 52 L.R.A.(N.S.) 285.

[18] *United States.*—Clark v. Manufacturers' Ins. Co. 8 How. (49 U. S.) 235, 12 L. ed. 1061; McMaster v. New York Life Ins. Co. (U. S. C. C.) 90 Fed. 40, 28 Ins. L. J. 960, 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. 10.

Alabama.—Satterfield v. Fidelity Mutual Life Ins. Co. 171 Ala. 429, 55 So. 200. So construed in connection with Ala. Code 1907, sec. 4579, requiring contract to be plainly expressed in policy. Same principle in Powell v. Prudential Ins. Co. 153 Ala. 611, 45 So. 208, 37 Ins. L. J. 421.

Illinois.—Quinn v. North American Union, 162 Ill. App. 319, 42 Nat. Corp. Rep. 593; Kelly v. Metropolitan Life Ins. Co. 152 Ill. App. 179, 39 Nat. Corp. Rep. 710; Peckham v. Modern Woodmen of America, 151 Ill. App. 95.

Kentucky.—See Kentucky & Louisville Mutual Ins. Co. v. Southard, 8 B. Mon. (Ky.) 634.

Massachusetts.—Holmes v. Charlestown Mutual Fire Ins. Co. 10 Met. (51 Mass.) 211, 43 Am. Dec. 428.

New York.—Burritt v. Saratoga County Mutual Fire Ins. Co. 5 Hill (N. Y.) 188, 40 Am. Dec. 345; Eban v. Mutual Ins. Co. of Albany, 5 Denio (N. Y.) 326; Jennings v. Chenango Mutual Ins. Co. 2 Denio (N. Y.) 75; Shoemaker v. Glen Falls Ins. Co. 60 Barb. (N. Y.) 84.

Oklahoma.—State Mutual Ins. Co. v. Craig, 27 Okla. 90, 111 Pac. 325.

Oregon.—Chrisman v. State Ins. Co. 16 Or. 283, 18 Pac. 466.

England.—Worsley v. Wood, 6 Durn. & E. 710.

[19] Kelly v. Metropolitan Life Ins. Co. 152 Ill. App. 179, 39 Nat. Corp. Rep. 710. See Pearson v. Knights Templars & Masons Life Indemnity Ins. Co. 114 Mo. App. 283, 89 S. W. 588.

[20] Heilig v. National Life Ins. Co. 162 N. Car. 521, 77 S. E. 997.

[1] American Ins. Co. v. Dillahunty, 89 Ark. 416, 117 S. W. 245.

[2] Campbell v. New England Mutual Life Ins. Co. 98 Mass. 380, 389, 391, per the court; Holmes v.

making the application a part of the policy must unequivocally appear on the face of the policy.[3] But the phraseology is immaterial where the intent to make the application a part of the policy is clear.[4] The language of the policy, however, and not that of the application must be considered in determining whether the latter is a part of the contract. The fact must affirmatively appear from the policy itself.[5] But a clause cannot be eliminated from the policy on the ground that it was not expressly referred to in the application, as the application and the policy constitute the contract.[6] So the words "reference being had to the application . . . for a more particular description, and as forming a part of this policy," are held a sufficient reference.[7]

An insurance company which absorbs another by merger, may by reference make the application to the absorbed company a part of a substituted policy.[8]

Again, where there was a provision in a policy that "in consideration of the statement of facts warranted to be true in the application for this policy, and of the payment" of certain specified sums, the company assumed the risk, it was held that the application was thus made a part of the contract.[9] So a declaration in an application constitutes a portion of the policy where the latter provides that it shall be void if the declaration "upon the faith of which this agreement was made" is untrue.[10]

§ 186a. Same subject.—It is held that where a policy is made and issued upon a survey and description of certain property, the survey being referred to by number as filed in the office of the com-

Charlestown Mutual Fire Ins. Co. 10 Met. (51 Mass.) 211, 43 Am. Dec. 428.

[3] Hartford Protection Ins. Co. v. Harmer, 2 Ohio St. 452, 59 Am. Dec. 684; Stebbins v. Globe Ins. Co. 2 Hall (N. Y.) 632. See Supreme Lodge of Sons & Daughters of Protection v. Underwood, 3 Neb. (Unoff.) 798, 92 N. W. 1051.

[4] Arrowsmith v. Old Colony Life Ins. Co. 164 Ill. App. 44; Kelly v. Metropolitan Life Ins. Co. 152 Ill. App. 179; Blasingame v. Royal Circle, 111 Ill. App. 202.

[5] Spence v. Central Accident Ins. Co. 236 Ill. 444, 19 L.R.A.(N.S.) 88n, 86 N. E. 104, 38 Ins. L. J. 87.

[6] Blunt v. Fidelity & Casualty Co. 145 Cal. 268, 104 Am. St. Rep. 34, 67 L.R.A. 793, 78 Pac. 729, 34 Ins. L. J. 166.

[7] Kennedy v. St. Lawrence County Mut. Ins. Co. 10 Barb. (N. Y.) 285.

What reference sufficient to make application part of policy, see notes 33 L.R.A.(N.S.) 676, and 19 L.R.A. (N.S.) 88.

[8] Maddox v. Southern Mutual Life Assoc. 6 Ga. App. 681, 65 S. E. 789. See Nelson v. Equitable Life Assur. Soc. 73 Ill. App. 133, 3 Chic. L. J. Wkly. 32; Vilas v. New York Central Ins. Co. 72 N. Y. 590, 28 Am. Rep. 186, both noted under § 187 herein.

[9] Standard Life & Accident Ins. Co. v. Martin, 133 Ind. 376, 33 N. E. 105. See §§ 1886–1891, 1916, 1958–1960 herein.

[10] Day v. Mutual Benefit Life Ins. Co. 1 MacArthur (D. C.) 41, 29 Am. Rep. 565. See §§ 1886–1891, 1916, 1958–1960 herein.

pany, such survey is a basis of the contract and part of the policy.[11] So where the reference is to the application filed in the office of the company,[12] and where an application and survey is made to accompany a policy or is referred to therein as a part thereof, they should be construed together with the policy as one entire contract.[13]

So the proposals and conditions attached to the policy form a part of it, and are of the same force as if embodied in the policy,[14]

But it is also held that the application need not be expressly referred to in the policy as a part thereof,[15] and that a written application for a fire policy becomes a part of the contract if the policy is issued thereon.[16] It is also held that the application is a part of the policy where the latter recites that "the basis of this contract is the application of the insured;" [17] and where the "application is made and accepted subject to all other clauses and conditions in the policies of the company," it is part of the policy ;[18] and this is so where the policy is issued and accepted in consideration of the agreements made in the application.[19]

[11] Stewart v. Phœnix Ins. Co. 5 Hun (N. Y.) 261. Examine Rankin v. Amazon Ins. Co. 89 Cal. 203, 23 Am. St. Rep. 460, 26 Pac. 872. See §§ 187, 1916, 1958–1960 herein.

On what must be attached in order to satisfy requirement that "application" be attached to policy, see note in 18 L.R.A.(N.S.) 1190.

[12] Draper v. Charter Oak Fire Ins. Co. 2 Allen (84 Mass.) 569. See also American Ins. Co. v. Dillahunty, 89 Ark. 416, 117 S. W. 245. See § 187 herein.

[13] Clinton v. Hope Ins. Co. 51 Barb. (N. Y.) 647. Examine Rankin v. Amazon Ins. Co. 89 Cal. 203, 23 Am. St. Rep. 460, 26 Pac. 872. See §§ 1916, 1958–1960 herein.

[14] Dewees v. Manhattan Ins. Co. 34 N. J. L. 244; Duncan v. Sun Fire Ins. Co. 6 Wend. (N. Y.) 488, 22 Am. Dec. 539.

[15] Murdock v. Chenango Mutual Ins. Co. 2 N. Y. 210.

[16] Cronin v. Fire Assoc. of Phila. 123 Mich. 277, 6 Det. L. News 1048, 82 N. W. 40, 29 Ins. L. J. 564.

[17] Bobbitt v. Liverpool & London & Globe Ins. Co. 66 N. C. 70, 8 Am. Rep. 494, followed in Sehas v. Equitable Life Assur. Soc. 166 N. Car. 55, 81 S. E. 1014, which follows also Cuthbertson v. North Carolina Home Ins. Co. 96 N. Car. 400, 2 S. E. 258.

[18] Weinberger v. Merchants' Ins. Co. 41 La. Ann. 31, 5 So. 728.

[19] Mandego v. Centennial Mutual Life Assn. 64 Iowa, 134, 17 N. W. 656, 19 N. W. 877; Parish v. Mutual Benefit Life Ins. Co. 19 Tex. Civ. App. 457, 49 S. W. 153. See also Becker v. Colonial Life Ins. Co. 138 N. Y. Supp. 491, 153 App. Div. 382, affg. 133 N. Y. Supp. 481, 75 Misc. 213, so under statute of N. Y. *Compare* Spence v. Central Accident Ins. Co. 236 Ill. 444, 19 L.R.A.(N.S.) 88n, 86 N. E. 104, 38 Ins. L. J. 87; Kansas Mutual Life Ins. Co. v. Pinson, 94 Tex. 553, 63 S. W. 531.

What is part of policy, see the following cases:

United States.—Jeffries v. Life Ins. Co. 22 Wall. (89 U. S.) 47, 22 L. ed. 833.

Illinois.—Supreme Council Royal Templars v. Curd, 111 Ill. 284. *Compare* Spence v. Central Accident Ins. Co. 236 Ill. 444, 19 L.R.A.(N.S.) 88n, 86 N. E. 104, 38 Ins. L. J. 87.

Maine.—Philbrook v. New England Mutual Fire Ins. Co. 37 Me. 137.

Again the application, bond and schedule in credit insurance are a part of the contract.[20]

It is held that the application for membership in a mutual benefit society constitutes a part of the contract even without regard to the fact whether there is any constitutional requirement of such character.[1] And if the application is referred to in the contract and made a part thereof it binds the named beneficiary.[1a] And the application becomes a part of the contract in a fraternal insurance association where it is expressly so provided by indorsements upon the certificate and it is also expressly stated that both the application and certificate constitute the complete and only contract.[2] An insurance application with answers to questions, the medical examiners report, and an agreement which recites that the preceding statements and answers, the application, and

Massachusetts.—Lee v. Prudential Life Ins. Co. 203 Mass. 299, 17 Am. & Eng. Ann. Cas. 236, 89 N. E. 529, *considered* in § 190 herein.

Nebraska.—Farmers' Mutual Aid Assoc. Co. v. Kinney, 64 Neb. 808, 90 N. W. 926.

New York.—Foot v. Life Ins. Co. 61 N. Y. 575; Studwell v. Mutual Benefit L. Assoc. of America, 29 Jones & S. 287, 19 N. Y. Supp. 709, aff'd (mem.) 139 N. Y. 615, 35 N. E. 204.

North Carolina.—Cuthbertson v. North Carolina Home Ins. Co. 96 N. C. 480, 2 S. E. 258. See also Follette v. United States Mutual Accident Assoc. 107 N. Car. 240, 12 L.R.A. 315, 22 Am. St. Rep. 878, 12 S. E. 370; Mace v. Provident Life Assn. 101 N. C. 122, 7 S. E. 624; also note 33 L.R.A.(N.S.) 676.

North Dakota.—Montgomery v. Whitbeck, 12 N. Dak. 385, 96 N. W. 327, 32 Ins. L. J. 983.

Tennessee.—Kimbro v. Continental Ins. Co. 101 Tenn. 245, 41 S. W. 413. See further on these points chapters on Representations and Warranties, §§ 1886–1891, 1916, 1958–1960 herein.

Where policy refers to application as part, and it is defective or even not made in writing, see Blake v. Exchange Mutual Ins. Co. 12 Gray (78 Mass.) 265.

[20] Lexington Grocery Co. v. Philadelphia Casualty Co. 157 N. Car. 116, 72 S. E. 870.

[1] Grand Lodge Ancient Order of United Workmen v. Jesse, 50 Ill. App. 101. See Quinn v. North American Union, 162 Ill. App. 319, 42 Nat. Corp. Rep. 593; Peckham v. Modern Woodmen of America, 151 Ill. App. 95; London v. Modern Brotherhood of America, 107 Minn. 12, 119 N. W. 425; Robson v. United Order of Foresters, 93 Minn. 24, 100 N. W. 381, 33 Ins. L. J. 945; Farmers' Mutual Ins. Co. v. Kinney, 64 Neb. 808, 90 N. W. 926. (*Compare* Supreme Lodge of Sons & Daughters of Protection v. Underwood, 3 Neb. (unoff.) 798, 92 N. W. 1051); Montgomery v. Whitbeck, 12 N. Dak. 385, 96 N. W. 327, 32 Ins. L. J. 983; Nickum v. Grand Lodge, A. O. U. W. 37 Pa. Co. Ct. 104; McLendon v. Sovereign Camp of Woodmen of the World, 106 Tenn. 695, 32 L.R.A. 444, 64 S. W. 36. *Examine* §§ 188, 1886–1891, 1916, 1958–1960 herein.

[1a] Blasingame v. Royal Circle, 111 Ill. App. 202.

[2] Covenant Mutual Life Assoc. v. Tuttle, 87 Ill. App. 309. See Grand Lodge of Brotherhood of Railroad Trainmen v. Daly, 54 Ohio Law Bull. 391.

this agreement are made part of the policy, form a part of the insurance contract.[3] And if the application in a fraternal and beneficial order provides that it with this constitution and by-laws shall form the basis of the contract it becomes a part thereof.[4]

§ 187. When application is not part of policy.—When the reference to the application is expressed to be for another purpose, or when no purpose or intention is indicated to make it a part of the policy, it will not be so treated.[5] So it is held that a mere general reference to the application or survey does not make it a part of the contract.[6] It is also held that the application is not a part of the contract so as to require setting forth in pleading, though the policy provides that if it is issued upon or refers to "an application, survey, plan, or description," it should be made a part of the contract, and this although the policy was issued on such application signed by the insured;[7] and a reference to and making an application a part of the contract does not bind the applicant where the application is not signed, authorized, or ratified by him.[8] It is also held that the agreements and statements in the application do not become a part of the policy, although it is provided in the application that they should "be the basis and form part of the contract or policy," and although the policy provided that the contract was "in consideration of the representations."[9] Nor does an indication in the policy of the place where the application is on file make it a part of the policy,[10] and a condition in the application does not make it a part of the policy where the policy does not refer to it,[1] and it is held that a slip or application is inadmissible to

[3] Northwestern Masonic Aid Assoc. v. Bodurtha, 23 Ind. App. 121, 77 Am. St. Rep. 414, 53 N. E. 787.

[4] McLendon v. Sovereign Camp of Woodmen of the World, 106 Tenn. 695, 52 L.R.A. 444, 64 S. W. 36.

[5] Campbell v. New England Mutual Life Ins. Co. 98 Mass. 380, 389, 392, per the court; Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567; Supreme Lodge of Sons & Daughters of Protection v. Underwood, 3 Neb. (Unoffic.) 798, 92 N. W. 1051.

[6] Wheelton v. Hardisty, 8 El. & B. 285, 295; Burritt v. Saratoga County Mutual Fire Ins. Co. 5 Hill (N. Y.) 188, 40 Am. Dec. 345; Weed v. Schenectady Ins. Co. 7 Lans. (N. Y.) 452. See §§ 1958–1960 herein.

[7] Throop v. North American Fire Ins. Co. 19 Mich. 423, one judge dissenting upon the authority of numerous cases. See §§ 186, 1958–1960 herein.

[8] Lycoming Fire Ins. Co. v. Jackson, 83 Ill. 302, 25 Am. Rep. 386.

[9] American Popular Life Ins. Co. v. Day, 39 N. J. L. 89, 23 Am. Rep. 198. See also Spence v. Central Accident Ins. Co. 236 Ill. 444, 19 L.R.A. (N.S.) 88 note, 86 N. E. 104, 38 Ins. L. J. 87.

[10] Commonwealth Ins. Co. v. Monninger, 18 Ind. 352. *Compare* § 186 herein.

[1] Brogan v. Manufacturers' & Merchants' Mutual Fire Ins. Co. 29 U. C. C. P. 414.

On retention of policy as waiver of mistake or fraud in insurer or its agent as to facts appearing in application only where copy is attached to policy, see note in 67 L.R.A. 734.

show the intention of the parties, since the policy is the only legal evidence of the contract.[2] Where a fire policy had expired and the application therefor was used in obtaining insurance in another company, the policy in which contained the words "as per application No. 1234," which was the number of the original application, it was determined not to be a sufficient reference to make it a part of the policy.[3] And where a policy issued subsequently to and in lieu of another refers to "said application," such a reference does not make the application on which the original policy was based a part of the second policy where such an intent does not appear.[4] In another case the court excluded the application as evidence in an action on a time policy of marine insurance, on the ground that the application was merged in the policy.[5] And where the policy refers only to the application as the consideration in part for the insurance, the legal construction of the policy cannot be controlled by a statement in the application of the understanding of the assured and what the insurance will "extend to." [6]

An application addressed to a certain company is not a part of contracts with other companies which the agent represents and among which he splits up the insurance, where no reference is made to the application except in the policy issued by the company to which it is addressed and it is therein "made the basis upon which said policy is issued and becomes a part of the same." [7]

§ 187a. Same subject: subsequent application.—An application subsequently delivered is not a part of the original completed contract where the policy is issued without a written application, or where it does not appear that the execution of the application was a condition precedent to the policy taking effect, or that it was issued under an agreement to execute one afterward.[8] In the first Colo-

[2] Dow v. Whelton, 8 Wend. (N. Y.) 160. See Spence v. Central Accident Ins. Co. 236 Ill. 444, 19 L.R.A. (N.S.) 88, 86 N. E. 104.

[3] Vilas v. New York Central Ins. Co. 72 N. Y. 590, 28 Am. Rep. 186.

[4] Nelson v. Equitable Life Assur. Soc. 73 Ill. App. 133, 3 Chic. L. J. Wkly. 32. See Maddox v. Southern Mutual Life Ins. Co. 6 Ga. App. 681, 65 S. E. 789, *noted* under § 186 herein.

[5] Folsom v. Mercantile Ins. Co. 9 Blatchf. (U. S. C. C.) 201, Fed. Cas. No. 4,903.

[6] Accident Ins. Co. v. Crandal, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. ed. 740. See Hunter v. Scott, 108 N. C. 213, 12 S. E. 1027. See further on this point chapter on Representations and Warranties §§ 1886–1891, 1916, 1958–1960 herein.

[7] Waukau Milling Co. v. Citizens Mutual Fire Ins. Co. 130 Wis. 47, 118 Am. St. Rep. 998, 10 Am. & Eng. Ann. Cas. 795, 109 N. W. 937, 36 Ins. L. J. 119.

[8] Loyal Mutual Fire Ins. Co. v. J. S. Brown & Bro. Mercantile Co. 47 Colo. 467, 107 Pac. 1098, 39 Ins. L. J. 870; Fire Association of Phila. v. Bynum, — Tex. Civ. App. —, 44 S. W. 579. See Michigan Fire & Marine Ins. Co. v. Wich, 8 Colo. App. 409, 46 Pac. 687.

rado case, cited below to the above rule, it appeared that the agent of the company, a mutual one, called at insured's place of business to solicit insurance, the latter was absent and his wife was requested to sign an application in his name but she refused. The agent then stated that he would send insured a policy and an application which the latter could sign and return. A few days later he mailed to insured the policy involved and also a blank application which he requested insured to sign and return to him. The policy was accepted by insured who signed the application in blank without answering any of the questions or making any statements in relation to the property insured. The policy referred to an application made by insured and made it a part thereof, and recited that one of the considerations for its issuance was the agreements, covenants, statements, and warranties of the assured in the application.[9] So an application constitutes no part of the written contract where it was issued by request of the general agent after the policy was issued and delivered and was not suggested, considered, written or signed prior to said delivery.[10]

[9] See criticism of this case in note in 39 Ins. L. J. 876.

[10] Colorado Leasing, Mining & Milling Co. v. Palatine Ins. Co. 57 Colo. 235, 141 Pac. 860. The court, per Scott, J., gave the following opinion: "Every contention raised in this case has been adjudicated in the case of Connecticut Ins. Co. v. Leasing Min. & Mill. Company, 50 Colo. 424, 116 Pac. 154, Ann. Cas. 1912C, 597. This case involves one of the insurance policies issued at the same time upon the same property and to the same owner as in the foregoing case.

The defendant in error here issued its policy for $20,000, being one third of the entire insurance taken upon the mill and property of plaintiff in error, on the 27th day of May, 1904. An exhaustive and detailed statement of the case will be found in Connecticut Company v. Colorado Company, supra, and it can serve no good purpose to repeat it here. The only question urged in this case is the admission in evidence of an application for insurance signed and delivered to the defendant company, after the delivery of the company's policy to the plaintiff in error, and the consideration given by the court to one of the questions and answers contained in such application. These points have been determined in the Connecticut Insurance Case, supra, but it may be well to refer to them further.

"The record makes it clear that the application relied on by the insurance company in this case was not written, signed, suggested, or considered prior to the delivery of the policy in question, but was first requested by the general agent of the company, in a letter written from his office in San Francisco, two days after the policy was issued and delivered by the agent of the company at Florence, Colo., where this cause of action arose. This very application was offered in the Connecticut Company Case and there held to be inadmissible in any case under the state of facts presented, and particularly so in that case, where it did not purport to be an application for the policy nor to the company involved in the action. The court there said of this application: 'The defendant says the court erred in refusing to admit in evidence an

§ 188. When charter and by-laws are and are not part of contract.—When a party complies with the requirements of a mutual benefit or like society, association or corporation, and becomes a member, its charter, constitution, and by-laws are presumed to have been known by him from the date of his membership, and they enter into and form a part of his contract even though, in the absence of a statutory requirement to the contrary, they are not set forth in his policy nor expressly made a part of it by reference,[11]

application for insurance made by the plaintiff to a company other than the defendant, and delivered to McCandless several days after the policy in this case was issued. That the application was inadmissible, even if made to the defendant, when it does not appear that the making of the application was a condition precedent to the policy taking effect or that it was made under an agreement on the part of plaintiff to make one after the issuance of the policy, is settled by this court in Loyal Mutual Fire Ins. Company v. J. S. Brown & Bros. Company, 47 Colo. 467, 107 Pac. 1078. and, when made to an entirely different company than the defendant, there is much more reason for not admitting it.'

"This has been the consistent holding of this court.

"In Loyal Mutual Company v. Brown, supra, the court said: 'It should be borne in mind that it does not appear the execution of the application was a condition precedent to the policy taking effect, or that it was issued under an agreement on the part of Beach to execute one afterwards. In such circumstances the rule of law is that where a policy of insurance has been issued without a written application, and without an agreement to execute one afterwards, an application subsequently delivered is not a part of the contract of insurance. Michigan Fire and Marine Ins. Co. v. Wich, 8 Colo. App. 409, 46 Pac. 687; Le Roy v. Park Fire Ins. Co. 39 N. Y. 56.'

"The court in the case at bar instructed a verdict for the defendant company, and such instructed verdict was based solely upon the erroneous theory that such application was a part of the contract of insurance, and therefore admissible, and that the answer to a specific question in such application was material.

"Holding, then, that the application was no part of the contract of insurance in this case, it is immaterial as to what questions and answers it contained. They were not under such circumstances either representations or warranties and constituted no consideration or basis for the issuance of the policy. The questions raised by the appellee having been fully disposed of and determined in this case and in Connecticut Company v. Colorado Company supra, and the amount of the judgment to be rendered exactly ascertainable from the record, the judgment is reversed, and the cause remanded, with directions to enter judgment in favor of plaintiffs below and against the defendant below in the sum of one-third of the amount found by the adjuster's committee to be the actual loss by reason of the burning of the insured property together with interest from the commencement of this suit and with costs to be taxed." Colorado Leasing, Mining & Milling Co. v. Palatine Ins. Co. 57 Colo. 235, 141 Pac. 860. See §§ 1886–1891, 1916, 1958–1960 herein.

[11] *United States.*—Fry v. Charter Oak Ins. Co. 31 Fed. 197; Wiggin v. Knights of Pythias, 31 Fed. 122.

Arkansas.—Supreme Royal Circle of Friends of the World v. Morrison, 105 Ark. 140, 150 S. W. 561.

for a certificate, in a fraternal benefit society, standing by itself, does not measure the rights of the parties, but it must be read in

California.—Conway v. Supreme Council Catholic Knights of America, 131 Cal. 437, 63 Pac. 727; Hass v. Mutual Relief Assoc. of Petaluma, 118 Cal. 6, 49 Pac. 1056, 26 Ins. L. J. 992.

Connecticut.—Treadway v. Hamilton Mutual Ins. Co. 29 Conn. 68.

District of Columbia.—Clark v. Mutual Reserve Fund Life Assoc. 14 App. D. C. 154, 27 Wash. Law Rep. 114, 43 L.R.A. 390.

Georgia.—Union Fraternal League v. Walton, 109 Ga. 1, 77 Am. St. Rep. 350, 46 L.R.A. 424, 34 S. E. 317, 29 Ins. L. J. 1055; Barbot v. Mutual Reserve Fund Life Assoc. 100 Ga. 681; 28 S. E. 498, 27 Ins. L. J. 338.

Illinois.—Love v. Modern Woodmen of America, 259 Ill. 102, 102 N. E. 183, rev'g 177 Ill. App. 76; Protection Life Ins. Co. v. Foote, 79 Ill. 361. See also Enright v. National Council, Knights & Ladies of Honor, 253 Ill. 460, 91 N. E. 681, rev'g 161 Ill. App. 365; Kaemmerer v. Kaemmerer, 231 Ill. 154, 83 N. E. 133; Benes v. Supreme Lodge Knights & Ladies of Honor, 231 Ill. 134, 14 L.R.A.(N.S.) 540 (annotated on estoppel of mutual benefit society by misrepresentations as to laws of order) 83 N. E. 127, 121 Am. St. Rep. 304; Quinn v. North American Union, 162 Ill. App. 319, 42 Nat. Corp. Rep. 593; Harvick v. Modern Woodmen of America, 158 Ill. App. 570; Supreme Council Catholic Knights & Ladies of America v. Beggs, 110 Ill. App. 139; Royal Arcanum v. Coverdale, 93 Ill. App. 373.

Indiana.—Pfister v. Gerwig, 122 Ind. 567, 23 N. E. 1041; Farra v. Braman, 171 Ind. 529, 86 N. E. 843; Gray v. Supreme Lodge Knights of Honor, 118 Ind. 293, 20 N. E. 833; Almy v. Commercial Travelers Ins. Assoc. 59 Ind. App. 249, 106 N. E. 893.

Iowa.—Farmers Mutual Hail Assoc. v. Slattery, 115 Iowa, 410, 88 N. W. 949; Wendt v. Iowa Legion of Honor, 72 Iowa, 682, 34 N. W. 470; Simeral v. Dubuque Mutual Fire Ins. Co. 18 Iowa, 319.

Kansas.—Triple Tie Benefit Assoc. v. Wood, 73 Kan. 124, 84 Pac. 565.

Louisiana.—Maginnis v. New Orleans Cotton Exchange Mutual Aid Assoc. 43 La. Ann. 1136, 10 So. 180.

Maryland.—Supreme Council of Royal Arcanum v. Brashears, 89 Md. 624, 73 Am. St. Rep. 244, 43 Atl. 866, 28 Ins. L. J. 751; Condon v. Mutual Reserve Fund Life Assoc. 89 Md. 99, 73 Am. St. Rep. 169, 42 Atl. 944, 44 L.R.A. 149.

Massachusetts.—Nute v. Hamilton Mutual Ins. Co. 6 Gray (72 Mass.) 174.

Michigan.—Douville v. Farmers Mutual Fire Ins. Co. 113 Mich. 158, 4 Det. Leg. N. 245, 71 N. W. 517.

Minnesota.—Davidson v. Old People's Mutual Benefit Soc. 39 Minn. 303, 304, 1 L.R.A. 482.

Mississippi. — Supreme Lodge Knights of Pythias v. Stein, 75 Miss. 107, 37 L.R.A. 775, 65 Am. St. Rep. 589, 21 So. 559.

Missouri.—Purdy v. Bankers' Life Assoc. 104 Mo. App. 91, 74 S. W. 486.

Montana.—Kennedy v. Grand Fraternity, 36 Mont. 325, 25 L.R.A. (N.S.) 78n, 92 Pac. 971.

New Hampshire.—Burbank v. Rockingham Ins. Co. 24 N. H. 550, 558, 57 Am. Dec. 300.

New Jersey.—Grand Lodge Ancient Order United Workmen v. Connolly, 58 N. J. Eq. 180, 43 Atl. 286.

New York.—Hyatt v. Wait, 37 Barb. (N. Y.) 29; Bird v. Mutual Union Assoc. 52 N. Y. Supp. 1044, 30 App. Div. 346.

North Carolina.—Boyle v. North Carolina Mutual Ins. Co. 7 Jones (N. C.) 373.

North Dakota.—J. P. Lamb & Co. v. Merchants National Mutual Fire Ins. Co. 18 N. Dak. 253, 119 N. W. 1048.

connection with the constitution and by-laws of the society, and the application for membership, and the nature, object, and purposes of the society must also be considered.[12] And all the provisions of

Pennsylvania.—Susquehanna Mut. Fire Ins. Co. v. Leavy, 136 Pa. St. 499, 20 Atl. 502, 505.

Texas. — Bennett v. Sovereign Camp, Woodmen of the World, — Tex. Civ. App. —, 168 S. W. 1023; Hayworth v. Grand Lodge of Texas, Knights of Pythias, — Tex. Civ. App. —, 138 S. W. 1194; Modern Woodmen of America v. Owens, — Tex. Civ. App. —, 130 S. W. 858.

Vermont.—Wilson v. Union Mutual Fire Ins. Co. 77 Vt. 28, 58 Atl. 799.

Virginia. — Supreme Lodge Knights of Honor v. Oeters, 95 Va. 610, 29 S. E. 322.

England.—Great Britain Steamship Assn. v. Wyllie, L. R. 22 Q. B. D. 710.

"Undoubtedly, when the plaintiff complied with what was required of him as a member, the by-laws constituted a contract." Stohr v. San Francisco Musical Fund Soc. 82 Cal. 557, 559, 22 Pac. 1125. See § 318 herein.

When application etc. a part of certificate or contract, see Bacon on Benefit Soc. & Life Ins. (3d ed.) secs. 181–184.

The constitution and by-laws of a beneficial association are elements of, and enter into, its contracts of insurance, and, while they measure and determine the member's duties and liabilities, also measure his right as well. Sourwine v. Supreme Lodge, 12 Ind. App. 447, 54 Am. St. Rep. 532, 40 N. E. 646. See also Haywood v. Grand Lodge of Texas Knights P. (1911) — Tex. Civ. App. —, 138 S. W. 1194.

The charter of a beneficial association is as much a part of the contract of insurance made by it as if written therein. Supreme Lodge Knights of Pythias v. Stein, 75 Miss. 107, 65 Am. St. Rep. 589, 37 L.R.A. 775, 21 So. 559. And an amended charter may become a part of a contract thereafter issued. Harrison v. Philadelphia Contributionship for Insurance of Houses from Loss by Fire, 171 Fed. 178, aff'd 176 Fed. 323, 99 C. C. A. 613.

So by-laws existing when the insured became a member of the association are a part of the contract.

Illinois.—Covenant Mutual Life Assoc. v. Kentner, 188 Ill. 431, 58 N. E. 966.

Michigan.—Pokrefky v. Detroit Firemens Fund Assoc. 121 Mich. 456, 6 Det. Leg. N. 527, 80 N. W. 240.

Missouri.—Gruwell v. National Council Knights & Ladies of Security, 126 Mo. App. 496, 104 S. W. 884.

New Hampshire. — Downs v. Knights of Columbus, 76 N. H. 165, 80 Atl. 227, 40 Ins. L. J. 1674.

Rhode Island.—Newton v. Northern Mutual Relief Assoc. 21 R. I. 476, 44 Atl. 690.

Member is bound to take notice of by-laws. Farmers Ins. Co. v. Borders, 26 Ind. App. 491, 60 N. E. 174; Montgomery v. Whitbeck, 12 N. Dak. 385, 96 N. W. 327, 32 Ins. L. J. 983; Wilson v. Union Mutual Fire Ins. Co. 77 Vt. 28, 58 Atl. 799.

Constitution and by-laws of secret society bind a member as he is presumed to know them. Emmons v. Hope Lodge, No. 21, I. O. O. F. 1 Marv. (Del.) 187, 40 Atl. 956.

[12] Fullenwider v. Supreme Council of the Royal League, 73 Ill. App. 321, per Windes, J. case is aff'd, on the point of the right to change by-laws, in 180 Ill. 621, 72 Am. St. Rep. 239, 54 N. E. 485, but the court, per Phillips, J., also declares that: "The contract between a beneficiary member and the corporation is not to be construed as merely a part of any

the by-laws not inconsistent with the terms of the policy,[13] or with the charter provisions, or the law of the land, and which are lawfully enacted, bind the member,[14] and become a part of the contract;[15] and when they are within the scope of the purposes and nature of the organization, will be held binding.[16]

So the constitution by-laws and regulations are a part of the contract of membership as it is presumed to have been entered into with reference to them;[17] and it is harmless error in instructing the jury to state that the policy and application constitute the contract without mentioning the by-laws and rules.[18]

The constitution and by-laws are binding on a charter member and form part of the contract where his attention has been directed to them;[19] or where they are referred to in the policy and printed on the back thereof,[20] or where they are expressly referred to in a deposit note as a part thereof said note being a part of the contract both by statute and by a policy reference, and so even through such by-laws are not copied into the policy nor upon any attached rider or paper.[1]

proceeding in connection with or in relation to the issuing of a certificate. In construing the contract by the holder of the certificate,—or rather that made between the member and the corporation,—the application, the examination by the physician, the constitution and by-laws and the certificate issued are all to be construed together as the contract between the parties." See Triple Tie Benefit Assoc. v. Wood, 73 Kan. 124, 84 Pac. 565; *Examine* Soehner v. Grand Lodge of Order of Sons of Herman, 74 Neb. 399, 104 N. W. 871.

[13] Davidson v. Old People's Mutual Ben. Soc. 39 Minn. 303, 1 L.R.A. 482.

On conflict between by-laws and certificate or policy of mutual benefit society or insurance company, see note in 47 L.R.A. 681.

[14] Purdy v. Bankers Life Assoc. 104 Mo. App. 91, 74 S. W. 486.

[15] Brashears v. Perry County Farmers Protective Ins. Co. 51 Ind. App. 8, 98 N. E. 889. J. P. Lamb & Co. v. Merchant's National Mutual Fire Ins. Co. 18 N. Dak. 253, 119 N. W. 1048.

[16] Mutual Assurance Soc. v. Korn, 7 Cranch (11 U. S.) 396, 3 L. ed. 383. See Conway v. Supreme Council Catholic Knights of America, 131 Cal. 437, 63 Pac. 727; Hass v. Mutual Relief Assoc. of Petaluma, 118 Cal. 6, 49 Pac. 1056, 26 Ins. L. J. 992.

[17] King v. Wynema Council, No. 10, Daughters of Pocahontas Imp. Ord. Red Men, 25 Del. (2 Boyce's) 255, 78 Atl. 845. See also Kimball v. Lester, 59 N. Y. Supp. 540, 43 App. Div. 27; Wilson v. Union Mutual F. Ins. Co. 77 Vt. 28, 58 Atl. 799.

[18] Smith v. Covenant Mutual Benefit Assoc. 16 Tex. Civ. App. 593, 43 S. W. 819.

[19] Sargent v. Supreme Lodge Knights of Honor, 158 Mass. 557, 33 N. E. 650, 22 Ins. L. J. 545; Sabin v. Senate of National Union, 90 Mich. 177, 51 N. W. 202; and see cases in last note.

[20] Pearson v. Knight's Templars & Mason's Life Indemnity Ins. Co. 114 Mo. App. 283, 89 S. W. 588. See also Montgomery v. Whitbeck, 12 N. Dak. 385, 96 N. W. 327, 32 Ins. L. J. 983; Stone v. Lorentz, 19 Pa. Co. Ct. 51, 6 Pa. Dist. R. 17; Wilson v. Union Mutual Ins. Co. 77 Vt. 28, 58 Atl. 999.

[1] Russell v. Oxford County Patrons

§ 188a. Same subject.—Where the application provides that it as well as the constitution and by-laws shall form the basis of the contract they become a part of it,[2] and bind the designated beneficiary.[3] So where a member of a benevolent, fraternal or mutual benefit association agrees to be bound by its constitution and by-laws the terms of his contract are determined thereby;[4] and this is so where the certificate is expressly conditioned that the member will abide by the laws, rules and regulations of the society;[5] or where in the application the member agrees to be bound by the constitution, laws, rules and regulations of the order.[6] And where the by-laws are expressly recognized in the certificate which is issued subject to all the conditions and provisions of the articles of incorporation and by-laws thereof they constitute a part of the contract and the member cannot be heard to deny a knowledge of their contents.[7]

The constitution and by-laws of an insurance on the assessment plan may constitute a part of the contract even though the policy does not in terms make them a part,[8] and they become a part of the contract with such a company where the application expressly refers to and makes them a part, and the member thereby becomes charged with a knowledge thereof.[9]

Where the policy declares that the insurance is made with ref-

of Husbandry Mutual Fire Ins. Co. 107 Me. 362, 78 Atl. 459.

[2] McLendon v. Sovereign Camp of Woodmen of the World, 106 Tenn. 695, 52 L.R.A. 444, 64 S. W. 36.

[3] Cotter v. Grand Lodge Ancient Order United Workmen, 23 Mont. 82, 37 Pac. 650. Compare Knowles v. Knowles, 205 Mass. 290, 91 N. E. 213.

[4] *Connecticut.* — Coughlin v. Knights of Columbus, 79 Conn. 218, 64 Atl. 223, 36 Ins. L. J. 44.

District of Columbia.—Drum Army Mutual Aid Assoc. v. Benton, 13 App. D. C. 245, 26 Wash. Law Rep. 642, 31 Chic. Leg. News, 72.

Nebraska.—Farmers' Mutual Aid Assoc. v. Kinney, 64 Neb. 808, 90 N. W. 926.

Missouri.—Gibbs v. Knights of Pythias of Mo. 173 Mo. App. 34, 156 S. W. 11; Gallop v. Royal Neighbors of America, 107 Mo. App. 85, 150 S. W. 1118.

Oklahoma.—Modern Brotherhood of Americe v. Beshara, 42 Okla. 684, 142 Pac. 1014.

[5] Grand Lodge A. O. U. W. of N. J. v. Gandy, 63 N. J. Eq. 692, 53 Atl. 142. See also French v. Society of Select Guardians, 51 N. Y. Supp. 675, 23 Misc. 86.

[6] United Moderns v. Colligan, 34 Tex. Civ. App. 173, 77 S. W. 1032.

[7] Fee v. National Masonic Accident Assoc. 110 Iowa, 271, 81 N. W. 483, 29 Ins. L. J. 635.

[8] Moran v. Franklin Life Ins. Co. 160 Mo. App. 1407, 140 S. W. 954, dependent upon statute defining and relating to the assessment plan. Rev. Stat. Mo. sec. 1889, Rev. Stat. 1909, 6950. *Citing* and *quoting* from Hayden v. Franklin Life Ins. Co. 136 Fed. 285, 290, 291, 69 C. C. A. 423, 428. But *compare* McDonald v. Bankers Life Assoc. 154 Mo. 618, 55 S. W. 999, 29 Ins. L. J. 780.

[9] Willison v. Jewelers' & Tradesmen's Co. 30 Misc. 197, 61 N. Y. Supp. 1125; Barbot v. Mutual Re-

erence to its conditions and the terms of its constitution and by-laws, the fact that each of the conditions annexed to the policy refers to a by-law cannot warrant the assumption on the part of the insured that the by-laws contain no other conditions,[10] and the rights of the parties in a fraternal benefit association are measured by the certificate.[11] Where the charter and by-laws are a part of the contract between the member and the society, the latter is also bound thereby, and where the by-laws provide for mortuary benefits the fact that the certificate does not provide for such benefits will not relieve the society from its liability.[12]

If there is nothing in the contract making any reference to by-laws, and nothing in the record to show what by-laws were in force when the certificate was issued, it cannot be held that any provision of them is a part of the contract,[13] and a by-law prohibiting insurance for over two-thirds the estimated value of the property is not a part of the contract, but is merely directory;[14] and the charter of a foreign insurance company must be brought to the notice of a party to bind him as to conditions therein.[15] And the constitution, by-laws and application are not a part of the contract where the fact is not shown by the language used or by proper averments in the pleadings.[16] And by-laws are not included as a part of the contract under a stipulation that the above application and declaration with the certificate issued thereon constituted the basis of the contract.[17]

Where insured is a member of a subsociety its constitution is a part of his contract with the principal society in so far as his membership rights are concerned.[18]

§ 189. Effect of subsequent amendment of by-laws or enactment of new by-laws.—The question has arisen not infrequently in our

serve Fund Life Assoc. 100 Ga. 681, 28 S. E. 498, 27 Ins. L. J. 338.

[10] Miller v. Hillsborough Mutual Fire Assur. Assoc. 42 N. J. Eq. 459, 462, 7 Atl. 895.

[11] Mund v. Rehaume, 51 Colo. 129, Ann. Cas. 1913A, 1243, 117 Pac. 159.

[12] Railway Passenger & Freight Conductors Mut. Aid & Benev. Assoc. v. Robinson, 147 Ill. 138, 35 N. E. 168, 23 Ins. L. J. 79.

[13] Covenant Mutual Life Assoc. v. Kentner, 188 Ill. 431, 441, 58 N. E. 966. See Elliott v. Monroe City Safety Fund Life Ins. Co. 76 Mo. App. 562, 1 Mo. App. Rep. 523.

[14] Cumberland Valley Mutual Protection Co. v. Schell, 29 Pa. St. 31.

[15] City Fire Ins. Co. v. Carrugi, 41 Ga. 660.

[16] Supreme Lodge of Sons & Daughters of Protection v. Underwood, 3 Neb. (unoffic.) 798, 92 N. W. 1051. *Compare* Grand Lodge of Brotherhood of Railroad Trainmen v. Daly, 54 Ohio L. Bull. 391.

[17] Purdy v. Bankers Life Assoc. 104 Mo. App. 91, 74 S. W. 486.

[18] Polish Roman Catholic Union of America v. Warczak, 182 Ill. 27, 55 N. E. 64, aff'g 82 Ill. App. 351.

courts as to the point whether or not the amendment of the by-laws or subsequent enactment of new laws or modifications of existing ones affects the contract so as to enter into the terms of it and become a part of it, or not. We believe, however, that such amendments or new laws cannot operate retroactively or infringe upon or divest the insured of rights which are already determined or ascertained by his contract. But the assured may, however, under the terms of his contract or by agreement or ratification, be bound by such subsequent amendments, modifications, or new laws,[19] for parties may undoubtedly so contract as to make subsequently enacted by-laws operate retrospectively and become a part of the contract.[20] So where a certificate in a mutual benefit society is to be paid "in an amount to be computed according to the laws" of the society, and such laws provide that the provisions therein relative to the payment of such certificates may be changed at any time, a member who has procured such a certificate will be bound by any change which is made therein between the time of procuring the certificate and the time of its payment.[1] If a by-law is adopted after the issuance of a benefit certificate prescribing only a new form of certificate it relates to future contracts and has no retroactive effect.[2] So a resolution of a mutual insurance society changing the form of its policies and including the class issued to insured does not operate retrospectively so as to include the previously issued policy to insured unless he complies.[3]

It is held, however, that it is incident to the very nature and purpose of beneficial and like insurance associations that they should have power to modify and change their by-laws so as to

[19] See Supreme Commandery Knights of the Golden Rule v. Ainsworth, 71 Ala. 436, 449, 46 Am. Rep. 332; Hass v. Mutual Relief Assoc. of Petaluma, 118 Cal. 6, 49 Pac. 1056, 26 Ins. L. J. 992; Coughlin v. Knights of Columbus, 79 Conn. 218, 64 Atl. 223, 36 Ins. L. J. 44; Poultney v. Bachman, 62 How. Pr. (N. Y.) 466; Bacon on Benefit Soc. and Life Ins. (ed. 1888) secs. 185–88; Id. (3d ed.) secs. 185–188a; §§ 377–380 herein.

As to right to amend by-laws, see note 1 L.R.A.(N.S.) 1065, et seq.

That secret order has right to amend by-laws and rules where no limitation in its power, see Lawson v. Hewell, 118 Cal. 613, 49 L.R.A. 400 note, 50 Pac. 763.

[20] Covenant Mutual Life Assoc. v. Tuttle, 87 Ill. App. 309.

A contract may be so expressly conditioned, that subsequently enacted by-laws become a part thereof. Reynolds v. Supreme Conclave Improved Order of Heptasophs, 18 Lancaster L. Rev. 125.

[1] Bowie v. Grand Lodge of the Legion of West, 99 Cal. 392, 34 Pac. 103.

[2] Modern Woodmen of America v. Bauersfield, 62 Kan. 340, 62 Pac. 1012.

[3] Sexton v. National Life Ins. Co. 40 Colo. 60, 12 L.R.A.(N.S.) 504 (annotated on retroactive effect of resolution or by-law of mutual insurance company changing period during which policy may be contested

graduate claims upon them under their contracts in such manner as experience and necessity may require. They may regulate the manner in which they shall most reasonably carry out the purposes for which they are associated, although they cannot pervert the objects of their organization. It is also held that a society may limit the amount of recovery for sick benefits by a subsequently-enacted by-law, in view of the above principles, and that such a by-law does not impair vested rights. The court, however, in this particular case modified the statements by the fact that when the certificate was taken out there was existing a special provision for altering or changing the by-laws.[4] In an Illinois case it is declared by the court that: "The power to enact by-laws for the government of a corporate body is an incident to the existence of a body corporate and is inherent in it. The power to make such changes as may be deemed advisable is a continuous one. Where the contract contains an express provision reserving the right to amend or change by-laws it cannot be doubted that the society has the right so to do, and where, in a certificate of membership, it is provided that members shall be bound by the rules and regulations now governing the council and fund or that may thereafter be enacted for such government, and those conditions are assented to and the member accepts the certificate under the conditions provided therein, it is a sufficient reservation of the right in the society to amend or change its by-laws." [5]

for suicide), 90 Pac. 58, 36 Ins. L. J. 861.

[4] Fugure v. Mutual Society of St. Joseph, 46 Vt. 362, 369, §§ 377, 479 herein.

Member is presumed to have contemplated such by-laws as are passed for the purpose of regulating business and general affairs of association. Covenant Mutual Life Assoc. v. Kentner, 188 Ill. 431, 440, 58 N. E. 966.

A benefit association has power to pass such by-laws as will enable it to accomplish the design of its existence, and so regulate its business and affairs in general and the member is presumed to have contemplated such by-laws. Covenant Mutual Life Assoc. v. Kentner, 188 Ill. 431, 440, 58 N. E. 966.

[5] Fullenwider v. Royal League, 180 Ill. 621, 625, 72 Am. St. Rep. 239, 54 N. E. 485 (the certificate of membership in this case provided "that the members shall comply in the future with the laws, rules and regulations now governing the council and fund or those that may hereafter be enacted, which are made a part of the contract. It was further expressly provided in the certificate: 'These conditions being expressly assented to and complied with, the Supreme Council of the Royal League hereby promises and binds itself to pay,' etc. And attached to the certificate was the provision, 'I accept this certificate on the conditions named herein,' which was signed by the beneficiary member.") This case is cited or quoted in Murphy v. Nowak, 223 Ill. 301, 314, 7 L.R.A.(N.S.) 393 note, 79 N. E. 112; Seow v. Supreme Council of the Royal League, 223 Ill. 32, 36, 39 N. E. 42; Covenant Mutual Life Assoc. v. Kentner, 188 Ill. 431, 441, 58 N. E. 966; Moerschbaecher v. Supreme Council of the Royal League, 188 Ill. 1, 13, 59 N.

§ 189a. Same subject.—It is decided that the fact that amendments were made to the articles of incorporation do not estop the insured from denying that they were part of the contract where they were not made known to him at the time of taking out the policy.[6] It is also held that a new article of incorporation adopted subsequently to the issue of a certificate does not make it a part of the contract so as to destroy a right which the insured previously had under his policy;[7] but it is otherwise where the insured agrees to be governed by changes which may afterward be made, and receives a copy of the new by-law, and does not object thereto and continues his membership.[8] Although future by-laws of an insurance society or association may by agreement be made a part of the policy or certificate issued by such association or society still by-laws subversive of statutory rights cannot enter into and form a part of such a general agreement and a by-law which seeks to deprive the policy holder of a substantial statutory right is invalid and not binding under such an agreement.[9] And where insured never intended to place it within the association's power to break his contract or render it valueless by subsequent stipulations or regulations without his consent such changes are not authorized. A mere general consent that the constitution and by-laws may be amended is insufficient. Whatever changes a mutual association may be empowered to make must not be destructive of vested rights.[10]

Where the general law of the state and the by-laws gives power to repeal, alter, or amend by-laws, both the statute and by-laws become part of the contract, and the amendment of the by-laws is not a breach of contract.[11] If the statute provides for or permits certain

E. 17; Baldwin v. Begley, 185 Ill. 180, 190, 56 N. E. 1065; Theorell v. Supreme Court of Honor, 115 Ill. App. 313, 317; Blasingame v. Royal Circle, 111 Ill. App. 202, 205; Reynolds v. Supreme Council of the Royal Arcanum, 192 Mass. 150, 156, 7 L.R.A.(N.S.) 1154 note, 7 Am. & Eng. Ann. Cas. 776, 78 N. E. 129. See § 379 herein.

On the right of mutual benefit society to increase rates, see notes in 7 L.R.A.(N.S.) 1154, and 31 L.R.A. (N.S.) 417. On right to decrease benefits, 31 L.R.A.(N.S.) 423.

[6] Day v. Mill Owners' Fire Ins. Co. 75 Iowa, 694, 38 N. W. 113. *Compare* Benes v. Supreme Lodge Knights & Ladies of Honor, 231 Ill. 134, 14 L.R.A.(N.S.) 540 (annotated on estoppel of mutual benefit society by misrepresentations as to laws of the order) 121 Am. St. Rep. 304, 83 N. E. 127.

[7] Hobbs v. Iowa Mutual Benefit Assoc. 82 Iowa, 107, 47 N. W. 983, 11 L.R.A. 299, 20 Ins. L. J. 434. See also Stewart v. Mutual Fire Insurance Assoc. 64 Miss. 499. See §§ 379, 380 herein.

[8] Bogards v. Farmers' Mutual Ins. Co. 79 Mich. 440, 44 N. W. 856. See §§ 377–380 herein.

[9] Eaton v. International Travelers' Assoc (1911) — Tex. Civ. App. —, 136 S. W. 817.

[10] Strauss v. Mutual Reserve Fund Life Assoc. 128 N. Car. 465, 83 Am. St. Rep. 699 and note, 54 L.R.A. 605, 39 S. E. 55, 30 Ins. L. J. 818.

[11] Stohr v. San Francisco Musical Fund Soc. 82 Cal. 557, 22 Pac. 1125;

changes in the by-laws all members will be bound by by-laws regularly made or amended even in the absence of an express stipulation in the application or certificate.[12]

Where nothing in an association's constitution authorizes an amendment binding a member to any change in the contract without his assent, an amendment of the articles of incorporation and by-laws does not affect certificates issued prior thereto as such amended articles cannot be treated as retroactive in their operation, especially where the amended articles do not purport to change existing contracts or to authorize any such change by the adoption of by-laws; nor does mere silence as to the effect of such amendments warrant the inference that any change wrought will extend or limit a pre-existing obligation created by the issuance of certificates of membership.[13] Nor will a by-law be retroactive where there is nothing therein evidencing such an intent,[14] and such intent must clearly appear.[15]

§ 190. Application and by-laws: when part of contract: statutory provisions.—In many of the states there are statutory provisions requiring the annexation of the application to the policy or its incorporation therein or indorsement thereon, or that copies of the application and by-laws shall be contained in or attached to the policies or referred to therein.[16] So the application must be incorpor-

Sargent v. Supreme Lodge Knights of Honor, 158 Mass. 557, 33 N. E. 650, 22 Ins. L. J. 545. See § 379.

[12] Reynolds v. Supreme Council of the Royal Arcanum, 192 Mass. 150, 7 L.R.A.(N.S.) 1154 note, 7 Am. & Eng. Ann. Cas. 776, 78 N. E. 129.

[13] Carnes v. Iowa Traveling Men's Assoc. 106 Iowa, 281, 68 Am. St. Rep. 306, 28 Ins. L. J. 345. See § 379 herein.

[14] Pittinger v. Pittinger, 28 Colo. 308, 89 Am. St. Rep. 193 and note, 64 Pac. 195.

[15] Haley v. Supreme Court of Honor, 139 Ill. App. 478.

[16] *California.*—Civ. Code, sec. 2605.

Connecticut.—Gen. Stat. 1888, sec. 2826.

District of Columbia.—Civ. Code, sec. 657, 32 Stat. at L. 534, c. 1329.

Georgia.—Civ. Code 1910, sec. 2471, acts 1906, p. 107, No. 466. See Torbert v. Cherokee Ins. Co. 141 Ga. 773, 82 S. E. 134; Southern Life Ins. Co. v. Logan, 9 Ga. App. 503, 71 S. E. 742; Southern Life Ins. Co. v. Hill, 8 Ga. App. 857, 70 S. E. 186.

Illinois.—Rev. Stat. 1908, p. 1248, sec. 208n (3) c. 273, sec. 209.

Iowa.—Ann. Code 1897, secs. 1741, 1819, 1826, Suppl. 1907, secs. 1741, 1819, 1826; McClain's Stat. 1888, sec. 1733.

Kansas.—Gen. Stat. 1889, vol. 1, sec. 3437.

Kentucky.—Stat. sec. 679, Russell's Stat. sec. 4400, Ky. Stat. sec. 656. See Masonic Life Assoc. of Western N. Y. v. Robinson, 149 Ky. 80, 41 L.R.A.(N.S.) 505n, 147 S. W. 882; Providence Savings Life Assur. Soc. v. Beyer, 23 Ky. L. Rep. 2460, 67 S. W. 827; Rice v. Rice's Admr. 23 Ky. L. Rep. 635, 63 S. W. 586; Provident Savings Life Assur. Soc. v. Purycar's Admr. 22 Ky. L. Rep. 980, 59 S. W. 15 (construing Ky. Stat. secs. 656 and 679 together); Manhattan Life Ins. Co. v. Myers, 22 Ky. L. Rep. 875, 59 S. W. 30.

Maine.—Laws 1907, c. 30, p. 28; c. 187, p. 204; Rev. Stat. 1883, c. 49, sec. 24.

ated in the policy to be a part thereof.[17] And the statute must be complied with otherwise the application and all testimony relating thereto will be excluded.[18] So an application which is not made a part of the policy or shown by it in any way cannot be considered.[19] And statements made by the applicant in a writing a copy of which is not endorsed on or attached to the policy are rightly excluded from evidence.[20]

A demurrer will lie to a plea of misrepresentations when such act has not been complied with;[1] and under such act an affidavit of defense is defective if it fails to allege that the application was so annexed.[2] So the application may be stricken from the complaint when referred to in but not attached to the policy as it is not a part of the contract.[3]

Massachusetts.—Rev. Laws, c. 118, sec. 73, acts & res. 1907, c. 576, sec. 73, p. 894; act 1890, c. 421, sec. 21; acts 1887, c. 214, sec. 59.

Michigan.—Pub. acts 1907, No. 187, subdiv. 4, sec. 1 (3 How. Stat. [2d ed.] sec. 8312); Pub. acts No. 180 (3 How. Stat. [2d ed.] sec. 8310 sec. 1.

Minnesota.—Laws 1907, c. 220, Rev. Laws Suppl. 1909, secs. 1695–2 to 1695–12 Rev. Laws 1905, sec. 1616.

Mississippi.—Code 1906, sec. 2675.

Missouri.—Rev. Stat. 1890, sec. 7929.

Ohio.—Bates Ann. Stat. 1906, sec. 3623; Giauque's Rev. Stat. 1890, 6th ed. sec. 3623. See Andrews v. National Life Ins. Co. 7 Ohio Dec. (5 Ohio Leg. N. 1898) 307.

Oklahoma.—Rev. Stat. 1903, sec. 3200, Stat. 1890, sec. 3155.

Pennsylvania.—1 Bright. Purd. Dig. 12th ed. p. 1076, sec. 62, act May 11, 1881, P. L. 20.

Texas.—Rev. Civ. Stat. 1911, art. 4951, Suppl. 1903, to Sayles Civ. Stat. sec. 3096 ee. See Lone Star Lodge, No. 1,935, Knights & Ladies of Honor v. Cole (1911) — Tex. Civ. App. —, 131 S. W. 1180; Metropolitan Life Ins Co. v. Gibbs, 34 Tex. Civ. App. 131, 78 S. W. 398.

Wisconsin.—Laws 1905, c. 51, p. 108, 1 Sanb. & Berr. Ann. Stat. 1889, sec. 1945 a.

Law governing as to necessity of attaching application or copy thereof to policy, see notes in 63 L.R.A. 867, 868; 23 L.R.A.(N.S.) 982, and 52 L.R.A.(N.S.) 285.

On what must be attached in order to satisfy requirement that "application" be attached to policy, see note in 18 L.R.A.(N.S.) 1190.

[17] Bush v. Indiana & Iowa Live Stock Ins. Co. 74 W. Va. 244, 81 S. E. 984.

[18] Fidelity Title & Trust Co. v. Illinois Life Ins. Co. 213 Pa. 415, 63 Atl. 51, act May 11, 1881 (P. L. 20).

The application is not admissible where not attached. Mahon v. Pacific Mutual Life Ins. Co. 144 Pa. St. 409, 22 Atl. 876; Pickett v. Pacific Mutual Life Ins. Co. 144 Pa. St. 79, 22 Atl. 871, 13 L.R.A. 661.

The application for insurance constitutes no part of the policy or of contract between the parties, and is therefore not receivable in evidence, unless a copy is attached to the policy as required by statute, Pennsylvania act of May 11, 1881. Imperial Fire Ins. Co. v. Dunham, 117 Pa. St. 460, 2 Am. St. Rep. 686, 12 Atl. 668.

[19] Breedon v. Western & Southern Life Ins. Co. 148 Ky. 488, 146 S. W. 1104.

[20] Wheelock v. Home Life Ins. Co. 115 Minn. 177, 131 N. W. 1081, Laws 1907, c. 220; Rev. Laws, secs. 1695–2 to 1695–12.

[1] Cook v. Federal Life Assoc. 74 Iowa, 746, 35 N. W. 500.

[2] Metropolitan Life Ins. Co. v. Jenkins, — Pa. —, 10 Atl. 474.

[3] Western & Southern Life Ins. Co.

If however a copy of the application is attached to policy and filed with the petition it cannot be excluded as evidence.[4] And if the existence of by-laws is expressly recognized in the certificate so that they become a part of the contract the insured is bound even though such by-laws are not posted in the company's office for public inspection as required by statute.[5]

Where the application is not admissible its contents cannot be shown by parol evidence.[6] And it is error to admit in evidence only a part of the contract where what purports to be a copy of the application appears on the back of the policy in writing and printing and the policy states that a copy of the application is annexed and also makes the statements in the application warranties and a part thereof.[7]

Again, if the statute, in addition to the requirement that a copy of the application be attached to the policy, also provides that each application shall have printed thereon in boldfaced type the words: each applicant "is entitled to be furnished with a copy of this application attached to any policy issued thereon," the omission of these words is not fatal as the intention of the legislature is held merely to have been to inform the assured that he was entitled to have a copy of the application attached to his policy, and that when this was done the application formed a part of the contract.[8]

It is held in England that a deed-poll containing an insurance against fire may refer to conditions in the printed proposals without stamp, seal, or signature.[9]

§ 190a. Standard policy: what is part of contract: application, by-laws, etc.: special provisions.—If a statute expressly makes the policy and deposit note one contract and the note, which is also referred to in the policy, refers to and makes the by-laws a part thereof, said by-laws thereby become a part of the contract even though a standard form of policy is prescribed.[10] Under a statute providing a standard form of fire policy and requiring a true copy of any application etc. to be attached to or indorsed upon the policy an agree-

v. Davis, 141 Ky. 358, 132 S. W. 410, 40 Ins. L. J. 248.

[4] Supreme Lodge Knights of Pythias v. Bradley, 33 Ky. L. Rep. 413, 109 S. W. 1178.

[5] Fee v. National Masonic Acc. Assoc. 110 Iowa, 271, 81 N. W. 483, 29 Ins. L. J. 635, Code Iowa, 1873. sec. 1076.

[6] Southern States Mutual Life Ins. Co. v. Herlihy, 138 Ky. 359, 128 S. W. 91.

[7] Kelly v. Metropolitan Life Ins. Co. 152 Ill. App. 179, 38 Nat. Corp. Rep. 710.

[8] Moore v. Northwestern Mutual Life Ins. Co. 192 Mass. 468, 7 Am. & Eng. Annot. Cas. 656, 78 N. E. 488, 35 Ins. L. J. 769; Rev. Stat. Mass. c. 118, sec. 73.

[9] Rutledge v. Burrell, 1 H. Black. 255.

[10] Russell v. Oxford County Patrons of Husbandry Mutual Fire Ins. Co. 107 Me. 362, 78 Atl. 459.

ment or condition is binding when it is within the express wording of the policy and the application therefor signed and attached to the policy.[11] By-laws are not a part of the contract where they are not annexed to or printed upon a standard form of policy which requires special provisions or stipulations, not inserted and which require mention in effecting insurance, to be legibly written or printed and permanently and securely attached to the policy and signed separately by the company or agent.[12]

§ 190b. What is part of contract: contract to be plainly expressed in policy: policy to contain entire contract: statutes.—Under the Alabama statute no life nor any other insurance company, nor any agent thereof, shall make any contract of insurance, or agreement as to policy contract, other than is plainly expressed in the policy written thereon.[13] And this provision is complied with by attaching the application to the policy, with a stipulation that the application is a part thereof and the two together constitute one contract to be construed as such.[14] And it is further held that the policy, including documents adopted by reference and attached constitute the sole expositor of the contract although the court said that parties are still disagreed as to the meaning and effect of the statute.[15] The statute also excludes all anterior or contemporaneous agreements not plainly expressed in the policy, also conditions in the application when it is not attached to the policy nor incorporated by proper reference.[16] The Kentucky statute requiring the contract to

[11] Straker v. Phenix Ins. Co. 101 Wis. 413, 77 N. W. 752, 28 Ins. L. J. 143, under Sand. & Ber. Ann. Stat. 1898, sec. 1945a.

[12] Gleason v. Canterbury Mutual Fire Ins. Co. 73 N. H. 583, 64 Atl. 187, 35 Ins. L. J. 932. See as to special regulations; standard policy, Nielsen v. Merchants' Mutual Ins. Assoc. 26 S. Dak. 405, 40 Ins. L. J. 65, 128 N. W. 491; § 176f herein.

Mutual companies or associations: "Special regulations" as part of policy, see § 176f herein.

[13] Code 1907, sec. 4579.

What life policy must contain. See § 177 herein.

[14] Satterfield v. Fidelity Mutual Life Ins. Co. 171 Ala. 429, 55 So. 200.

[15] Empire Life Ins. Co. v. Gee, 171 Ala. 435, 40 Ins. L. J. 1384, 55 So. 166.

[16] Manhattan Life Ins. Co. v. Verneuille, 156 Ala. 592, 47 So. 72, 37 Ins. L. J. 892. The court, per Anderson, J., said: The language of the statute "is clear and unambiguous. It means what it says and says what it means. To hold that the insured is bound by any anterior or contemporaneous agreements, not plainly expressed in the policy, would strike down both the spirit and letter of the statute. Certainly the parties could, in the absence of the statute, make the application a part of the contract by proper reference thereto, and without setting out said agreement in the policy; but to hold that they can do so in the very face of this statute would be to emasculate it. It was intended to prevent the very conditions set up in the defendant's special pleas, and to relieve the insured from any statements or agreements not plainly expressed in the policy. The trial court

be plainly expressed in the policy is construed as having the same meaning as the statute of that state requiring the application to be attached to the policy.[17] In Missouri, where a policy is one of assessment insurance it is not within the intent of a statute which applies only to old time policies and prohibits life insurance companies from making any contract of insurance or agreement as to such contract other than as plainly expressed in the policy issued thereon.[18] In Massachusetts, where the statute provides that a life policy and application shall constitute the entire contract the words "the application is attached hereto" must be added to a policy provision "this instrument contains the entire contract."[19] Under a New York decision where a policy of life insurance states that the consideration therefor is the application of the assured, which is made a part of the contract and a copy of the application is annexed to the policy and the statute requires that every policy of life insurance shall contain the entire contract and that nothing shall be incorporated therein by reference to other writings not indorsed upon or attached to the policy, the word "consideration" therein is not limited to its technical definition of "some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other," but rather is used in the sense of "inducing cause."[20]

§ 190c. State has power to enact: such statutes constitutional.—It is clearly within the power of the state to enact such statutes and to require that the entire contract between the parties and all con-

did not err in sustaining the demurrers to the defendant's pleas."

[17] Provident Savings Life Assur. Soc. v. Puryear's Admr. 22 Ky. L. Rep. 980, 59 S. W. 15.

[18] Easter v. Yeomen, 172 Mo. App. 292, 157 S. W. 992, Rev. Stat. 1909, sec. 6934 (enacted Laws 1907, p. 316).

[19] Ætna Life Ins. Co. v. Hardison (Travelers' Life Ins. Co. v. Hardison) 199 Mass. 181, 85 N. E. 407, 37 Ins. L. J. 818. See also New York Life Ins. Co. v. Hardison (Mutual Benefit Life Ins. Co. v. Hardison) 199 Mass. 190, 127 Am. St. Rep. 478, 85 N. E. 410, 37 Ins. L. J. 848. See § 177 herein.

[20] Becker v. Colonial Life Ins. Co. 138 N. Y. Supp. 491, 153 App. Div. 382, aff'g 133 N. Y. Supp. 481, 75 Misc. 213, Ins. Law, Consol. Laws, chap. 28 (Laws 1909, c. 33) sec. 58 N. Y. Ins. Law, Consol. Laws, c. 28 (Laws 1909, c. 33) sec. 58 (first appeared in Laws 1906, c. 326), provides that every policy of life insurance shall contain the entire contract between the parties, and nothing shall be incorporated therein by reference to any constitution, by-laws, rules, application or other writings unless the same are indorsed upon or attached to the policy when issued, etc.

Policy to contain "entire contract." N. Y. Consol. Laws, c. 28 (Ins. Law) sec. 58 construed, in connection with nonattachment of medical examination to policy, in Becker v. Colonial Life Ins. Co. 138 N. Y. Supp. 491, 153 App. Div. 382, aff'g 133 N. Y. Supp. 481, 75 Misc. 213.

ditions and stipulations by which the policy may be avoided shall be embodied in or attached to the policy delivered to insured and this is the manifest intent of statutes requiring a copy of the application to be attached or of like statutes.[1] So an act requiring that the application be annexed to or copied into the policy has been held constitutional. Such act does not impair the obligation of contracts.[2]

§ 190d. Purpose or intent of such statutes.—Statutes of this character are clearly intended to protect the policy-holder by requiring the insurer to place in his hands written evidence of the entire contract between them,[3] or in other words by requiring all the terms, conditions and representations to be incorporated or embodied in the policy.[4] It is held in Pennsylvania that the intent of the statute, making applications for insurance and by-laws of companies inadmissible in evidence unless a copy thereof is attached to the policy, was to produce a uniform rule of procedure and to apply to all insurance companies incorporated by the laws of the state, as well as to all other corporations insuring within the state.[5]

§ 190e. Construction of such statutes, the policy and application or contract.—The court should construe such statutes so as to give them force and effect so as best to accomplish the legislative intent.[6] And all defenses based on the application when a copy thereof is not attached will be ineffective and the policy should be treated, construed and enforced as if no written application had been made or as if no such paper existed.[7] If both the application and the policy make the former a part of the contract and it is also made in the policy a part of the consideration both should be construed together in determining the parties' rights.[8]

While a policy or contract for credit insurance refers to the application as a part of it but does not in terms refer to the form of the policy to be issued for an explanation or definition of its terms the policy cannot be resorted to in construing the application.[9]

[1] Rauen v. Prudential Ins. Co. of America, 129 Iowa, 725, 106 N. W. 198, 35 Ins. L. J. 288.

[2] New Era Life Assoc. v. Musser, 120 Pa. St. 384, 14 Atl. 155.

[3] Rauen v. Prudential Ins. Co. of America, 129 Iowa, 725, 106 N. W. 198, 35 Ins. L. J. 288.

[4] Kirkpatrick v. London Guarantee & Accident Co. 139 Iowa, 370, 19 L.R.A.(N.S.) 102 (annotated on failure to attach copy of application to policy as affecting right of insurer to rely on representations or warranties incorporated in the policy itself) 115 N. W. 1107.

[5] Kittaning Ins. Co. v. Hebb, 138 Pa. St. 174, 21 Pitts. L. J. N. S. 153, 27 Week. N. C. 97, 48 Phila. Leg. Ins. 35, 20 Ins. L. J. 92, 20 Atl. 837.

[6] Rauen v. Prudential Ins. Co. of America, 129 Iowa, 725, 106 N. W. 198, 35 Ins. L. J. 288.

[7] Rauen v. Prudential Ins. Co. of America, 129 Iowa, 725, 106 N. W. 198, 35 Ins. L. J. 288.

[8] Lee v. Prudential Life Ins. Co. 203 Mass. 299, 17 Amer. & Eng. Ann. Cas. 236, 89 N. E. 529.

[9] L. Black & Co. v. London Guar-

§ 190f. Such statutes govern only relative rights of parties.—The statute is intended only to govern the relative rights of, or the contractual relations between the insurer and policy-holder, so that where the proceeds of the insurance are claimed by different persons the application may be admissible even though it is not attached to the policy.[10] But while the fact that a true copy of the application is not attached may preclude the company from using it, in pleading or evidence, still an officer or incorporator is not so precluded where it is sought to hold him personally liable on a death claim.[11]

§ 190g. Retroactive effect of such statutory requirements.—Where a certificate was issued before the enactment of the statute a by-law subsequently enacted but not attached to the policy is inadmissible in evidence.[12] But the requirement that that part of the constitution referred to must be attached is not retroactive especially where the statute only covers policies or certificates "hereafter issued."[13]

§ 190h. Necessity of true, correct, or entire copy of application.—The attached copy of the application must be a true copy,[14] as an incomplete copy of the application is not within the intent of the statute,[15] and a copy of the entire application even though subdivided, or on different pages must be attached under the Pennsylvania statute.[16] So where a copy of the entire application must be attached to the policy an omission of a part of the application even though supplementary operates to exclude the whole.[17] But it is not necessary that the attached copy of the application should be a facsimile, although it must show by comparison, without resorting to construction, that it is so exact and accurate as to be a "true copy,"[18] and if the copy varies from the original application so that

antee & Accident Co. 144 N. Y. Supp. 424, 159 App. Div. 186.

[10] Knowles v. Knowles, 205 Mass. 290, 91 N. E. 213. *Compare* Cotter v. Grand Lodge Ancient Order United Workmen, 23 Mont. 82, 37 Pac. 650.

[11] Moore v. Fraternal Acc. Assoc. 103 Iowa, 424, 72 N. W. 645, acts 18th Gen. Assemb. c. 211, sec. 2.

[12] Hunziker v. Supreme Lodge Knights of Pythias, 117 Ky. 418, 25 Ky. L. Rep. 1510, 78 S. W. 201.

[13] Grand Lodge A. O. U. W. of Ky. v. Denzer, 129 Ky. 202, 33 Ky. L. Rep. 643, 110 S. W. 882, 37 Ins. L. J. 726.

[14] Metropolitan Life Ins. Co. v. Moore, 117 Ky. 651, 25 Ky. L. Rep. 1613, 79 S. W. 219.

[15] Corson v. Anchor Mutual Fire Ins. Co. 113 Iowa, 641, 85 N. W. 806; Manhattan Life Ins. Co. v. Albro, 127 Fed. 281, 62 C. C. A. 213 (under Mass. acts 1894, p. 718, c. 522, sec. 75) certiorari denied 194 U. S. 633, 48 L. ed. 1159, 24 Sup. Ct. 857; Albro v. Manhattan Life Ins. Co. 119 Fed. 629.

[16] Morris v. State Mutual Life Ins. Co. 183 Pa. 563, 41 Wkly. N. C. 353, 39 Atl. 52.

[17] Fisher v. Fidelity Mutual Life Assoc. 188 Pa. 1, 29 Pitts. L. J. N. S. 163, 41 Atl. 457, Pa. act May 11, 1881 (P. L. 20).

[18] Johnson v. Des Moines Life Ins.

its real meaning depends upon reference to another paper it is not a true or correct copy.[19] The signature of the applicant as it was in the original must also appear as the use of the word "signed," of itself alone is insufficient to constitute a "true copy."[20] A photographic copy of the application attached, which comparison with the original shows to be a correct one, even though such copy is greatly reduced in reproduction, is a sufficient compliance with the statute.[1] If the description of the property differs the copied application is not a correct copy.[2] And where a copy of the application annexed to the policy does not correctly state the place to which notice of premiums shall be addressed, and omits some of the statements of the assured referring to his past afflictions and all of the examiner's report, the insurer must be deemed to have violated a statute requiring a copy of the application to be annexed to every policy.[3]

In case of a variance between the original application for a policy of life insurance, which is made a part of the contract, and a copy of the application appended to the policy, but not referred to in the body thereof, the original application must control.[4]

It will, however, be presumed, in the absence of evidence to the contrary that the copy of the application is a true copy.[5]

§ 190i. Such statutes do not apply to oral contracts.—The Pennsylvania statute is limited in every particular to written policies and does not apply to oral contracts.[6]

§ 190j. Copy of application for renewal or reinstatement to be annexed, etc.—A copy of an application for renewal or reinstatement of a policy must be annexed to it, to enable the insurer to rely on false statements therein.[7]

Co. 105 Iowa, 273, McClain's Code, sec. 1733.

[19] Greiner v. Safety Mutual Fire Ins. Co. 25 Lancaster L. Rev. 338.

[20] Seiler v. Economic Life Assoc. 105 Iowa, 87, 43 L.R.A. 537, 8 Am. & Eng. Corp. Cas. N. S. 661, 74 N. W. 941, acts 18th Gen. Assemb. c. 211, sec. 2.

[1] Arter v. Northwestern Mutual Life Ins. Co. 130 Fed. 768, 65 C. C. A. 156, 33 Ins. L. J. 852, Pa. act May 11, 1881 (P. L. 20).

[2] Greiner, to use, etc. v. Safety Mutual Fire Ins. Co. 24 Lancaster L. Rev. 161.

[3] Goodwin v. Provident Savings Life Assur. Assn. 97 Iowa, 226, 59 Am. St. Rep. 411, 32 L.R.A. 473, 66 N. W. 157.

[4] Metropolitan L. Ins. Co. v. Dimick, 69 N. J. L. 384, 55 Atl. 291, 62 L.R.A. 774.

[5] Holleran v. Life Assur. Co. of America, 18 Pa. Super. Ct. 573.

[6] Benner v. Fire Assoc. of Phila. 229 Pa. 75, 140 Am. St. Rep. 706, 78 Atl. 44, 40 Ins. L. J. 84, Pa. act May 11, 1881 (P. L. 20).

[7] Goodwin v. Provident Savings Life Assur. Soc. 97 Iowa, 226, 32 L.R.A. 473, 59 Am. St. Rep. 411, 66 N. W. 157.

§ 190k. Mere reference to application insufficient under such statutes.—It is not sufficient to merely refer in the policy to the application nor to adopt the same in terms where the statute requires that a copy thereof be attached to the policy,[8] and the application, if not attached, is properly excluded in evidence, though the policy provides that it is to be a part thereof,[9] so the fact that the application was referred to by the policy and made a part of the contract does not of itself alone constitute a compliance with the contract.[10] A statement unsigned, although annexed and entitled "copy of application," is not admissible in evidence,[11] and a statement written at the end of a policy entitled "copy of application," not containing any signature, is not a part of the policy, nor are any of its recitals binding on the insured.[12] Again, a reference to the application in certain paragraphs relating to occupation and suicide is not sufficient to make it a part of the policy.[13] And even though the certificate declares that it is subject to the by-laws of the order, this is not a sufficient compliance with the statute such by-laws not being made a part of the certificate.[14] So a special time limitation in the constitution of the corporation cannot be pleaded in bar of an action where it does not appear in the certificate, and no copy of the constitution or by-laws is attached although they are "made a part of this certificate." [15]

§ 1901. Right of insurer to provide forms of application under such statutes.—Where a statute provides that an application unless attached to the policy cannot be treated as a part of the contract or received in evidence in any controversy between the parties to or interested in such policy, an insurance company has the right to provide a form of application for its business, to require that it be used by its agents and those desiring insurance of it, and that a separate application be made and signed for each policy.[16]

[8] Bowyer v. Continental Casualty Co. 72 W. Va. 333, 78 S. E. 1000, Code 1906, c. 34, as am'd by acts 1907, c. 77, secs. 15, 62, 69.

[9] Imperial Fire Ins. Co. v. Dunham, 117 Pa. St. 460, 2 Am. St. Rep. 686, 12 Atl. 668, under act May 11, 1881; Provident Savings Life Assur. Soc. v. Puryear's Admr. 22 Ky. L. Rep. 980, 59 S. W. 15.

[10] Rauen v. Prudential Ins. Co. of America, 129 Iowa, 725, 106 N. W. 198, 35 Ins. L. J. 288.

[11] Susquehanna Mutual Ins. Co. v. Hallock, 22 Wkly. Notes Cas. 151, 14 Atl. 167.

[12] Under act Pa. May 11, 1881; Susquehanna Mutual Fire Ins. Co. v. Hallock, 22 W. N. C. 151, 14 Atl. 167; Dunbar v. Phœnix Ins. Co. 72 Wis. 492, 40 N. W. 386.

[13] Mutual Life Ins. Co. v. Morgan, 39 Okla. 205, 135 Pac. 279.

[14] Mooney v. Ancient Order United Workmen, Grand Lodge of Ky. 114 Ky. 950, 24 Ky. L. Rep. 1787, 72 S. W. 288.

[15] Corley v. Travelers Protective Assoc. 105 Fed. 854, 46 C. C. A. 278, under Ky. Stat. sec. 679.

[16] Provident Savings Life Assur. Soc. v. Elliott, 29 Ky. L. Rep. 552, 93

§ 190m. What is and is not part of contract: statutes.—An application is held to be a part of the contract even though it is not referred to in the certificate, where each of them provided that the applicant should be bound by the by-laws etc. of the order and the application was signed as required by the by-laws.[17] So a statutory requirement of attachment of an application for insurance to the policy is satisfied if the subdivision of a document designated, as a whole, "proposal for insurance," which is entitled "application," is so attached, where all material portions of the contract are incorporated in such application; and the fact that the name of the beneficiary appears only in the proposal, and is not attached to the policy, is immaterial, since it in no way affects any essential element of the contract upon which the right of the insurer to avoid it depends.[18] So an agreement, written on the face of the policy making the mutual agreements, benefits and privileges stated on subsequent pages a part of the contract as fully as if recited at length over the signatures affixed includes everything on subsequent pages following the signatures of the officers, especially so where the policy provides that the contract is issued in consideration of the statements and agreements made on the application and made a part of the policy, and the application is also thereby made a part of the policy unless it is within an exception in the statute requiring that a copy of the application accompany the policy or contract unless there is a clause making the policy indisputable.[19] Again, conditions or agreements which modify or impair the effect of an insurance contract must when required by statute be set out in full on the policy and this applies to a fidelity guarantee agreement, although the application of insured is not excluded as a part of the contract under the statute.[20] But unless the statute is complied with the by-laws are not a part of the contract, even though delivered contemporaneously with the certificate.[1] Nor are the by-laws a part of the contract, though attached to the policy, when unsigned by the company's officers as provided by statute.[2] And where neither the insurer's by-

S. W. 659, 35 Ins. L. J. 713; Ky. Stat. 1903, sec. 679, Russell's Stat. sec. 4,400.

[17] Williams v. Supreme Council of Catholic Mutual Benefit Assoc. 152 Mich. 1, 131 N. W. 1081.

As to what should be attached to policy, see note 18 L.R.A.(N.S.) 1190.

[18] Langdeau v. John Hancock Mutual Life Ins. Co. 194 Mass. 56, 18 L.R.A.(N.S.) 1190 annot. 80 N. E. 452, 36 Ins. L. J. 432.

[19] Grell v. Sam Houston Life Ins. Co. (1913) — Tex. Civ. App. —, 157 S. W. 757, Tex. Rev. Civ. Stat. 1911, sec. 4951.

[20] Elgin Loan & Savings Co. v. London Guarantee & Acc. Co. (Can. H. C. J.) 24 Canadian Law J. 354; Ins. act R. S. O. 1897, c. 203, sec. 144 (1) sec. 1a.

[1] Bankers Fraternal Union v. Donahue, 33 Ky. L. Rep. 196, 109 S. W. 878.

[2] Capitol Ins. Co. v. Pleasanton, 48

laws nor the application of the insured is attached to his policy of accident insurance, as required by statute, they are not admissible in evidence in aid of the policy.[3] So a preliminary statement of the company's agent signed only by him and containing only information of a general nature useful to the company, but which is not referred to in the policy is no part of the contract where the statute requires a copy of the application made by the insured to be delivered with the policy.[4] Again neither a proposal for insurance, for the applicant to fill out and sign, nor a memorandum for the solicitor to sign as a part of the application is within the statute requiring a correct copy thereof to be attached to the policy.[5]

§ 190n. Same subject: medical examination.—An insurer cannot avail itself of any defense based on matters contained in the medical examination which is part of the application of which no copy is attached to the policy,[6] for where the medical examiner's report is a part of the application it is within the requirements of the statute,[7] and if the medical examination is a part of the application and intended to accompany it it may properly be excluded where the application is not attached.[8] A supplementary application or statement made to the medical examiner as supplemental to and part of the application is also within the statute even though a copy of the original application is endorsed upon the policy.[9] It is held, however, that it is not necessary to include the medical examiners report in a copy of the application required to be attached to or indorsed upon the policy.[10]

The medical examination, even though a copy is not attached, is competent evidence in case of fraud.[11]

Kan. 397, 29 Pac. 578; Capitol Ins. Co. v. Bank of Blue Mound, 48 Kan. 393, 29 Pac. 576.

[3] Pickett v. Pacific Mut. L. Ins. Co. 144 Pa. 79, 27 Am. St. Rep. 618, 13 L.R.A. 661, 22 Atl. 871.

[4] Griffith v. Metropolitan Life Ins. Co. 36 App. D. C. 8, 38 Wash. L. Rep. 758 (Civ. Code, D. C. sec. 657 [32 Stat. at L. 534, c. 1329]) *citing* Metropolitan Life Ins. Co. v. Hawkins, 31 App. D. C. 493, 14 Am. & Eng. Ann. Cas. 1092.

[5] Bonville v. John Hancock Mutual Life Ins. Co. 200 Mass. 197, 85 N. E. 1057.

[6] Rauen v. Prudential Ins. Co. of America, 129 Iowa, 725, 106 N. W. 198, 35 Ins. L. J. 288. *Examine* Northwestern Life Assur. Co. v. Tietze, 16 Colo. App. 205, 64 Pac. 773.

[7] Morris v. State Mutual Life Ins. Co. 183 Pa. 563, 41 Wkly. N. C. 353, 39 Atl. 52.

[8] Southern States Mutual Life Ins. Co. v. Herlihy, 138 Ky. 359, 128 So. 91.

On medical examiner as agent of insurer or of insured, see note in 41 L.R.A.(N.S.) 506.

[9] Fisher v. Fidelity Mutual Life Ins. Co. 188 Pa. 1, 29 Pitts. L. J. N. S. 163, 41 Atl. 467, under Pa. act May 11, 1881 (P. L. 20) requiring copy of entire application.

[10] Johnson v. Des Moines Life Ins. Co. 105 Iowa, 273, 75 N. W. 101, McClain's Code, sec. 1733.

[11] Hews v. Equitable Life Assur. Soc. 143 Fed. 850, 74 C. C. A. 611, 35 Ins. L. J. 202, Pa. act May 11, 1881 (Pub. L. 20).

§ 190o. Foreign contracts: effect of statutes.—In Massachusetts the statute applies only to policies issued there and not to contracts issued or made in other states even though upon the lives of persons domiciled in Massachusetts.[12] In Wisconsin the statute providing that all fire insurance corporations, except mutual companies, in cities and villages, shall, upon issuing a policy, attach to it a copy of any application which by the terms of the policy is made a part thereof, does not except from its operation mutual companies organized outside the state, but only those organized under the laws of Wisconsin.[13]

§ 190p. What companies or associations are within such statutes.—The Georgia statute requiring a copy of the application by-law or rule etc. to be attached applies to fraternal associations as well as to other insurance corporations.[14] In Iowa the statute applies to all cases and a society or fraternal association must attach a copy of the application to each certificate.[15] Mutual fire companies are also within the terms of that statute [16] nor is such act superseded by an act regulating mutual benefit societies.[17] In Kentucky a fraternal society which is under the supervision of a supreme council and secures members through the lodge system exclusively and pays no commissions, nor employs any agents except in the organization and supervision of the work of the local council is exempt from the operation of the Kentucky statute requiring the application, constitution, by-laws, or other rules of the corporation or society to be contained in or attached to the contract of insurance, before they can be received in evidence.[18] But it is decided in a later case in

[12] Johnson v. Mutual Life Ins. Co. 180 Mass. 407, 63 L.R.A. 833, 62 N. E. 733, 31 Ins. L. J. 340. See Rauen v. Prudential Ins. Co. of America, 129 Iowa, 725, 106 N. W. 798, 35 Ins. L. J. 288. The Pennsylvania Stat. of May 11th, 1881 (Pub. L. 20) covers policies issued by foreign companies doing business therein. See Kittaning Ins. Co. v. Hebb, 138 Pa. St. 174, 21 Pitts. L. J. N. S. 153, 27 Wkly. N. C. 97, 48 Phila. Leg. Int. 35, 20 Ins. L. J. 92, 20 Atl. 837, *noted* under § 190d herein. See § 194 (b) herein.

[13] Waukau Milling Co. v. Citizens' Mutual Fire Ins. Co. 130 Wis. 47, 118 Am. St. Rep. 998, 109 N. W. 937.

On conflict of laws as to construction of insurance policy, see notes in 63 L.R.A. 856, and 52 L.R.A.(N.S.) 279. On laws or judgments of courts of state in which insurance company is incorporated as binding in other states, see note in L.R.A.1916A, 770.

[14] Heralds of Liberty v. Bowen, 8 Ga. App. 325, 68 S. E. 1008.

[15] Mullen (Lee, Intervenor) v. Woodmen of the World, 144 Iowa, 228, 122 N. W. 903; Stork v. Supreme Lodge Knights of Pythias of the World, 113 Iowa, 724, 84 N. W. 721 (acts 18th Gen. Assemb. c. 211, sec. 2). *Examine* Grimes v. Northwestern Legion of Honor, 97 Iowa, 315, 327, 64 N. W. 806, 66 N. W. 183.

[16] Corson v. Iowa Mutual Fire Ins. Assoc. 115 Iowa, 485, 88 N. W. 1086.

[17] McConnell v. Iowa Mutual Aid Assn. 79 Iowa, 757, 760, 43 N. W. 188.

[18] Yeomen of America v. Rott, 145 Ky. 604, 140 S. W. 1018, Ky. Stat.

that state that by-laws must be incorporated in or attached to policy where the society is one not excepted from the operation of the statute.[19] It is also held in an earlier case there that the statute applies also to assessment co-operative companies in the lodge plan.[20] Benevolent fraternal associations are not included in the Minnesota statute.[1] It is held in a Pennsylvania case that the by-laws may be put in evidence by the insurer, notwithstanding they are not attached to the policy as required by statute, since the statute does not apply to orders doing business through lodges.[2] And a beneficial association incorporated as such under a statute providing therefor is not within the statute.[3] But it is also decided in that state that an association which is in effect an insurance company must comply with the statute requiring a copy of the constitution and by-laws to be attached to the policy.[4] In Wisconsin the statute does not exempt from its operation mutual companies organized outside the state but only those organized under the laws of that state.[5]

Accident insurance is not within the Pennsylvania act of 1881.[6] And it is held in Iowa that mutual accident companies need not attach a copy of the by-laws to the certificate.[7]

A live stock policy of insurance is within the West Virginia statute requiring the application to be attached to or incorporated in the policy in order to become a part of the contract.[8]

§ 190q. Failure to comply with such statutes does not preclude defenses based upon policy alone.—The omission to indorse or attach

sec. 679, by express terms provisions do "not apply to secret or fraternal societies, lodges or councils, which are under the supervision of a grand or supreme body, and secure members through the lodge system exclusively, and pay no commission nor employ any agents, except in the organization and supervision of the work of local subordinate lodges or councils."

[19] Home Protective Assoc. v. Williams, 150 Ky. 134, 150 S. W. 11, rev'd 151 Ky. 146, 151 S. W. 361, Ky. St. sec. 679. Russell's Stat. sec. 4400.

[20] Supreme Commandery of the United Order of the Golden Cross of the World v. Hughes, 114 Ky. 175, 24 Ky. L. Rep. 984, 70 S. W. 405.

[1] Loudon v. Modern Brotherhood of America, 107 Minn. 12, 119 N. W. 425, Rev. Laws 1905, sec. 1616.

[2] Donlevy v. Supreme Lodge Shield of Honor, 11 Pa. Co. Ct. 477; 49 Leg. Intell. 145.

[3] Weisenbrodt v. Mutual Beneficial Assoc. of America, 36 Pa. Co. Ct. Rep. 570.

[4] Fahey v. Empire Life Ins. Co. 5 Lack. Leg. News, 377, Pa. act May 11, 1881 (P. L. 20).

[5] Waukau Milling Co. v. Citizens' Mutual Fire Ins. Co. 130 Wis. 47, 118 Am. St. Rep. 998, 109 N. W. 937.

[6] National Accident Soc. v. Dolph, 94 Fed. 748, 38 C. C. A. 1, act May 11, 1881 (P. L. 20); Standard Life & Accident Ins. Co. v. Carroll, 86 Fed. 567, 30 C. C. A. 253, 58 U. S. App. 76, 41 L.R.A. 194, distg. Pickett v. Pacific Mutual Life Ins. Co. 144 Pa. St. 79, 13 L.R.A. 661, 22 Atl. 871.

[7] Fitzgerald v. Metropolitan Acc. Assoc. 106 Iowa, 457, 76 N. W. 809, acts 18th Gen. Assemb. c. 211, sec. 2.

[8] Bush v. Indiana & Ohio Live

a copy of the application does not, however,[9] invalidate the policy, but only goes to the pleading and proof of the representations.[10] So where by statute neither the application nor by-laws constitute a part of the contract except so far as they are incorporated in the policy the policy alone constitutes the contract, and where not so incorporated the description or location in the application of the property insured does not limit that stated in the policy and this is so even though the policy refers to the application as a part thereof, but no copy of it is attached to or incorporated therein.[11] And where there is no reference whatever to the application and no reliance thereon or assertion of rights thereunder by the insurer it is not precluded from defenses based only upon the policy itself.[12] So in an action to recover on a life insurance policy, the beneficiary may offer such policy in evidence without the application therefor, as the policy constitutes the contract upon which the suit is brought, when the application is no part of the policy and is in the possession of the defendant.[13] And the policy itself is admissible in evidence even though the application attached is not a correct copy.[14] Again, an insurance company is not precluded from relying on a breach by the insured of conditions and warranties inserted in the policy by failure to attach to it a copy of the application, which is not referred to in the policy, although they are similar to those contained in the application, under a statute providing that omission to attach a copy of the application to the policy will preclude the company from alleging or proving any such application or representations, or falsity thereof or any parts thereof, in an action on the policy, but permits the insured to plead or prove the application or representation at his pleasure to show waiver by the insurer.[15]

§ 190r. Application as part of contract: statutes: fraud as defense: misrepresentations.—In Georgia the insurer is not precluded from showing fraudulent misrepresentations in procuring the policy notwithstanding the statute requires a copy of the application to be attached in order to constitute a part of the contract.[16] The

Stock Ins. Co. 74 W. Va. 244, 81 S. E. 984.

[9] Under Iowa act, Miller's Code, 1888, p. 398.

[10] McConnell v. Iowa Mutual Aid Assn. 79 Iowa, 757, 43 N. W. 188.

[11] Coleman v. Retail Lumberman's Ins. Assoc. 77 Minn. 31, 79 N. W. 588, 28 Ins. L. J. 650, Laws 1895, c. 175, sec. 52.

[12] Kirkpatrick v. London Guarantee & Acc. Co. 139 Iowa 370, 19 L.R.A. (N.S.) 102n, 115 N. W. 1107.

[13] Albert v. Mutual Life Ins. Co. 122 N. C. 92, 65 Am. St. Rep. 693, 30 S. E. 327, 28 Ins. L. J. 723.

[14] Ellis v. Metropolitan Life Ins. Co. 228 Pa. 230, 77 Atl. 460.

[15] Kirkpatrick v. London Guarantee & Accident Co. 139 Iowa, 370, 19 L.R.A.(N.S.) 102 (annotated on failure to attach copy of application to policy as affecting right of insurer to rely on representations or warranties incorporated in the policy itself) 115 N. W. 1107, Code Iowa, sec. 1741. See § 503 herein.

[16] Southern Life Ins. Co. v. Logan,

Minnesota statute requiring a copy of the application to be indorsed on or attached to the policy covers "all statements made by the insured . . . in the absence of fraud" and this is construed to mean not statements made in the absence of fraud but the ordinary and usual statements in the signed application whether made in the absence of fraud or not.[17] In another case in that state it is held that although an application is not admissible in evidence as a part of the contract when a copy thereof is not attached to nor incorporated in the policy yet it may be competent evidence on the issue of fraud or to show false representations inducing the issue of the policy.[18] The Pennsylvania statute does not apply where the policy was obtained by fraud.[19] In Michigan fraud in applicant's statements are held to constitute no defense where the application is not indorsed upon nor attached to the policy when issued.[20] And it is so held in Iowa.[21] Under a New York decision although fraud vitiates a contract yet when applied to a life insurance contract the matters relied upon as constituting fraud must not only have been false within the knowledge of the party against whom the fraud is alleged but in addition must have been material and have been relied upon as an inducement to the contract.[1]

§ 190s. Conspiracy a defense though application not attacked.—Conspiracy in making the application, in being examined, and in procuring the insurance, may be shown even though the application is not attacked.[2]

9 Ga. App. 503, 71 S. E. 742; Southern Life Ins. Co. v. Hill, 8 Ga. App. 857, 70 S. E. 186; Johnson v. American Mutual Life Ins. Co. 134 Ga. 800, 68 S. E. 731.

Effect of fraud as to materiality of fact: representations, see §§ 1896, 1897 herein.

[17] Wheelock v. Home Life Ins. Co. 115 Minn. 177, 131 N. W. 1081. Laws 1907, c. 220, Rev. Laws Suppl. 1909, secs. 1695–2 to 1695–12.

[18] Coleman v. Retail Lumberman's Ins. Assoc. 77 Minn. 31, 79 N. W. 588, 28 Ins. L. J. 650, Laws 1895, c. 175, sec. 52.

[19] Hews v. Equitable Life Assur. Soc. 143 Fed. 850, 74 C. C. A. 611, 35 Ins. L. J. 202, Pa. act May 11th 1881 (Pub. L. 20).

[20] New York Life Ins. Co. v. Hamburger, 174 Mich. 254, 140 N. W. 510, Pub. acts 1907, No. 187, subd. 4, sec. 1 (3 How. Stat. [2d ed.] sec. 8312) & Pub. acts No. 180 (3 How. Stat. [2d ed.] sec. 8310) sec. 1.

[21] Parker v. Des Moines Life Assoc. 108 Iowa, 117, 78 N. W. 826. Examine Kirkpatrick v. London Guarantee & Accident Co. 139 Iowa, 370, 19 L.R.A.(N.S.) 102 (annot.) 115 N. W. 1107.

[1] Becker v. Colonial Life Ins. Co. 138 N. Y. Supp. 491, 153 App. Div. 382, aff'g 133 N. Y. Supp. 481, 75 Misc. 213. The court considers the following cases and declares that they are not in point viz: Empire Life Ins. Co. v. Gee, 171 Ala. 435, 55 So. 166, 40 Ins. L. J. 1384; Johnson v. American National Life Ins. Co. 134 Ga. 800, 68 N. E. 731; Southern Life Ins. Co. v. Hill, 8 Ga. App. 857, 70 S. E. 186; Holden v. Prudential Ins. Co. 191 Mass. 153, 77 N. E. 309.

[2] Southern States Mutual Life Ins.

§ 190t. Waiver of statutory rights by insurer or insured.—An insurer which issues a policy to which no copy of the application is attached thereby expresses its purpose to waive or relinquish its right to have the application considered as any part of the contract.[3] If the statute permits the insured to plead or prove the application or representation even though such application is not attached to nor indorsed upon the policy, the purpose thereof is to show a waiver by the insurer of a breach of conditions or warranties, but insured cannot show oral or written representations not attached to or incorporated in the contract in order to defeat the contract.[4] But it is held that insured may not waive compliance with the statute.[5]

§ 190u. When question whether copy of application annexed to or indorsed on policy is for jury.—The question whether a copy of the application was annexed to the policy is for the jury, and requests to charge may be refused where each assumes as correct that the application was annexed, or in other words assumes the existence of a fact upon which the jury is to pass.[6]

§ 191. When other papers are and are not part of policy.—Other papers may become a part of the policy by being annexed thereto or subjoined, or by being referred to therein in plain terms as a part thereof,[7] but the intent to incorporate such other papers should be plainly manifest and not dependent upon implication.[8] So docu-

Co. v. Herlihy, 138 Ky. 359, 128 S. W. 91.

[3] Rauen v. Prudential Ins. Co. of America, 129 Iowa, 725, 106 N. W. 198, 35 Ins. L. J. 288; New York Life Ins. Co. v. Hamburger, 174 Mich. 254, 140 N. W. 510.

[4] Kirpatrick v. London Guarantee & Accident Co. 139 Iowa, 370, 19 L.R.A.(N.S.) 102n, 115 N. W. 1107.

[5] Mullen v. Woodmen of the World, 144 Iowa, 228, 122 N. W. 903; Iowa Code 1897, sec. 1826. See also Sovereign Camp of Woodmen of the World v. Salmon (1909) — Ky. —, 120 S. W. 358. That person has right to waive statutory provision. See Mutual Life Ins. Co. v. Durden, 9 Ga. App. 797, 72 S. E. 295.

[6] Monjeau v. Metropolitan Life Ins. Co. 208 Mass. 1, 94 N. E. 302, 40 Ins. L. J. 917, under Mass. Rev. Laws, c. 118, sec. 73. In this case evidence was offered to show that the policies were lost and plaintiff put in secondary evidence of their contents consisting almost entirely of oral evidence, no policy nor any claimed copy being offered, and defendant introduced copies claimed to be true copies but they were conceded to be such. These copies contained each a reference to the application "as a part of this contract" and had annexed to it a copy of the application.

[7] See Carson v. Jersey City Ins. Co. 43 N. J. L. 303 (14 Vroom. 300) 39 Am. Rep. 584; Sheldon v. Hartford Fire Ins. Co. 22 Conn. 235, 58 Am. Dec. 420. As to mutual benefit societies and other papers, see Bacon on Benefit Soc. & Life Ins. (3d ed.) secs. 181, 184.

[8] Moore v. State Ins. Co. 72 Iowa, 414, 34 N. W. 183; Weed v. Schenectady Ins. Co. 7 Lans. (N. Y.) 452; Burritt v. Saratoga County Mutual Fire Ins. Co. 5 Hill (N. Y.) 188, 40 Am. Dec. 345, per Bronson, J.; Merchants Ins. Co. v. Dwyer, 1 Tex. Unrep. Cas. 445.

ments adopted by reference and attached to the policy constitute the contract.[9] So a mortgage slip making the loss payable to the mortgagee may be attached to the policy and become a part of the contract;[10] and a paper written in lead pencil and signed by the insured may be a part of the policy when it is referred to therein by number.[11] A separate paper may by distinct and clear reference be expressly made a part of the contract, but a simple reference is not sufficient.[12] And where a policy is delivered and there is pinned thereon a smaller sheet of paper partly printed and partly written and not signed, it is held that the two papers thus delivered constitute the contract and differences between the two papers in texture, color or quality are entitled to slight weight in determining whether the contract is contained in both or one only.[13]

The whole of a survey may be incorporated by proper reference.[14] But where conditions in a policy of insurance, relating to misrepresentations or concealments as to the situation or occupancy of the property insured therein, are in a clause which refers to an application, plan, survey, or description, and assumes to make such paper a part of the policy and a warranty by the insured, but the record fails to disclose the existence of any such paper, the clause which refers to it, and attempts to describe its place and effect as a part of the contract, and to determine the consequences of misstatements or omissions therein, must be regarded as inapplicable to the facts in the case, and therefore nugatory.[15] If drawings and specifications of the architect are identified by the signature of the parties and are made a part of the contract and there is no question as to their identity, and they are adopted by all the parties under a bond for the due performance of a building contract, the failure to sign them is immaterial as the formality of signing is waived by the con-

[9] Empire Life Ins. Co. v. Gee, 171 Ala. 435, 55 So. 166, under Ala. Code 1907, sec. 4579.

[10] Westchester Fire Ins. Co. v. Coverdale, 48 Kan. 446, 29 Pac. 682, 21 Ins. L. J. 530. See § 196 herein.

As to provision that conditions of insurance as to mortgagee be written upon policy or attached thereto, and as "Union Mortgage Clause," see Brecht v. Law Union & Crown Ins. Co. 160 Fed. 899, 87 C. C. A. 351, 18 L.R.A.(N.S.) 197 (annotated on effect of breach of policy of insurance by mortgagor on rights of mortgagee) 37 Ins. L. J. 621.

[11] City Ins. Co. v. Bricker, 91 Pa. St. 488.

[12] Hartford Protection Ins. Co. v. Harmer, 2 Ohio St. 452, 59 Am. Dec. 684. See Anderson v. Fitzgerald, 4 H. L. Cas. 474.

[13] Timlin v. Equitable Life Assur. Soc. 141 Wis. 276, 124 N. W. 253.

This case is *criticized* as a radical departure from the rule in 39 Ins. L. J. 295, 302–306. *Compare* Co-operative Ins. Assoc. v. Ray, — Tex. Civ. App. —, 138 S. W. 1122.

[14] Sheldon v. Hartford Fire Ins. Co. 22 Conn. 235, 58 Am. Dec. 420.

[15] Allemannia Fire Ins. Co. v. Peck, 133 Ill. 220, 23 Am. St. Rep. 610, 24 N. E. 538.

duct of the parties.[16] Again, a receipt for the husband's notes given in payment of a premium for a policy insuring his wife's interest in his life, is a part of the contract.[17] So an ad interim receipt may be a part.[18]

Again, a separate paper may by express stipulation be made part of a policy, but where from the manner of referring to it it would seem that the insurers were satisfied to look to it only for the purpose of estimating the risk, it is not a part of the policy.[19] So an agreement for deduction from the amount of the premium for services rendered which is a separate contract cannot be considered as a part of the policy or introduced in evidence in an action to recover on the policy.[20] In Bize v. Fletcher,[1] it appeared that at the time the insurers underwrote the policy a slip of paper was wafered to it describing the state of the ship as to repairs and strength, and it also mentioned several particulars as to her intended voyage, and Lord Mansfield held that this was not a part of the policy so as to make the statements other than representations. It was said of this in a New York case [2] that it would be impossible to sustain the decision if the slip so wafered had expressly declared itself to be conditions. In this last case the policy was printed on one-half the sheet and the "conditions of insurance" on the other, and it was held that the conditions were part of the policy, and that there was no need of an express reference thereto in the policy; that the juxtaposition of the papers was prima facie evidence of the parties' intention, which might be rebutted, however, by parol evidence, as by showing that the two were thus connected by mistake.[3] Again, it is held that a paper detached from the policy containing instructions relative to the force with which the ship was to sail, and which was shown to the underwriter at the time of subscribing, did not thereby become a part thereof [4] and a diagram on the back of an application which is not itself properly made a part, there being no evidence that the insured ever saw or knew of the diagram, it having

[16] Ætna Indemnity Co. v. Waters, 110 Md. 673, 73 Atl. 712.

[17] Baker v. Union Mutual Life Ins. Co. 6 Abb. Pr. N. S. (N. Y.) 144, 37 How. Pr. (N. Y.) 126.

[18] Goodwin v. Lancashire Fire & Life Ins. Co. 16 L. C. Jur. 298.

[19] Snyder v. Farmers' Insurance and Loan Co. 13 Wend. (N. Y.) 92, aff'd 16 Wend. (N. Y.) 481, 30 Am. Dec. 118.

[20] Commonwealth Life Ins. Co. of Louisville v. Bowling (1908) — Ky. —, 114 S. W. 327.

[1] 1 Doug. 284, 291; 13, n. 4.

[2] Roberts v. Chenango County Mutual Ins. Co. 3 Hill (N. Y.) 501, 503.

[3] Same point in Murdock v. Chenango County Mutual Ins. Co. 2 N. Y. 210, 220. See also Duncan v. Sun Fire Ins. Co. 6 Wend. (N. Y.) 488, 22 Am. Dec. 539.

[4] Pawson v. Watson, 2 Cowp. 785, 13 Eng. Rul. Cas. 540.

been made by the agent,[5] and a letter written after the application was rejected in regard to insurable interest, and held not to be a part of the policy thereafter issued, nor of the application,[6] nor are proofs of loss a part.[7]

§ 191a. Receipt books, manuals, and schedules as part of contract.—A receipt book under the head of extracts from the rules, regulations, etc., therein printed, when accepted by the insured becomes a part of the contract.[8] A "manual," however, giving definitions of terms and classifications of risks in accident insurance is not a part of the policy when not mentioned or referred to therein. To become a part of the policy it should have been embodied in the face of the contract and made a part thereof in plain unmistakable terms.[9] But even though a "manual of occupation" may not be a part of an accident policy still it is held that it may be looked to for the purposes agreed upon by the parties, or as a means of ascertaining the amount of indemnity.[10]

In an action brought to indemnify against loss by giving credit the application bond and a schedule consisting of several distinctly lettered paragraphs relating to customers and conditions, and to which the bond refers constitute the contract of insurance between the parties.[11]

§ 191b. Riders or slips as part of contract: standard policy.—It is well settled that a rider attached to the policy is a part of the contract,[12] to the same extent and with like effect as if embodied there-

[5] Vilas v. New York Cent. Ins. Co. 72 N. Y. 590, 28 Am. Rep. 186.

[6] Mace v. Providence Life Ins. Assoc. 101 N. C. 122, 7 S. E. 647. See Menk v. Home Ins. Co. 76 Cal. 51, 9 Am. St. Rep. 158; Allemannia Fire Ins. Co. v. Peck, 133 Ill. 220, 23 Am. St. Rep. 610, 24 N. E. 538.

[7] McMaster v. President & Directors of Insurance Co. of North Amer. 55 N. Y. 222, 14 Am. Rep. 239.

[8] Rowe v. United States Industrial Life Ins. Co. 90 S. Car. 168, 72 S. E. 1018.

[9] Miller v. Missouri State Life Ins. Co. 168 Mo. App. 330, 153 S. W. 1080.

[10] McCarthy v. Pacific Mutual Life Ins. Co. 178 Ill. App. 502, holding also that the Rev. Stat. sec. 208a, clause 3, making a copy of the application endorsed upon or attached to a life policy with the policy the entire contract and sec. 209, c. 73, R. S. requiring accident policies to state on their face the agreement with the person receiving the same do not apply.

[11] Lexington Grocery Co. v. Philadelphia Casualty Co. 157 N. Car. 116, 72 S. E. 870. The application provided that: "Experience shall be the basis for credit under as on Schedule A," (the above-mentioned schedule) with a specified account limit and it was expressly stipulated that Schedule A should describe the class of customers to be covered by the bond.

[12] Scharles v. N. Hubbard Jr. & Co. 131 N. Y. Supp. 848, 74 Misc. 72.

As to effect of riders or slips attached to policies, see note 30 L.R.A. 636–642.

As to slips containing "Union Mortgage Clause" and provision that conditions as to mortgagee be written

in.[13] And a rider of itself supersedes the policy, especially so where the obvious intention of the rider is to substitute all its conditions, exceptions and provisos for those of the policy.[14] Again a credit insurance policy may, by a rider, be made to relate back or to antedate the policy as to outstanding accounts.[15] So a rider attached to a marine policy subsequent to its issuance giving permission to navigate in other waters than allowed by the terms of the policy becomes a part of the contract,[16] and a written notice of a contract of transfer of insured's policy by the company in which his policy was originally issued to another company, duly executed and sent to insured with written directions to him to attach it, as a rider, to the policy in his possession, when so attached becomes a part of the policy and with it constitutes the contract.[17]

A rider or slip attached to a standard policy making it payable to the mortgagee as his interest may appear and also providing for a pro rata liability of the company in case of other insurance is a part under a statute authorizing slips or riders to be attached to standard policies modifying the provisions in the body of the policy.[18] So a clause in a rider attached to a policy in the standard form, which provides that: "It is a part of the consideration of this policy, and the basis upon which the rate of premium is fixed, that the insured shall maintain insurance on the property described by this policy, to the extent of at least eighty per cent of the actual cash value thereof; and failing so to do, the insured shall be an insurer to the extent of such deficit, and to that extent shall bear his, her or their proportion of any loss that may happen to said property," is a part of the contract, and is a provision "adding to or modifying those contained" in the standard form.[19] And, under a New York decision, where the statute specifies in certain exceptions the nature of the clauses which may be added without being deemed a

upon policy or attached thereto, see note 18 L.R.A.(N.S.) 197, to Brecht v. Law Union & Crown Ins. Co. 160 Fed. 899, 87 C. C. A. 351, 37 Ins. L. J. 621.

[13] Farmers' Bank v. Manchester Assurance Co. 106 Mo. App. 114, 80 S. W. 299.

[14] New York & Porto Rico Steamship Co. v. Ætna Ins. Co. (U. S. C. C.) 192 Fed. 212, aff'd 204 Fed. 255, as to construction, see §§ 223, 224 herein.

[15] Philadelphia Casualty Co. v. Canon & Byers Millinery Co. 133 Ky. 745, 118 S. W. 1004.

[16] Mark v. Home Ins. Co. 52 Fed. 170, aff'd 64 Fed. 804, 13 C. C. A. 157.

[17] Mutual Reserve Life Ins. Co. v. Ross, 42 Ind. App. 621, 86 N. E. 506.

[18] Hardy v. Lancashire Ins. Co. 166 Mass. 210, 44 N. E. 209, 33 L.R.A. 241, 55 Am. St. Rep. 395, see Brecht v. Law Union & Crown Ins. Co. 160 Fed. 899, 87 C. C. A. 351, 18 L.R.A. (N.S.) 157, and note 197, 37 Ins. L. J. 621.

[19] Quinn v. Fire Assoc. of Phila. 180 Mass. 560, 62 N. E. 980.

departure from the statutory form and among such exceptions provides that printed or written forms of description and specifications or schedules of the property covered by any particular policy, and any other matter necessary to clearly express all the facts and conditions of insurance or any particular risk not inconsistent with or a waiver of any of the conditions or provisions of the standard policy, a rider is within the exception where it states that it is issued upon the understanding and warranty by assured that another certain company has a policy in force insuring the identical property in identically the same proportions and at no higher rate of premium.[20] Under the Maine standard policy law[21] a company may write upon the margin or across the face of a policy, or write, or print in type not smaller than long primer, upon separate slips or riders attached thereto, provisions adding to or modifying those contained in the standard form, and it is held that the statute does not require a separate slip or rider for each provision modified or added to but that the word "separate" means something separate from, or not physically a part of the policy, but something originally distinct, apart from the policy, but to be attached thereto; and the statute permits the inclusion of more than one provision on the same rider.[1] So in that state a stipulation as to vacancy of the premises may be modified by a slip or rider attached to the standard policy.[2]

The policy and rider comprise the contract and effect will be given to the "rider" attached to a policy of fire insurance on a steam cotton-gin, where the rider is inserted in and made a part of the entire policy for the purpose of adapting its provisions to this particular kind of property, especially with reference to the method and conditions of its operation; where there is nothing uncertain or restrictive in its terms, and it contains the provision, "attached to and made a part of this policy;" and where there is, at the end of the entire policy, a stipulation that it is "made and accepted under the foregoing stipulations and conditions, together with such other provisions, agreements, and conditions as may be indorsed hereto."[3] Although the Minnesota statutes prescribe the form of fire policies and changes and additions are forbidden except as specifically permitted, and although the policy must contain a com-

[20] Scharles v. N. Hubbard Jr. & Co. 131 N. Y. Supp. 848, 74 Misc. 72.

[21] Rev. Stat. c. 49, sec. 4.

[1] Rolfe v. Androscoggin Mutual Fire Ins. Co. 106 Me. 345, 76 Atl. 879.

[2] Knowlton v. Patrons' Androscoggin Mutual Fire Ins. Co. 100 Me. 481, 2 L.R.A.(N.S.) 517 (annotated on when insured property is vacant or unoccupied) 62 Atl. 289, 35 Ins. L. J. 81, Rev. Stat. c. 49, sec. 4.

[3] Lancaster v. Southern Ins. Co. 153 N. Car. 285, 138 Am. St. Rep. 665, 69 S. E. 214, 39 Ins. L. J. 1748.

plete description of the property insured, and while a "clear space" clause attached as a rider is not authorized with respect to the warranty therein, still, as the statute authorizes printing on the policy forms of description and specification of the property reference may be had to said "space clause" for a description and identification thereof as limiting the general descriptive language of the policy.[4]

§ 192. Whether prospectus or pamphlet part of policy.—Whether a prospectus or pamphlet is a part of the policy is a question in which there is a conflict between the cases wherein this issue has been distinctly before the courts. It would seem that in many English decisions, where there has been an equitable replication,[5] the courts have been inclined to hold that the prospectus or pamphlet is a part of the contract, especially if it appears that the representations therein were an inducement to the assured to enter into the contract.[6] The rule in this country is not settled. If the prospectus or pamphlet is expressly, by reference or otherwise, made a part of the policy, then such should be the effect, but in case it is not so made a part of the policy, then the question is not so easily determined. If the question were to be decided upon equitable principles, then such prospectus or pamphlet, where the representations therein were made a special inducement to the assured to enter into the contract, and were relied upon by him, might be considered a part of the policy on the ground of estoppel, or perhaps, if on no other, of mistake, in that the policy did not contain all the terms of the agreement. But we believe that inasmuch as it is within the power of the parties to the contract to expressly make such prospectus or pamphlet a part of the policy by reference or otherwise, that the neglect so to do ought not to give the right after delivery and acceptance thereof to vary or enlarge or disannul the provisions of a written contract which the parties have solemnly consummated, and which they are bound to know merges all prior negotiations. This rule is subject, however, to such exceptions as may exist in cases of clear estoppel or mistake, and we believe that the best considered cases and authorities make this question to depend upon the same general principles that underlie references to other papers, and which require some evidence in the policy itself of a purpose or intent to make such a prospectus or pamphlet a part of the contract, or clear evidence of an estoppel or mistake. Otherwise, serious ques-

[4] Wild Rice Lumber Co. v. Royal Ins. Co. 99 Minn. 190, 108 N. W. 871, 35 Ins. L. J. 824.

[5] Under the Common Law Procedure Act. 1854, 17 & 18 Vict. c. 125, secs. 83–86.

[6] See Wood v. Dwarris, 11 Exch. (Hurl. & G.) 493; Salvin v. James, 6 East, 571.

tions might arise in construing a written contract of insurance. The presumption that a policy contains the real terms of the contract is a presumption against the existence of such prospectus or pamphlet when it is not incorporated in the policy by reference or otherwise.[7] And subject to the above exceptions to permit such presumption to be overcome by proof that it was intended to make such papers a part of the policy, would be to open the doors to the admission of parol evidence, establishing a different contract entirely from that evidenced by the policy which has been deliberately executed, delivered, and accepted.

§ 193. Same subject: the cases.—In a New York case [8] it is held that a prospectus issued by a life insurance company and delivered to the insured by the company's agent, importing that the company was careful to prevent forfeitures, and which is not referred to in, nor in any manner annexed to, the policy, is not part of the contract, and is inadmissible to control the express terms of the policy, providing that it should determine upon failure to pay the premium. This case, however, came subsequently before the same court [9] on a motion for reargument, based upon the ground that the attention of the court on the prior hearing was not called to several decisions in England, where a contrary ruling had been adopted upon this point. The cases referred to were Wood v. Dwarris,[10] Wheelton v. Hardisty,[11] and Collett v. Morrison,[12] and the court says these cases "do certainly hold that the prospectus might equitably be regarded as forming a part of and controlling the terms of the policy. It is not improbable that an examination of these cases would have led this court to a different conclusion," but the case was not reopened, however. In the case of Wood v. Dwarris [13] the prospectus issued by the company represented that all policies effected by it should be indisputable, except in cases of fraud, and it appeared that the prospectus was issued prior to the issuance of the policy, and the statements therein were relied upon by the insured as a basis of the contract, and that when he went to the office of the company it professed to grant him assurance on those terms. These facts were held to preclude the company from defending on grounds which would leave out of consideration the prospectus,[14] and it was said [15] that it would no doubt have been competent for the company

[7] See Opinion of Earl, J., in Wheelton v. Hardisty, 8 El. & B. 232.

[8] Ruse v. Mutual Benefit Life Ins. Co. 23 N. Y. 516, 519, overruling s. c. 26 Barb. 556.

[9] 24 N. Y. 653.

[10] 11 Ex. 493.

[11] 92 Eng. C. L. 231.

[12] 9 Hare, 162, 173.

[13] 11 Ex. (Hurl. & G.) 493.

[14] See opinion of Baron Alderson in this case.

[15] By Martin, B.

to have granted a policy upon terms which would have excluded the prospectus. In the case of Wheelton v. Hardisty [16] the facts were similar, although it did not appear that the prospectus was ever in fact seen by the plaintiff, or that its statements were an inducement to him to enter into the contract, and it was held, reversing the judgment of the Queen's Bench, that the plaintiff was not entitled to a verdict, and that if a certain statement contained in a proposal as to health was intended to be the basis of the contract, it should have been inserted therein. It was further held that the prospectus was not a part of the contract, nor made so by a mere reference hereto.[17] The case of Collett v. Morrison [18] merely decided that if on a proposal and agreement for a life insurance a policy be drawn up at the insurance office in a form which differs from the terms of the agreement and varies the rights of the parties assured, equity will interfere and deal with the case on the footing of the agreement and not that of the policy. It is held, however, in a New York case [19] that the terms of the policy cannot be affected by a statement in the company's pamphlets that it would allow "thirty days' grace . . . on all payments" subsequent to the first. So in Tennessee [20] a prospectus of the company is not a part of the contract, and is not made so by a statement on the back of the policy that it may be had gratis on application. So in Georgia [1] a pamphlet promulgated as containing the terms and conditions upon which insurance would be granted, and which was not referred to in the policy, was held not a part of the policy and inadmissible in evidence to vary its terms, but that if referred to it might have been part of the policy.[2] But in that state a circular issued by a fraternal order and submitted to the insured to obtain her application for insurance which set forth the amount of protection or benefits and the terms of membership, should be considered to explain any ambiguities or inconsistencies in the language embraced in the contract, even though said circu-

[16] 8 El. & B. 285, 92 Eng. C. L. 231.

[17] This case was decided in 1858, the Collett case in 1851, and the Wood case in 1856.

[18] 9 Hare, 162.

[19] Fowler v. Metropolitan Life Ins. Co. 116 N. Y. 389, 26 N. Y. St. Rep. 770; 5 L.R.A. 805, 22 N. E. 576; *distinguishing* Ruse v. Mutual Benefit Life Ins. Co. 23 N. Y. 516, 24 N. Y. 653; and Howell v. Knickerbocker Life Ins. Co. 44 N. Y. 276, reversing Fowler v. Metropolitan Life Ins. Co. 41 Hun (N. Y.) 357.

[20] Knickerbocker Ins. Co. v. Heidel, 8 Lea (Tenn.) 488.

[1] Mutual Benefit Life Ins. Co. v. Ruse, 8 Ga. 534.

[2] See 1 Parsons' Marine Ins. (ed. 1868) p. 124; Bliss on Life Ins. sec. 400; 1 Duer on Ins. lect. 1, sec. 22, ed. 1845, p. 76, for general rule as to other papers. But see Rohrschneider v. Knickerbocker Life Ins. Co. 76 N. Y. 216, 32 Am. Rep. 290, 8 Ins. L.

lar was not by the terms of the contract made a part thereof.[3] And in a Kentucky case [4] a prospectus or pamphlet issued by the company and shown to the assured at the time he took out the policy provided that he should be entitled to a paid-up policy after the payment of a certain number of annual premiums, and also represented that the policy was nonforfeitable. The policy itself provided for forfeiture for nonpayment of the premiums at the time when due, and that the right to a paid-up policy should be forfeited unless the original contract was surrendered within thirty days after default in payment of the premiums, and the terms of the prospectus were held to govern the rights of the insured under the contract. So under a Connecticut decision a canvassing pamphlet used as an explanation of the plan of insurance and entitled "Key to the Reserve Dividend Plan," must be read in connection with the terms of the policy, although it is not the policy, and when its language may be construed as consistent with those terms a different and inconsistent construction cannot be given.[5] In an Iowa case a circular which may have induced the contract but which is not referred to or made a part of the certificate and which is not identified as coming from the insurer, nor does it appear that the insured ever saw or relied upon it before becoming a member of the society, cannot be made a basis of recovery and should be stricken from the pleadings.[6]

§ 194. Whether common or statutory law part of contract: city ordinances or local laws.—A contract of insurance is presumed to have been made in reference to common and statutory laws, so far as applicable, which are in force at the time of contracting. Such laws enter into and form a part of every such contract as much as if incorporated therein.[7] This rule also applies to certificates in

J. 392; Continental Life Ins. Co. v. Hamilton, 41 Ohio St. 274; Walsh v. Ætna Life Ins. Co. 30 Iowa, 133, 6 Am. Rep. 664; Clemmett v. New York Life Ins. Co. 76 Va. 355.

[3] Hall v. Royal Fraternal Union, 130 Ga. 820, 61 So. 977.

[4] Southern Mutual Life Ins. Co. v. Montague, 84 Ky. 653, 4 Am. St. Rep. 218, 2 S. W. 443.

[5] Fuller v. Metropolitan Life Ins. Co. 70 Conn. 647, 41 Atl. 4.

[6] Sleight v. Supreme Council of Mystic Toilers, 121 Iowa, 724, 96 N. W. 1100.

[7] *United States.*—Fry v. Charter Oak Life Ins. Co. 31 Fed. 197; Weingartner v. Charter Oak Life Ins. Co. 32 Fed. 314.

Illinois.—Freund v. Freund, 218 Ill. 189, 109 Am. St. Rep. 283, 75 N. E. 925, 35 Ins. L. J. 23.

Missouri.—Christian v. Connecticut Mutual Life Ins. Co. 143 Mo. 460, 45 S. W. 268, 27 Ins. L. J. 968; Wauschaff v. Masonic Mutual Benefit Soc. 41 Mo. App. 211 (where section 5981 of the Revised Statutes of Missouri, 1879, is construed and held to become a part of the contract).

Texas.—Germania Life Ins. Co. v. Peetz, — Tex. Civ. App. —, 47 S. W. 687, 690.

Virginia.—Smith & Marsh v.

mutual benefit societies, associations and the like.[8] Emerigon says:[9] "In cases of doubt the parties are presumed to have intended to form their agreements according to the rules established by the law, which is nothing else than the universal will of the community."[10]

If a standard policy statute expressly provides that it shall be a part of every contract of insurance such enactment controls.[11]

Where the construction of a statute or of the Constitution becomes settled *by judicial construction*, such construction, so far as contract rights acquired under the statute are concerned, becomes a part of the statute itself, and necessarily, therefore, a part of the obligation of the contract.[12] So the construction given by courts in judicial decisions and the ordinances of commercial countries, so far as these latter may be applied or have been adopted by our own courts, are presumed to have entered into the consideration of the parties when making the contract and to have become a part thereof.[13]

Northern Neck Mutual Fire Assoc. 112 Va. 192, 38 L.R.A.(N.S.) 1016 (annotated on applicability to existing contracts of statute avoiding contractual stipulations limiting time for action) 70 S. E. 482, 40 Ins. L. J. 1018.

Wisconsin.—Breakstone v. Appleton Mutual Fire Ins. Co. 149 Wis. 303, 135 N. W. 853; Oshkosh Gas Light Co. v. Germania Fire Ins. Co. 71 Wis. 454, 5 Am. St. Rep. 233, 37 N. W. 819.

Laws in existence are necessarily referred to in all contracts made under such laws. Sharp v. Niagara Fire Ins. Co. 164 Mo. App. 475, 147 S. W. 154.

[8] Union Fraternal League v. Walton, 109 Ga. 1, 77 Am. St. Rep. 350, 46 L.R.A. 424, 34 S. E. 317; Kaemmerer v. Kaemmerer, 231 Ill. 154, 88 N. E. 133; Freund v. Freund, 218 Ill. 189, 109 Am. St. Rep. 283, 75 N. E. 925, 35 Ins. L. J. 23.

[9] Emerigon on Ins. (Meredith's ed. 1850) 49, 555, c. 2, sec. 7.

[10] Verba conventionum secundum jus commune debent intelligi. Nam jus commune informat conventiones easque interpretatur. Et si conventio est ambigua redigiturad intellectum jur communi. Num qui contrahit præsumitur habere mentem quae congruit legis dispositioni: Id. The contract is "regulated by the general principles of justice and equity that abide in the written reason of the law:" Id. "The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence where it is made; these are necessarily referred to in all contracts, and forming a part of them, as the measure of the obligation to perform them by the one party and the right acquired by the other." McCracken v. Hayward, 2 How. (43 U. S.) 608, 612, 11 L. ed. 397, per Mr. Justice Baldwin.

[11] Franklin v. New Hampshire Fire Ins. Co. 70 N. H. 251, 47 Atl. 91, 30 Ins. L. J. 73; Laws 1879, c. 13, Pub. Stat. 1901, c. 170, sec. 18. See Hewins v. London Assur. Corp. (12 cases) 184 Mass. 177, 68 N. E. 62 considered under § 206b herein.

[12] Douglass v. County of Pike, 101 U. S. 677, 25 L. ed. 698; Louisiana v. Pilsbury, 105 U. S. 278, 294, 26 L. ed. 1090. See Knights Templars' & Masons' Life Ins. Co. v. Jarman, 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. 108, 32 Ins. L. J. 57, aff'g 104 Fed. 638, 44 C. C. A. 93, 30 Ins. L. J. 230; Lowenstein v. Fidelity & Casualty Co. 88 Fed. 474, 28 Ins. L. J. 52, aff'd Fidelity & Casualty Co. v. Lowenstein, 97 Fed. 17, 38 C. C. A. 29, 46 L.R.A. 450.

[13] Taunton Copper Co. v. Merchants' Ins. Co. 22 Pick. (39 Mass.)

So every contract of marine insurance is also presumed to have been made in view of *commercial treaties* in force between this and other maritime countries, which treaties are part of the private law of the countries parties thereto,[14] for no risk can be the subject of a valid marine insurance if the course of trade or voyage contravene either the *laws of the land or the laws of nations.*[15]

(a) The parties are presumed to have knowledge of a *city ordinance or local laws* affecting the property and risk,[16] for city ordinances which are within the police power and in the interests of the public welfare become an integral part of fire insurance contracts upon property within the fire limits to which they apply.[17]

(b) It is said in a Virginia case by the court that a *statute relating to foreign insurance companies,* and providing that they must have a citizen as a resident therein, and must act through him, must be

111. See 1 Marshall on Ins. (ed. 1810) 19, et. seq.

[14] 1 Arnould on Marine Ins. (ed. 1850) 716, s. p. 714 (8th ed; Hart and Simey) sec. 746, p. 907; Lord Stowell in The Emson, 2 Rob. Adm. Rep. 6.

[15] 1 Arnould on Marine Ins. (ed. 1850) 701, s. p. 698; Id. (8th ed. Hart and Simey) sec. 734, p. 896, where it is said "By the third section of the marine insurance act it is declared that, subject to the provisions of the act, 'every lawful marine adventure may be the subject of a contract of marine insurance.' The forty-first section declares that 'there is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.' No species of property or interest at risk on a sea venture can be the subject of a valid contract of marine insurance, if the course of trade, or the voyage, in the prosecution of which it is so exposed to risk, be in contravention either of the laws or the war policy of the country of the insurer."

[16] Brady v. Northwestern Ins. Co. 11 Mich. 425.

[17] Larkin v. Glens Falls Ins. Co. 80 Minn. 527, 81 Am. St. Rep. 286, 83 N. W. 409, 29 Ins. L. J. 833. The court, per Brown, J., said: "The question is a new one in this State, and an examination of the books discloses very few adjudged cases on the subject in other States. We have found only the following: Hamburg-Bremen Fire Ins. Co. v. Garlington, 66 Tex. 103, 18 S. W. 337; Brady v. Northwestern Ins. Co. 11 Mich. 425; Brown v. Royal Ins. Co. 1 El. & L. 853, 6 Eng. Rul. Cas. 597; Fire Association v. Rosenthal, 108 Pa. St. 474, 1 Atl. 303; Monteleone v. Royal Ins. Co. 47 La. Ann. 1563, 56 L.R.A. 784, 18 So. 472. These authorities lay down the rule that such ordinances are a part of the contract of insurance, and that the insurer is bound thereby. This is in line with the general doctrine that, where parties contract upon a subject which is surrounded by statutory limitations and requirements, they are presumed to enter into their engagements with reference to such statute, and the same enters into and becomes a part of the contract. There would seem to be no logical reason why this general rule should not apply to a case of this kind. The parties are presumed to know of the ordinances. They directly and materially affect their rights in case of a loss under the policy, and should govern and control in the adjustment and settlement of such loss."

read as a constituent part of the contract.[18] And this question arose in connection with that at issue in the case as to whether the nonpayment of premium when prevented by war avoided the contract. And it is held that it is not within the power of an insurance company incorporated in a foreign state to make such provision in its contracts as to overthrow the laws of another state in which it is permitted by its laws to transact business.[19] It is also decided that the statutes of a state in which a contract of insurance is made are as much a part of it as if incorporated in it.[20] And in Illinois the provisions of a statute in force in a state where a life insurance policy is issued become a part thereof as if embodied in the policy itself.[1] So the statute of another state must, it is decided, be considered as a part of a contract of life insurance when the policy is issued by a corporation organized under its laws.[2] And statutes which provide for construction of policies by the laws of a foreign state are held to be part of the contract.[3] So under a Missouri decision if a policy is executed in one state the statute in force respecting its subject matter becomes as much a part of the contract as if copied therein although the policy is issued, by a foreign corporation, in another state and expressly provides that it shall be construed according to the laws of that state.[4]

(c) *As to prospective or retroactive statutes, or in case of repeal or amendment* of statutes it may be stated that a certificate issued prior to the enactment of a statute is not within its provisions,[5] and if a statute is repealed before the right given thereby becomes vested by the policy, the right falls with the repeal.[6] And it is held that general statutory provisions inconsistent with a charter granted subsequently thereto are of no effect.[7] And a statutory requirement as

[18] Manhattan Life Ins. Co. v. Wadsworth, 20 Gratt. (Va.) 614, 623.

[19] Fletcher v. New York Life Ins. Co. 4 McCrary (U. S. C. C.) 440, 13 Fed. 526, 528.

[20] Union Central Life Ins. Co. v. Pollard, 94 Va. 146, 64 Am. St. Rep. 715, 36 L.R.A. 271, 26 S. E. 421. See § 190o herein.

[1] Freund v. Freund, 218 Ill. 189, 109 Am. St. Rep. 283, 75 N. E. 925, 35 Ins. L. J. 23.

[2] Nielson v. Provident Sav. Life Assur. Soc. 139 Cal. 332, 96 Am. St. Rep. 146, 73 Pac. 168. See also Nall v. Provident Savings Life Assurance Soc. — Tenn. Ch. App. —, 54 S. W. 109.

[3] New York Life Ins. Co. v. Orlopp, 25 Tex. Civ. App. 284, 61 S. W. 336.

[4] Cravens v. New York Life Ins. Co. 148 Mo. 583, 71 Am. St. Rep. 628, 53 L.R.A. 305, 50 S. W. 519, aff'd 178 U. S. 389, 44 L. ed. 1116, 20 Supp. Ct. 762. *Cited* in Smoot v. Bankers' Life Assoc. 138 Mo. App. 438, 120 S. W. 719.

[5] Lindsey v. Western Mutual Aid Soc. 84 Iowa, 734, 50 N. W. 29; Laws 21 St. Gen. Assm. Iowa, c. 65, sec. 7.

[6] Pryce v. Security Ins. Co. 29 Wis. 270, 274. *Compare* Knights Templars' & Masons' Life Ins. Co. v. Jarman, 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. 108, 32 Ins. L. J. 57, aff'g 104 Fed. 638, 44 C. C. 93, 30 Ins. L. J. 230.

[7] New York County Mutual Fire Ins. Co. v. York, 48 Me. 75.

to notice in certain cases notwithstanding a stipulation to the contrary in the policy does not become a part of the contract by a policy issued while the statute is in force so as to be operative after the statute is repealed, but the repeal simply permits the enforcement of the contract according to its own terms and conditions.[8] If a general statute is already a part of an existing contract, a subsequent enactment, with certain exemptions as to policies thereafter issued, does not apply, but an amendment thereto repealing such exemptions brings the policy within the original statute where the assured does not die until after the date of the last statute.[9] And a statute regulating assessments by mutual fire insurance companies, in force at the date of the policy, becomes a part thereof even though when the company was organized the statute was different and the then existing statute was embodied in the articles of organization and is endorsed upon the policy; and wherever the law and the language of the policy differ the law is paramount.[10] Again it is declared that while a contract is presumed to be made with reference to existing laws, still it is well established that those laws may be altered, amended or repealed without affecting the binding force of the contract, so long as a sufficient remedy is left for its enforcement. And it is held in this connection that as the legislature has power to shorten a period of limitation where a reasonable time is left within which to invoke a remedy or to prolong such period where the right to plead it has not accrued, a statute which extends the time within which suit or action may be brought upon a policy after loss is not wholly prospective in its operation but applies to policies theretofore issued, where there is nothing to indicate a purpose on the part of the legislature to limit the operation of the statute to policies thereafter to be issued.[11] But it is held in Iowa that a statute which relates to the remedy, as where a time limitation for suing is fixed by statute, is not a part of a contract issued when such statute was in force, where such en-

[8] Rosenplanter v. Provident Savings Life Assur. Soc. 96 Fed. 721, 37 C. C. A. 566, 46 L.R.A. 473.

[9] Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. 108, 32 Ins. L. J. 57, case affirming 104 Fed. 638, 44 C. C. A. 93, 30 Ins. L. J. 230.

[10] Breakstone v. Appleton Mutual Fire Ins. Co. 149 Wis. 303, 135 N. W. 853.

[11] Smith & Marsh v. Northern Neck Mutual Fire Assoc. 112 Va. 192, 38 L.R.A.(N.S.) 1016 and note, 70 S. E. 482, 40 Ins. L. J. 1018.

As to rights of parties not being changed by amendment—nonforfeiture statute, see Christensen v. New York Life Ins. Co. 160 Mo. App. 486, 141 S. W. 6; Rev. St. 1899, sec. 7897, am'd Laws 1903, p. 208.

actment was repealed reducing the time.[12] And a contract of fire insurance, stipulating as to the time within which suit may be brought after loss, is not affected by a subsequent statute relating to the time for commencing actions on policies of insurance.[13]

(d) *As to mutual companies, benefit societies and the like* the provisions of a statute authorizing the organization of mutual insurance companies are a part of the contract.[14] And if the general law of the state provides that the by-laws of an incorporated society may be changed; it enters into and forms a part of the contract.[15] So in another case in the United States Supreme Court [16] it is held that the rights and benefits given to the beneficiary by statute are a part of the contract. So where the statute specifies the classes of beneficiaries that may be named and there is an extract therefrom in the book of a fraternal benefit society containing its constitution and by-laws, the statute becomes part of the laws of the society and forms a part of every contract of insurance it makes.[17] Again where mutual insurance companies are required by statute to execute a bond for the payment of all claims such bonds will, as to the rights of principal and surety, be construed as though the statute were written therein.[18] But a statute providing for the creation of an emergency fund by assessment insurance associations does not become a part of existing contracts, so as to entitle their beneficiaries to the benefit thereof, unless the affirmative acts contemplated by the legislature for the adoption of the statute by existing companies are performed, although the constitution and by-laws of the association are changed to permit of creation of the fund, and the fund is actually accumulated.[19]

(e) If the facts involved in an insurance *total loss* bring the case

[12] Jones v. German Ins. Co. 110 Iowa, 75, 46 L.R.A. 860, 81 N. W. 188, 29 Ins. L. J. 60.

[13] Sample v. London & Lancashire Fire Ins. Co. 46 S. Car. 491, 57 Am. St. Rep. 701, 47 L.R.A. 696, 24 S. E. 334.

[14] Farmers' Mutual Ins. Co. v. Kinney, 64 Neb. 808, 90 N. W. 926; J. P. Lamb & Co. v. Merchants' National Mutual Fire Ins. Co. 18 N. Dak. 253, 119 N. W. 1048; Montgomery v. Whitbeck, 12 N. Dak. 385, 96 N. W. 327, 32 Ins. L. J. 983.

[15] Stohr v. San Francisco Musical Fund Soc. 82 Cal. 557, 22 Pac. 1125.

[16] Central Bank of Washington v. Hume, 128 U. S. 195, 206, 32 L. ed. 370, 9 Sup. Ct. 41, 16 Wash. L. Rep. 777. Other points in this case were (1) That the beneficiary in a life policy had a vested interest in the policy and the money to become due thereunder, (2) That a married man might rightfully apply a part of his earnings to insure his life for the benefit of his wife and children, where no fraudulent intent to hinder or defraud creditors appears. See chapters on beneficiaries herein.

[17] Supreme Colony United Order, Pilgrim Fathers v. Towne, 87 Conn. 644, 89 Atl. 264.

[18] Crawford v. Ozark Ins. Co. 97 Ark. 549, 134 S. W. 951.

[19] Crawford v. Northwestern Traveling Men's Assoc. 226 Ill. 57, 10 L.R.A.(N.S.) 264, 80 N. E. 736.

within regulations prescribed by statute, such statute enters into and forms part of the contract of insurance as completely as if written into it.[20]

So a valued policy statute is integrated into and made part of the policy; it supervenes all policies issued under it and writes out of them all stipulations in conflict therewith.[1] And where the statute provided that in case the property was wholly destroyed by fire the amount written in the policy should "be taken conclusively to be the true value of the property when insured," and determine the measure of damages, and the terms of the policy provided a different rule, it was decided that the provisions of the statute could not be thus changed by a stipulation contra in the policy,[2] and it is so held in Texas,[3] for a policy stipulation as to liability in case of total loss by fire is of no validity when repugnant to the statutory provision on that point.[4] Where concurrent policies of insurance on property afterward destroyed were written with the consent of the respective companies, the aggregate amount of such insurance written in the policies is the value of property as stipulated in each policy, and must be regarded as conclusive not only as to the true value of the property when insured, but also as to the true amount of loss and measure of damages when destroyed, under the provisions of the Wisconsin statute, which must be regarded as a part of the contract of insurance.[5]

(f) *As to representations and warranties:* In a case which arose

[20] Havens v. Germania Fire Ins. Co. 123 Mo. 403, 45 Am. St. Rep. 570, 26 L.R.A. 107, 27 S. W. 718.

[1] Western Assurance Co. v. Phelps, 77 Miss. 625, 27 So. 745, 29 Ins. L. J. 506.

A valued policy law is to be treated as if incorporated in the policy. Sharp v. Niagara Fire Ins. Co. 164 Mo. App. 475, 147 S. W. 154.

[2] Reilly v. Franklin Ins. Co. 43 Wis. 449, 28 Am. Rep. 552; Oshkosh Gaslight Co. v. Germania Fire Ins. Co. 71 Wis. 454, 5 Am. St. Rep. 233, 37 N. W. 819; 1 Sanborn & B. Ann. Stat. 1889, sec. 1943. See Wall v. Equitable Life Assurance Soc. 32 Fed. 273, 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. 822.

[3] Queen Ins. Co. v. Jefferson Ice Co. 64 Tex. 578; Tex. Rev. Stat. sec. 2971.

[4] Hartford Fire Ins. Co. v. Bourbon County Court, 24 Ky. L. Rep. 1850, 72 S. W. 739.

See also New Orleans Real Estate Mortgage & Securities Co. v. Teutonia Ins. Co. 128 La. 45, 54 So. 466, 40 Ins. L. J. 999; Havens v. Germania Fire Ins. Co. 123 Mo. 403, 26 L.R.A. 107, 27 S. W. 718, 45 Am. St. Rep. 570; Hickerson v. Germania Ins. Co. 96 Tenn. 193, 32 L.R.A. 172, 33 S. W. 1041; Dugger v. Mechanics' & Traders' Ins. Co. 95 Tenn. 245, 28 L.R.A. 796, 32 S. W. 5. Milwaukee Mechanics' Ins. Co. v. Russell, 65 Ohio St. 230, 56 L.R.A. 159, 62 N. E. 338; Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 9 L.R.A. 45, 24 N. E. 1072. *Compare* Burkett v. Georgia Home Ins. Co. 105 Tenn. 548, 58 S. W. 848.

[5] Oshkosh Gas Light Co. v. Germania F. I. Co. 71 Wis. 454, 5 Am. St. Rep. 233, 37 N. W. 819.

in Kentucky [6] it was held that a provision in a statute "that all statements and descriptions in any application for a policy of insurance shall be deemed and held representations and not warranties, nor shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy," was but declaratory of the law then existing in that state. It was further declared by the court that the very purpose of the statute was to bring such representations and warranties within its provisions, and to prevent the insured from losing his indemnity upon either a representation or warranty that was not fraudulent or material to the risk, and when parties have entered into an insurance contract since the adoption of this statute they must be held as contracting with reference to the statutory provision. So much of the opinion in the case of the Farmers' and Drovers' Insurance Company v. Curry [7] which held a contrary view was declared overruled. This latter case held that when the parties undertake in the policy to declare the meaning and effect of its stipulations, they have the right to do so, and cannot be controlled by statute.[8] Under a Pennsylvania statute,[9] which declared that any statement in an application for a life policy, though incorrect, should not, if made in good faith, avoid the policy or be a ground of defense, it was held that this was binding, though the insured in his application warranted all statements therein to be true, and that if untrue the policy should be void notwithstanding any statute or law to the contrary.[10]

(g) *As to stipulations in the policy contrary to statutory requirements:* Emerigon,[11] in considering the question whether one might stipulate agreements contrary to the Ordonnance,[12] which provided in terms what the policy should contain, but also provided in addition that it might contain all other covenants the parties should choose to agree upon, states the rule to be substantially this: that it might be varied from in all points not expressly prohibited and which did not concern the essence of the contract nor good morals

[6] Germania Ins. Co. v. Rudwig, 80 Ky. 223, under Ky. Gen. Stat. 1887, p. 308.

[7] 13 Bush (Ky.) 312, 26 Am. Rep. 194.

[8] See Barre Boot Co. v. Mulford Mutual Fire Ins. Co. 7 Allen (89 Mass.) 42; Chamberlain v. New Hampshire Fire Ins. Co. 55 N. H. 249.

[9] Act Pa. June 23, 1885.

[10] Barre Boot Co. v. Mulford Mutual Fire Ins. Co. 7 Allen (89 Mass.) 42; Hermany v. Fidelity Mutual Life Assn. 151 Pa. St. 17, 24 Atl. 1064. *Examine* as to representations and warranties, §§ 1882 et seq., and 1942 et seq. herein.

Examine Germania Ins. Co. v. Rudwig, 80 Ky. 223. See McElroy v. Continental Ins. Co. 48 Kan. 200, 29 Pac. 478, where it was held that the statute of limitations in the state did not conflict with that in the policy.

[11] Emerigon on Ins. (Meredith's ed. 1850) 48.

[12] De la Marine, art. 3, des assur.

nor public policy. It is also declared by a well-known writer [13] that "the right of the parties by a positive stipulation and within certain limits to vary or prevent the application of any of the rules of law by which their rights and liabilities under the contract are defined and governed, is undoubted." It will be observed that Mr. Duer's statement, if it be held to be the law, is so far qualified by the words "within certain limits," that it offers a wide field for controversy and construction. Whether the parties may evade the positive requirements of a statute in its nature mandatory, or which contain provisions in the nature of conditions precedent to acquiring certain rights, is one thing; whether they may waive requirements calculated to benefit one of the parties is another matter, and whether they may waive positive prohibitions presents still another question. Emerigon's rule above stated is reasonable, beyond that, and rulings that parties cannot by agreement evade the operation of laws which contain requirements in the nature of conditions precedent to acquiring certain rights, the decisions are not clearly in harmony, with the exception perhaps that courts seem inclined, as a rule, to favor that construction which shall benefit the assured: [14] and the general rule also seems to be that no contract can change laws in existence, and stipulations in a policy must yield to the statute.[15] So policy conditions repugnant to the statute are not binding as they are invalid.[16] And stipulations in the policy which are not in conformity with statutory requirements are not binding [17] for statutes are paramount to repugnant or conflicting contracts or stipulations therein.[18] And clauses of a policy which are inconsistent with statutory requirements and which materially change the scheme of the contract as outlined by such statutory requirements and prohibitions are unauthorized and invalid.[19] And departure from the exact form of

[13] 1 Duer on Ins. (ed. 1845) 271.

[14] See § 1916 herein.

[15] Sharp v. Niagara Fire Ins. Co. 164 Mo. App. 475, 147 S. W. 154.

[16] Merchants' Ins. Co. v. Stephens, 22 Ky. L. Rep. 999, 59 So. 511.

[17] Equitable Life Assurance Soc. v. Wilson, 110 Va. 571, 3 Va. App. 943, 66 S. E. 836. See also Burruss v. National Life Assoc. 96 Va. 543, 1 Va. Sup. Ct. Rep. 57, 32 S. E. 49.

[18] Marston v. Kennebec Mutual Life Ins. Co. 89 Me. 266, 56 Am. St. Rep. 412, 36 Atl. 389.

[19] Franklin Life Ins. Co. v. Commissioner of Insurance, 159 Mich. 636, 124 N. W. 522, 16 Det. L. N. 994, 39 Ins. L. J. 468, pub. acts 1907, No. 187, sec. 1, subdvs. 1 and 2. The court, per Blair, J., said: "As we have heretofore held, 'the requirement that certain provisions shall be and certain others shall not be incorporated in the policy requires us to say that no provisions should be inserted which have the effect of avoiding or nullifying the required provisions,' and 'no provision may rightfully be used which shall, with or without action of the policyholder, materially change or avoid the statute scheme of the contract.' Mutual Benefit Life Ins. Co. v. Commissioner of Insurance, 151 Mich. 610, 115 N. W. 707. Prior to the enactment of the statute, it was optional

life policy required by statute which are not beyond doubt, as advantageous to the insured and as desirable as the prescribed provision, and which are not in accordance with public policy are invalid.[20] So an application which is not made a part of the policy in the manner provided by statute is not a part thereof, although the policy so provides.[1] And a separate agreement contrary to a statute prohibiting discriminating between policy holders is void.[2]

While a nonforfeiture statute is part of the contract,[3] still where the statute provides for nonforfeiture, after payment of two full annual premiums, and also provides for temporary insurance, this cannot be changed by a stipulation in the policy requiring the payment of three full annual premiums before insured can claim temporary insurance, such stipulation being void.[4]

And a statutory provision in the nature of a statutory limitation of actions on insurance policies cannot be eliminated from a policy by providing therein that the contract is wholly embraced in its terms and that of the application.[5] So a time limitation for suing in a policy contrary to the express prohibition of the statute as to such stipulations is not enforceable.[6] But a statute prescribing a

with the parties what provisions the contract should contain upon the subject of payment. Since the passage of the act it has ceased to be optional with the parties and authorities construing the contract independent of the statute are not conclusive. . . . The question of waiver has no application to the case. The respondent's inquiry is limited to a consideration of the question whether the policy forms submitted are in compliance with the statute."

[20] New York Life Ins. Co. v. Hardison, 199 Mass. 190, 127 Am. St. Rep. 478, 85 N. E. 410, 37 Ins. L. J. 848. See also, Ætna Life Ins. Co. v. Hardison (Travelers Ins. Co. v. Hardison) 199 Mass. 181, 85 N. E. 407, 37 Ins. L. J. 818.

[1] Imperial Fire Ins. Co. v. Dunham, 117 Pa. St. 460, 2 Am. St. Rep. 686, 12 Atl. 668; act Pa. May 11 1881. See §§ 186–187a, 190, 190a herein.

[2] Commonwealth Life Ins. Co. v. Bowling (1908) — Ky. —, 114 S. W. 327.

[3] Christensen v. New York Life Ins. Co. 160 Mo. App. 486, 141 S. W. 6. *Compare* Citizens Life Ins. Co. v. McClure, 138 Ky. 138, 27 L.R.A. (N.S.) 1026, 127 S. W. 749, *considered* hereafter in this section.

[4] Wall v. Equitable Life Assurance Soc. 32 Fed. 273, 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. 822, Rev. Stat. Mo. sec. 5983. But see Caffery v. John Hancock Mutual Life Ins. Co. (U. S. C. C.) 27 Fed. 25.

[5] Vose v. Hawkeye Ins. Co. 76 Iowa, 548, 41 N. W. 300; Acts 18th Gen. Assembly Iowa, 1880, c. 211, sec. 3. Same effect, Taylor v. Merchants' & Bankers' Ins. Co. 83 Iowa, 402, 49 N. W. 994; same statute, Marden v. Hotel Owners' Ins. Co. 85 Iowa, 584, 52 N. W. 509.

[6] General Accident Fire & Life Assur. Co. v. Walker, 99 Miss. 404, 55 So. 51, 40 Ins. L. J. 1504.

As to time limitation in standard fire policy, see Bellinger v. German Ins. Co. 100 N. Y. Supp. 424, 113 App. Div. 917.

As to the right of the legislature to shorten or prolong the period of limitation for suing, see Smith & Marsh v. Northern Neck Mutual Fire Assoc. 112 Va. 192, 38 L.R.A.(N.S.)

period in which relief can be obtained from contracts secured by fraud has no effect upon an incontestable clause in a life insurance policy, although such clause makes the policy incontestable in a much shorter time than the statute allows for obtaining relief from a fraudulent contract.[7] And conditions annexed to the policy concerning notice and proof of loss may control a statutory provision, as we have already seen.[8]

Under a California decision the parties to a contract of *rent insurance* may stipulate for a method of ascertaining and computing the loss notwithstanding the statute provides that the sole object of insurance is indemnity.[9]

(h) *Express statutory provisions making void policy stipulations contra.* If by the terms of a statute any stipulation in a policy contrary to its provisions shall be void it imposes a condition upon every policy thereafter issued notwithstanding any stipulation in the policy to the contrary. It is an independent and binding obligation overriding and nullifying any stipulation of the parties.[10] And stipulations in conflict with a standard policy statute are void where the enactment expressly so provides.[11] But a statutory requirement that every contract of life insurance shall contain a certain provision under penalty of having the insurer's license withdrawn does not become a part of a policy which does not contain such a provision.[12]

(i) *As to waiver:* There cannot be any waiver of statutory provisions requiring a standard form of fire policy where the statute expressly precludes waiver being set up by the company.[13] Nor, it is held, can the benefits of a statute be waived and renounced by the policy-holders of a purely mutual fire insurance company so as to

1016 and note, 70 S. E. 482, 40 Ins. L. J. 1018; Jones v. German Ins. Co. 110 Iowa, 75, 46 L.R.A. 860, 81 N. W. 188, 29 Ins. L. J. 60. *Considered* ante under this section.

[7] Citizens' Life Ins. Co. v. McClure, 138 Ky. 138, 27 L.R.A.(N.S.) 1026, 127 S. W. 749.

[8] Eastern Railroad Co. v. Relief Ins. Co. 98 Mass. 420.

[9] Whitney Estate Co. v. Northern Assur. Co. 155 Cal. 521, 23 L.R.A. (N.S.) 123, 18 Am. & Eng. Ann. Cas. 512, 101 Pac. 911.

[10] Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. 108, 32 Ins. L. J. 57, case affirms 104 Fed. 638, 44 C. C. A. 93, 30 Ins. L. J. 230.

[11] Franklin v. New Hampshire Fire Ins. Co. 70 N. H. 251, 47 Atl. 91, 30 Ins. L. J. 73; Laws 1879, c. 13, Pub. Stat. 1901, c. 170, sec. 18. See also Gleason v. Canterbury Mutual Fire Ins. Co. 73 N. H. 583, 64 Atl. 187, 35 Ins. L. J. 932.

[12] Equitable Life Assur. Soc. v. Babbitt, 11 Ariz. 116, 13 L.R.A. (N.S.) 1046 (annotated on effect of statute providing for application of reserve to the purchase of extended or paid-up insurance), 89 Pac. 531. See also Straube v. Pacific Mutual Life Ins. Co. 123 Cal. 677, 56 Pac. 546.

[13] Franklin v. New Hampshire Fire

prevent the statute from operating upon its contracts.[14] It is also decided that there cannot be a waiver of statutory provisions requiring policies to be construed by the laws of a foreign state.[15] But a statutory provision may be waived by a stipulation contra in the policy where such waiver is not against public policy and public policy favors the stipulation.[16]

§ 194a. Same subject: what statutes are and are not part of contract: miscellaneous cases.—A statute authorizing reinsurance or the taking over of another company's risks become a part of the contract.[17] And a statute which permits only the Attorney General to apply for the appointment of a receiver constitutes a part of every contract of the state insurance company and even to policyholders who are citizens of foreign states.[18] So a statute requiring notice through the mails of annual premiums due is part of the contract.[19] A statute does not, however, apply where the policy was never issued and a receipt for the first premium and the application constitute the only evidence of a contract, and the acceptance of the application does not aid a recovery where the insured was not in sound health when the policy was issued and one of the conditions was that he should be in sound health at the date of issuance and delivery of the policy.[20]

§ 195. Indorsements: marginal references: when part of policy: when not.—Where an indorsement is made upon the policy, it must appear that the parties intended that it should be considered a part thereof.[1] An indorsement is construed as a part of the policy when expressly referred to therein, and when so referred to it makes no difference that it is upon the back of the policy,[2] and the words and figures may be written transversely.[3] So words and figures written in the margin are generally a part of the policy.[4] A memorandum

Ins. Co. 70 N. H. 251, 47 Atl. 91, 30 Ins. L. J. 73; Laws 1879, c. 13, Pub. Stat. 1901, c. 170, sec. 18.

[14] Word v. Southern Mutual Ins. Co. 112 Ga. 585, 37 S. E. 897.

[15] New York Life Ins. Co. v. Orlopp, 25 Tex. Civ. App. 284, 61 S. W. 336.

[16] Mutual Life Ins. Co. v. Durden, 9 Ga. App. 797, 72 S. E. 295.

[17] Federal Life Ins. Co. v. Risinger, 46 Ind. App. 146.

[18] Brown v. Equitable Life Assur. Soc. 142 Fed. 835, S. C. Equitable Life Assoc. v. Brown, 213 U. S. 25, 53 L. ed. 682, 29 Sup. Ct. 404. But *compare* as to policies issued to citizens of foreign states, American Credit Indemnity Co. v. Carrollton Furniture Mfg. Co. 95 Fed. 111, 36 C. C. A. 671.

[19] Nall v. Provident Savings Life Assurance Soc. — Tenn. Ch. App. —, 54 S. W. 109.

[20] Commonwealth Life Ins. Co. v. Davis, 136 Ky. 339, 124 S. W. 345.

[1] Planters' Mutual Ins. Co. v. Rowland, 66 Md. 236, 240, 7 Atl. 257.

[2] St. Clair County Benevolent Soc. v. Fietsam, 97 Ill. 474; Harris v. Eagle Fire Ins. Co. 5 Johns. (N. Y.) 368. See § 196 herein.

[3] Kenyon v. Berthon, Doug. 12, n.

[4] McLaughlin v. Atlantic Ins. Co. 57 Me. 170; Pierce v. Charter Oak Life Ins. Co. 138 Mass. 151; DeHahn

written on the margin prior to its execution and delivery enters into the construction of the instrument, and is a part thereof,[5] and all intendments are in favor of construing a policy as nonforfeitable where so defined in its margin.[6] So words and printed figures on the margin relating to payment of premiums are part of the policy.[7] The same is true of a description of goods in the margin,[8] and the marginal words "against actual total loss" may limit the liability.[9] It is held, however, that the fact that the indorsement is written on the policy does not necessarily make it a part thereof.[10] So where a fire policy was indorsed with a proviso that when an alteration in the property was intended to be made that certain steps should be taken to determine whether the risk would be thereby increased, it was held that such indorsement did not form a part of the policy unless referred to therein as such.[11]

§ 195a. Same subject.—Agreements, benefits and privileges stated on subsequent pages are made a part of the contract as fully as if recited at length over the signatures affixed where such an express agreement appears upon the face of a life policy.[12] And if a life insurance policy appears on one sheet of paper embracing four pages, the first containing the main contract, the next certain printed conditions and agreements, the next the application and certain acknowledgments and agreements of the applicant, and the last the usual indorsement indicating that the folded paper contains a policy on the life of the insured, the policy consists of the whole document, and an offer to submit it in evidence carries everything on

v. Hartley, 1 Term Rep. 343, 14 Eng. Rul. Cas. 171; Cochran v. Retberg, 3 Esp. 121.

[5] Patch v. Phœnix Mutual Life Ins. Co. 44 Vt. 487. See Emerson v. Murray, 4 N. H. 171, 17 Am. Dec. 407. For case where memorandum not a part, see McQuitty v. Continental Life Ins. Co. 15 R. I. 573, 10 Atl. 635.

[6] Cowles v. Continental Life Ins. Co. 63 N. H. 300.

[7] Pierce v. Charter Oak Life Ins. Co. 138 Mass. 151.

[8] Guerlain v. Columbian Ins. Co. 7 Johns. (N. Y.) 527.

[9] Bart v. Brewers' & Malsters' Ins. Co. 78 N. Y. 400, 9 Hun (N. Y.) 383.

That indorsements and marginal references are part of the policy, see also, Alabama Gold Life Ins. Co. v. Thomas, 74 Ala. 578; Wright v. Mutual Benefit Life Assoc. 118 N. Y. 237, 6 L.R.A. 731, 23 N. E. 186, 16 Am. St. Rep. 749, 43 Hun (N. Y.) 61.

The clause "camphene cannot be used in building" is part: Mead v. North Western Ins. Co. 7 N. Y. 530.

[10] Stone v. United States Casualty Co. 34 N. J. L. 371; Caraher v. Royal Ins. Co. 63 Hun (N. Y.) 82, 17 N. Y. Supp. 858, 44 N. Y. St. Rep. 141.

[11] Planters' Mutual Ins. Co. v. Rowland, 66 Md. 236, 240, 7 Atl. 257; Mullaney v. National Fire & Marine Ins. Co. 118 Mass. 393. See further as to when indorsement and marginal reference not a part, Kingsley v. New England Mutual Fire Ins. Co. 8 Cush. (62 Mass.) 393.

[12] Grell v. Sam Houston Life Ins. Co. (1913) — Tex. Civ. App. —, 157 S. W. 756.

the four pages, rendering it unnecessary to thereafter offer specially the copy of the application for the policy in order to get it before the court.[13] Again, where it is obviously so intended an indorsement upon a previously issued policy may operate *as equivalent to an entirely new and distinct policy* containing all the stipulations of the indorsed upon contract save those the adoption of which the indorsement negatives, either expressly or by necessary implication.[14] And where the form used for a *policy of reinsurance* was one primarily intended for the insurance of property by its owners and only one of the printed conditions was applicable such form may be made applicable in part by a slip pasted upon the face of the policy.[15] And where by express language the *indorsement on a certificate* provides that it with the application shall constitute the complete and only contract they will be construed together as one instrument.[16]

§ 196. Indorsements continued: conditions annexed to policy, etc.: when and when not part of same.—Conditions, although on another paper, may be made a part of the policy by reference when annexed thereto,[17] and where the conditions are annexed to and delivered with a policy, they are prima facie a part thereof, although not referred to in the policy.[18] So the proposals and conditions attached to a policy form part of the contract, the same as if written in the body of it.[19] And an iron safe clause slip attached to the policy and referred to in a descriptive attached slip as subject thereto constitutes a part of the policy.[20] So, also, where a policy of insurance is made "as per form attached," it is held that the provisions of the attached form must prevail over the inconsistent provisions stated in the body of the policy.[1] And a partly printed partly written unsigned paper with a marginal note which is pinned to, delivered and accepted with the policy is held a part of the contract even though said paper is different in texture, color and quality and notwithstanding the policy provision that the contract

[13] Grevening v. Washington Life Ins. Co. 112 La. 879, 104 Am. St. Rep. 474, 36 So. 790.

[14] Corporation of London Assurance v. Paterson, 106 Ga. 538, 32 S. E. 650, 28 Ins. L. J. 385.

[15] Royal Ins. Co. v. Vanderbilt Ins. Co. 102 Tenn. 264, 52 S. W. 168, 28 Ins. L. J. 910.

[16] Covenant Mutual Life Assoc. v. Tuttle, 87 Ill. App. 309.

[17] Jennings v. Chenango Mutual Ins. Co. 2 Denio (N. Y.) 75.

Riders or slips as part of contract: standard policy, see § 191b herein.

[18] Murdock v. Chenango Mutual Ins. Co. 2 N. Y. (2 Const.) 210; Hyatt v. Wait, 37 Barb. (N. Y.) 29.

[19] Duncan v. Sun Fire Ins. Co. 6 Wend. (N. Y.) 488, 22 Am. Dec. 539. *Examine* Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567.

[20] City Drug Store v. Scottish Union & National Ins. Co. — Tex. Civ. App. —, 44 S. W. 21.

[1] St. Paul Fire & Marine Ins. Co. v. Kidd, 55 Fed. 238, 5 C. C. A. 88, 14 U. S. App. 201, 22 Ins. L. J. 457.

is completely set forth therein together with the application therefor and that none of its terms can be modified except by an agreement in writing properly signed.[2] Where, however, the insured accepts a policy with conditions printed on the other half of the sheet with the policy or any sheet physically attached, the intent that the two shall be taken together is presumed, although they are not referred to, but it may be shown that they were annexed by mistake.[3]

(a) *Conditions and stipulations when indorsed upon the back of a policy,* when properly referred to in the body of the instrument, became a part of the contract the same as if recited therein but they are not a part of the contract and must be ignored in construing it if no sufficient reference to such indorsed conditions and stipulations is made upon the face of the policy.[4] And the reference must be made expressly to the matters indorsed on the back of the policy or certificate. A general reference on the face of the contract to all the conditions therein named is insufficient.[5] If the insured agrees on the face of the policy that the insurance shall be "subject to all the conditions indorsed hereon" such conditions are binding upon him as a part of his contract.[6] So conditions printed on the back and referred to in the body of the policy as follows: "In conformity with the annexed conditions." are part of the contract, even though they are unsigned.[7] And where the policy provides that it is issued "on the special conditions stated on the back of this policy, which are hereby accepted by the assured as part of this contract," the insured is bound by the conditions so referred to.[8] Again, indorsements on the back of a policy form a constituent part of the contract where they supply certain essentials necessary to complete said contract which essentials do not appear upon the fact thereof and both the face and back of the policy will constitute the contract, where such indorsements are duly

[2] Timlin v. Equitable Life Assur. Soc. of the U. S. 141 Wis. 276, 124 N. W. 253, 39 Ins. L. J. 295 *criticised* in note Id. 302–306. See also Forman v. Mutual Life Ins. Co. (1917) — Ky. —, — S. W. —, 49 Ins. L. J. 139, and note 154. *Compare* Co-operative Ins. Assoc. of San Angelo v. Ray, — Tex. Civ. App. —, 138 S. W. 1122.

[3] Crigler v. Standard Fire Ins. Co. 49 Mo. App. 11; Roberts v. Chenango Mutual Ins. Co. 3 Hill (N. Y.) 501; See Murdock v. Chenango Mutual Ins. Co. 2 N. Y. (2 Comst.) 210.

[4] Burbank v. Pioneer Mutual Ins. Assoc. 60 Wash. 253, Ann. Cas. 1912B, 762, 110 Pac. 1005, *quoting* a similar rule from Planters' Mutual Ins. Co. v. Rowland, 66 Md. 236, 240, 7 Atl. 257.

[5] Page v. Knights & Ladies of America (1900) — Tenn. Ch. —, 61 S. W. 1068. See § 196 herein.

[6] Brown v. United States Casualty Co. (U. S. C. C.) 88 Fed. 38, 27 Ins. L. J. 951, dismissed 90 Fed. 829.

[7] Kensington National Bank v. Yerkes, 86 Pa. St. 227.

[8] Porter v. United States Life Ins. Co. 160 Mass. 183, 35 N. E. 678.

signed.[9] And an indorsement on the back of a policy with the president's and secretary's name printed under such indorsement makes the whole policy the contract of the insurer where the president has also signed his name on the face of the policy.[10] The indorsement on the back of a *certificate of membership* and policy must be construed together with the face of the certificate.[11] But an indorsement printed on the back of a policy designating its nature is no part thereof and insured cannot be held to have relied upon it rather than on the terms of the instrument.[12] And the insured cannot generally be held bound by conditions which are printed on the back in small type where they have not been called to his attention, for usually the policy is transmitted to the insured after the agent and the insured have contracted, after the premium has been paid, and under circumstances which put it out of the power of the insured to object to such provisions inserted in it as were not in his mind or in the oral understanding which was had when he paid the premium.[13]

§ 197. Whether premium note part of policy.—The premium note, together with the application and policy, are generally parts of the same transaction, and are to be construed together in determining the rights of the parties,[14] especially so in case of ambiguity.[15] It is also held that a promissory note given for a premium is a part of the contract, and therefore inadmissible to change the terms of the policy in relation to forfeiture.[16] So a condition in a note of forfeiture for nonpayment of premium is held to be nugatory where the policy contains no such provision and no condition that it should not take effect until the premium is paid, but is executed on the theory that the

[9] Bushnell v. Farmers' Mutual Ins. Co. 81 Mo. App. 523. See § 212 herein.

[10] Equitable Life Assurance Soc. of U. S. v. Menth, 145 Ky. 160, 140 S. W. 157, modified 145 Ky. 746, 141 S. W. 37, Annot. Cas. 1913B, 661 and note 663, as to sufficiency of printed signature within statute of frauds.

[11] Smoot v. Bankers' Life Assoc. 138 Mo. App. 438. 120 S. W. 719.

[12] Hill v. Travelers' Ins. Co. 146 Iowa 133, 28 L.R.A.(N.S.) 742 and note, 124 N. W. 898.

Ferrer v. Home Mutual Ins. Co. 47 Cal. 416, holds that an indorsement on the back of the policy of the name and place of business of the company by which it is issued forms no part of the policy. In this case the copies contained in the complaint did not contain this indorsement, and when the policies were offered in evidence defendant objected on the ground of not being annexed to or contained in the complaint. Warwick v. Scott, 4 Camp. 62; Hygum v. Ætna Ins. Co. 11 Iowa, 21.

[13] Bassell v. American Fire Ins. Co. 2 Hughes (U. S. C. C.) 531, 536, Fed. Cas. 1094.

[14] Schultz v. Hawkeye Ins. Co. 42 Iowa, 239; American Ins. Co. v. Stoy, 41 Mich. 385, 1 N. W. 877.

[15] Kimbro v. Continental Ins. Co. 101 Tenn. 245, 47 S. W. 213.

[16] New England Mutual Life Ins. Co. v. Hasbrook, 32 Ind. 447.

note is accepted as payment of the premium, and that the policy is to take effect upon the acceptance of the note and the delivery of the policy.[17] Where the note is not accepted as absolute payment it is inadmissible to contradict the terms of the policy.[18] It is also held that the premium note is so far a collateral instrument that the courts will not permit it to be construed so as to defeat the manifest intent of the parties expressed in the policy, as in a case where the terms of the note in relation to forfeiture are inconsistent therewith.[19] Other cases hold that the premium note and the policy issued by a mutual company are independent contracts.[20]

§ 197a. Same subject: statutory provisions: standard policy.—A statute may operate to preclude certain defenses where a copy of the premium note is not endorsed upon or attached to the policy.[21] And where the statute expressly provides that the policy and deposit note given therefor are one contract,[1] a premium note given on a mutual fire policy forms a part of the contract of insurance, even though it is neither copied in full into the policy, nor written upon its margin, nor across its face, nor attached to it by slip or rider, according to the statute relating to the form and use of the standard policy.[2]

§ 198. Usage: how far a part of policy.—It has been constantly adjudicated that all usages which are so well established and so well known as that parties engaged in the trade to which the usage relates are presumed to have contracted in reference thereto, become as much a part of the policy as if written therein in terms.[3]

[17] Dwelling House Ins. Co. v. Hardie, 37 Kan. 674, 16 Pac. 92.

[18] Continental Ins. Co. v. Dorman, 125 Ind. 189, 25 N. E. 213.

[19] Fithian v. Northwestern Life Ins. Co. 4 Mo. App. 386.

[20] American Ins. Co. v. Gallahan, 75 Ind. 168; New England Mutual Fire Ins. Co. v. Butler, 34 Me. 451; Shaw v. Republic Life Ins. Co. 67 Barb. (N. Y.) 586.

[21] Summers v. Des Moines Ins. Co. 116 Iowa, 503, 88 N. W. 326, Iowa Code sec. 1741, nonpayment of note precluded as defense. See also Dubuque Fire & Marine Ins. Co. v. Oster, 74 Ill. App. 139, Iowa Stat. Gen. sec. 1733, of 18th Gen. Assemb. (McClain's Iowa Code, sec. 2), c. 211, claim of forfeiture not a defense.

[1] Me. Rev. Stat. c. 49, sec. 30. Under original act Laws 1868 c. 194 "policy and note shall be treated as parts of the same contract."

[2] Russell v. Oxford County Patrons of Husbandry Mutual Fire Ins. Co. 107 Me. 362, 78 Atl. 459. "If it may have been a debatable question whether this provision (which is now sec 30, c. 49) declaring that a policy and deposit note are one contract was so far inconsistent with the provisions of the statute of 1895, establishing and requiring the use of a standard form of insurance policy, as to be repealed thereby, that question was entirely eliminated by the revision of the statutes in 1903 whereby sec. 30 was enacted equally with the other provisions of c. 49, relating to the form and use of the standard policy." Id. per King, J.

[3] Colorado Ins. Co. v. Catlett, 12 Wheat. (25 U. S.) 383, 6 L. ed. 664;

But such inference is repelled where the express terms of the policy itself by implication shows on its face an intent to contract without reference to usage,[4] for the parties may undoubtedly make whatever contract they please in this respect.[5] An express contract is always admissible to supersede or vary or control usage or custom, for the latter may always be waived at the will of the parties.[6] Insurers, says the Connecticut supreme court, "are presumed to act and contract in reference to known and general usage, and to submit to it, and such general usage may be well enough said to become a part of all their contracts." [7] So Lord Mansfield declares that "every man who contracts under a usage does it as if the point of usage were inserted in the contract in terms." [8] The established

Renner v. Bank of Columbia, 9 Wheat. (22 U. S.) 581, 6 L. ed. 166; Gracie v. Marine Ins. Co. 8 Cranch (12 U. S.) 75, 3 L. ed. 492; Rogers v. Mechanics' Ins. Co. 1 Story (U. S. C. C.) 603, 607, 608, Fed. Cas. 12,016; Martin v. Delaware Ins. Co. 2 Wash. (U. S. C. C.) 254, Fed. Cas. 9161; Trott v. Wood, 1 Gall. (U. S. C. C.) 443, Fed. Cas. 14,190; Union Ins. Co. v. American Fire Ins. Co. 107 Cal. 327, 28 L.R.A. 692, 40 Pac. 431, 48 Am. St. Rep. 140; Taunton Copper Co. v. Merchants' Ins. Co. 22 Pick. (39 Mass.) 111; Stevens v. Reeves, 9 Pick (26 Mass.) 198; Brough v. Whitmore, 4 Term Rep. 206, per Butler, J. See Savage v. Salem Mills Co. 48 Oreg. 1, 10 Amer. & Eng. Ann. Cas. 1065, 85 Pac. 69; McClusky v. Klosterman 20 Oreg. 108, 10 L.R.A. 785, 25 Pac. 366.

Usage; incorporation of; construction, see Earl of Halsbury's Laws of England, pp. 344 et seq.

As to construction etc.; usage, see §§ 237–259 herein.

[4] Mobile Marine Dock & Mutual Ins. Co. v. McMillan, 27 Ala. 77, and see cases cited in last note. Vardeman v. Penn Mutual Life Ins. Co. 125 Ga. 117, 54 S. E. 66, 5 Amer. & Eng. Annot. Cas. 221.

[5] Parsons on Marine Ins. (ed. 1868) p. 88. See § 245 herein.

[6] The Schooner Reeside, 2 Sum. (U. S. C. C.) 567, 570, Fed. Cas. 11,657, per Story, J.

[7] Crosby v. Fitch, 12 Conn. 422, 31 Am. Dec. 745.

[8] Mason v. Skurray, U. P. Case, per Lord Mansfield, *cited* in 1 Marshall on Ins. (ed. 1810) 226. "Such usages form part of the law-merchant, and to incorporate them with the policy is merely to admit the addition of known terms not inconsistent with the tenor of the instrument and well understood by the contracting parties:" 1 Arnould on Ins. (Perkins' ed.) 71; s. p. 72; Id. p. 66, sec. 42; Id. 65 side p. 66. "Whatever is usually done is presumed to be foreseen and to be in the contemplation of the parties in making the contract, and is, therefore, understood to be referred to by every policy, and to make a part of it much as if it were express:" 1 Marshall on Ins. (ed. 1810) 186, *citing* Pelly v. Royal Exch. Assur. Co. 1 Burr. 348, 14 Eng. Rul. Cas. 30. "While the usage is established, it becomes part of the contract, and has the same effect upon the construction of the policy as if it were adopted by express words:" 1 Duer on Ins. (ed. 1845) p. 195, secs. 42, 43, et seq. p. 271. The introduction of a clause referring to usage is superfluous, "since the contract itself by legal construction, and without any express provision, fully provides for all that can be effected by a general clause of this description:" 1 Phillips on Ins. sec. 36.

usage as to the course of a voyage constitutes a part of the policy as much so as if expressed therein in terms.[9] So "what is usually done by such a ship with such a cargo in such a voyage is understood to be referred to by every policy, and to make a part of it as much as if it were expressed."[10] In this case the usage was to store rigging in a particular manner universal with all European ships for many years: so a general usage among shipowners and underwriters in relation to the settlement of average loss, if known to the parties, becomes part of the contract, and binds them.[11] In marine insurances "every policy, then, in the absence of any express stipulation to the contrary, is generally read as though it contained on the face of it an exemption in terms against liability" for goods carried on deck contrary to the usage of trade in like cases,[12] and a usage of a mutual benefit association that a question whether a member was a Mason in good standing should be decided by Masonic tribunals, is held to be as conclusively a part of the contract of insurance as though it provided so in terms.[13] Mr. Duer, in considering how far an illegal usage enters into and becomes a part of the contract of insurance, says "an illegal usage does not become a part of the contract merely by the consent of the insurers to assume its risk, but it does become a part of the contract where the effect of the policy is to sanction and encourage a practice which the law condemns, and in such cases the insurance is doubtless void."[14]

[9] Bulkeley v. Protection Ins. Co. 2 Paine (U. S. C. C.) 82, Fed. Cas. 2,118; Eyre v. Marine Ins. Co. 5 Watts & S. (Pa.) 116; Salvador v. Hopkins, 3 Burr. 1707, 1714, per Lord Mansfield; 1 Arnould on Marine Ins. (ed. 1868) 69, 360, side pp. 70, 354.

[10] Pelly v. Royal Exch. Assur. Co. 1 Burr. 341, 350, 14 Eng. Rul. Cas. 30, per Lord Mansfield.

[11] Sanderson v. Columbia Ins. Co. 2 Cranch (U. S. C. C.) 218.

[12] 1 Arnould on Marine Ins. (Perkins' ed.) 1850, 68, 69 (*citing* Taunton Cop. Co. v. Merchants' Ins. Co. 22 Pick. (39 Mass.) 108; Wolcott v. Eagle Ins. Co. 4 Pick. (21 Mass.) 429, and other cases; Id. (Maclachlan's ed. 1887) 281, 282). See Earl of Halsbury's Laws of England, pp. 344 et seq.

[13] Connelly v. Masonic Mutual Benefit Assn. 58 Conn. 552, 557, 18 Am. St. Rep. 296, 20 Atl. 671, 9 L.R.A. 428.

[14] 1 Duer on Insurance (ed. 1845) 274. See Hopper v. Sage, 112 N. Y. 530, 8 Am. St. Rep. 771, 20 N. E. 350; Columbus & H. Coal & Iron Co. v. Tucker, 48 Ohio St. 41, 12 L.R.A. 577, 29 Am. St. Rep. 528, 26 N. E. 630. See § 252 herein.

CHAPTER VIII.

CONSTRUCTION OF POLICY.

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§ 231j. Lex loci: policy pledged for loan: collateral note: capital-stock note.
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§ 205. Construction generally.—Inasmuch as all prior negotiations are assumed to be merged in the written contract, the policy itself, in the absence of fraud, duress, or mistake must be looked to to ascertain the meaning and intent of the parties,[1] and the policy will be construed as a whole[2] and where the contract is clear, precise, and unambiguous in its terms, and the sense is manifest and leads to nothing absurd, there is no need of

[1] Higginson v. Dall, 13 Mass. 96. See § 181 herein.

See Miller v. Interstate Indemnity Co. 6 Lackawanna Leg. N. 62; Slawson v. Equitable Fire Ins. Co. 82 S. C. 51, 62 S. E. 782. Construction generally; parol evidence. See notes 16 L.R.A.(N.S.) 1166; 13 Id. 263; 11 Id. 340; 7 Id. 217; 5 Id. 790.

[2] Ætna Life Ins. Co. v. Bowling Green Gaslight Co. 150 Ky. 732, 150 S. W. 994, 43 L.R.A.(N.S.) 1128 note.

a resort to rules of construction,[3] and extrinsic evidence is then inadmissible to vary or control its terms.[4] Nor can a contract different from that made by the written agreement be read into it to give it a more extensive meaning than that expressed,[5] and the parties in such cases should be held to their agreement,[6] for where there is no uncertainty in the meaning of an insurance contract and it is legal and not against public policy it is the duty of the court to enforce the contract as made;[7] and words and phrases are to be construed according to their context.[8] So the words used and their relation each to the other determines their construction regardless of the punctuation.[9] If the policy be ambiguous, extrinsic evidence is admissible not to contradict or change the contract, but to develop and explain its true meaning.[10] Resort may then be had to the facts

[3] Emerigon on Ins. (Meredith's ed. 1850) c. ii. sec. 7, p. 49.

See also the following cases:

United States.—McKinney v. General Accident Fire & Life Assur. Co. 211 Fed. 951; Holmes v. Phoenix Ins. Co. 98 Fed. 240, 39 C. C. A. 45, 47 L.R.A. 308; Kiesel & Co. v. Sun Insurance Office of London, 88 Fed. 243, 60 U. S. App. 10, 31 C. C. A. 578.

California.—See Laventhal v. Fidelity & Casualty Co. 9 Cal. App. 275, 98 Pac. 1075.

Illinois.—Crandall v. Continental Casualty Co. 179 Ill. App. 330.

Indiana.—Union Life Ins. Co. v. Jameson, 31 Ind. App. 28, 67 N. E. 199.

Iowa.—Quinn v. Prudential Ins. Co. 116 Iowa, 522, 90 N. W. 349.

New York.—Houlihan v. Preferred Accident Ins. Co. 196 N. Y. 337, 25 L.R.A.(N.S.) 1261, 89 N. E. 927.

Texas.—Royal Ins. Co. v. Texas & G. Ry. Co. 53 Tex. Civ. App. 154, 115 S. W. 117.

Wisconsin.—Thurston v. Burnett & Beaver-Dam Farmers Mutual Fire Ins. Co. 98 Wis. 476, 41 L.R.A. 316, 74 N. W. 1021.

[4] Dewees v. Manhattan Ins. Co. 35 N. J. L. 366. See also Baltimore Fire Ins. Co. v. Loney, 20 Md. 20, 36; Burnham v. Boston Marine Ins. Co. 139 Mass. 399, 1 N. E. 837; Mumford v. Hallett, 1 Johns. (N. Y.) 433; Capital Fire Ins. Co. v. Carroll, 26 Okla. 286, 109 Pac. 535, 39 Ins. L. J. 1258, 1264. See § 185 herein.

[5] Kupfersmith v. Delaware Ins. Co. 80 N. J. L. 441, 34 L.R.A.(N.S.) 503 (annotated on admissibility of extrinsic evidence to extend scope of mortgagee clause) 80 Atl. 561, 40 Ins. L. J. 1938.

[6] Laventhal v. Fidelity & Casualty Co. 9 Cal. App. 275, 98 Pac. 1075.

[7] Cileck v. New York Life Ins. Co. 95 Neb. 274, 145 N. W. 693 (*citing* Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. ed. 231; Swartz v. Siegel, 117 Fed. 13, 54 C. C. A. 399; Dwight v. Germania Life Ins. Co. 103 N. Y. 341, 57 Am. Rep. 729, 8 N. E. 654); Rye v. New York Life Ins. Co. 88 Neb. 707, 130 N. W. 434, 40 Ins. L. J. 910. See also Jefferson v. New York Life Ins. Co. 151 Ky. 609, 152 S. W. 780 (contract should be enforced as written); Royal Ins. Co. v. Texas & G. A. Ry. Co. 53 Tex. Civ. App. 154, 115 S. W. 117.

[8] Hunter v. United States Fidelity & Guaranty Co. 129 Tenn. 572, 167 S. W. 692.

[9] Holmes v. Phenix Ins. Co. 98 Fed. 240, 39 C. C. A. 45, 47 L.R.A. 308.

[10] Finney v. Bedford C. Ins. Co. 8 Met. (49 Mass.) 348, 41 Am. Dec. 515. See also Sayles v. Northwestern Ins. Co. 2 Curt. (U. S. C. C.) 610, Fed. Cas. No. 12,422; St. Paul Fire & Marine Ins. Co. v. Balfour, 168 Fed.

and circumstances attendant at the time the insurance was effected to aid the interpretation.[11] So conversations between the parties had at such time is held competent.[12]

Where parties have by certain acts of their own placed a construction upon doubtful terms of a contract, this construction will be adopted by the courts as against them.[13]

212, 47 C. C. A. 498; Messenger v. German American Ins. Co. 47 Colo. 448, 107 Pac. 643; Tesson v. Atlantic Mutual Ins. Co. 40 Mo. 33, 93 Am. Dec. 293.

[11] *United States.*—Fuller v. Metropolitan Life Ins. Co. 37 Fed. 163; Manger v. Holyoke Ins. Co. 1 Holmes (U. S. C. C.) 287, Fed. Cas. No. 9,305, per Shipley, J.

Maine.—Bickford v. Aetna Ins. Co. 101 Me. 124, 63 Atl. 552.

Minnesota.—Frost's Detroit Lumber & Wooden Ware Works v. Millers & Mfg's Mut. Ins. Co. 37 Minn. 300, 5 Am. Rep. 846, 34 N. W. 35.

Missouri.—Renshaw v. Missouri State Mutual Ins. Co. 103 Mo. 595, 23 Am. St. Rep. 904, 15 S. W. 945.

New York.—Reynolds v. Commerce Fire Ins. Co. 47 N. Y. 597, per Church, C. J.

Oklahoma.—Capital Fire Ins. Co. v. Carroll, 26 Okla. 286, 109 Pac. 535, 39 Ins. L. J. 1258, 1264.

Pennsylvania.—Philadelphia Tool Co. v. British-American Assur. Co. 132 Pa. St. 236, 19 Am. St. Rep. 596, 19 Atl. 77; Kauffman Brothers v. Western Ins. Co. 21 Lancaster L. Rev. 252. See § 210 herein.

[12] Gray v. Harper, 1 Story (C. C.) 574, Fed. Cas. No. 5,716.

"Whether parol evidence of the declarations and conversations of the parties at the time their contract was made may be received in order to show in what sense general words were in fact used by them, or to determine particular words to a distinct and particular sense, is a question that I have purposely omitted to discuss in the text. The authorities are conflicting, and I have found myself not only unable to reconcile them, but to state any distinction satisfactory to my own mind upon which the propriety of admitting the evidence can be founded." 1 Duer on Insurance (ed. 1845) 308.

"An inquiry is often made into the history of a clause in a policy and the purpose for which it was introduced. But although this may afford some aid in arriving at its meaning, yet it cannot control the construction of its language." 1 Parsons on Ins. (ed. 1868) 129, *citing* Hugg v. Augusta Ins. & Banking Co. 7 How. (48 U. S.) 595, 12 L. ed. 834; Kettle v. Alliance Ins. Co. 10 Gray (76 Mass.) 144; Heebner v. Eagle Ins. Co. 10 Gray (76 Mass.) 131, 69 Am. Dec. 308.

[13] Brooklyn Life Ins. Co. v. Dutcher, 95 U. S. 269, 24 L. ed. 410. See Missouri State Life Ins. Co. v. Hill, 109 Ark. 17, 159 S. W. 31; Mutual Reserve Fund Life Assoc. v. Taylor, 99 Va. 208, 3 Va. Sup. Ct. 131, 37 S. E. 854.

See also as to the general rule in such cases:

Colorado.—Lovell v. Goss, 45 Colo. 304, 132 Am. St. Rep. 184, 101 Pac. 72.

Florida.—Webster v. Clark, 34 Fla. 637, 27 L.R.A. 126, 16 So. 601.

Indiana.—Union Trust Co. v. Richmond City Rd. Co. 154 Ind. 291, 48 L.R.A. 41, 55 N. E. 745; Vincennes v. Citizen's Gaslight & C. Co. 132 Ind. 114, 16 L.R.A. 485, 31 N. E. 573.

Nebraska.—Gorder v. Pankonin, 83 Neb. 204, 131 Am. St. Rep. 629, 119 N. W. 449.

Pennsylvania.—Sternberg v. Brock, 225 Pa. 279, 133 Am. St. Rep. 837, 74 Atl. 166.

§ 205a. **Recitals: when not conclusive.**—Recitals in policies of insurance which are not contractual elements thereof are not conclusive on the parties thereto.[14]

§ 206. **Whether same rules govern marine, fire, and life policies.**—The rules of marine insurance apply to the interpretation of policies on vessels expressly employed in inland navigation when not inapplicable from the particular subject matter. In a New Hampshire case [15] it is declared that "great strictness has always been held in contracts of marine insurance. . . . I apprehend that from this strictness existing in the law of marine insurance have been drawn the rigid rules laid down by many tribunals upon fire insurance policies, and that the authorities in cases of marine insurance have been followed in actions upon policies against fire without perhaps sufficiently adverting to the difference that exists in the knowledge of facts upon which the respective contracts are founded. Kent says that the strictness and nicety required in the contract of marine insurance do not so strongly apply to insurance against fire, for the risk is generally assumed upon actual examination of the subject by skillful agents on the part of insurance offices.[16] The severity of these rules has caused courts in many instances to endeavor to avoid their effect." [17] It is said that insurance on lives is governed by the same legal rules which control other contracts,[18] and that it is to be construed by the terms in which it is couched.[19] But in a New York case it is held that in respect to life policies the rule in regard to the construction of the statements of the assured in the application is different from that which prevails in construing statements in applications for marine and fire policies. In applications of the former class the statements of the insured concerning his health or vital organs are not understood or intended as warranties; because the applicant may not know enough of the human system to be aware of the existence of some affection of a vital organ, and because the insurers are supposed to rely upon the opinions of their own medical advisers.[20] The question, however,

[14] Commonwealth Mutual Fire Ins. Co. v. Hayden, 60 Neb. 636, 83 Am. St. Rep. 545, 83 N. W. 922.

[15] Campbell v. Merchants' & Farmers Mut. Fire Ins. Co. 37 N. H. 43, 72 Am. Dec. 324, per Eastman, J.

[16] 3 Kent's Commentaries, 373. See 17 Earl of Halsbury's Laws of England, pp. 342, 527.

[17] Caldwell v. St. Louis Ins. Co. 1 La. Ann. 85.

[18] St. John v. American Mutual Life Ins. Co. 13 N. Y. 31, 39, 64 Am. Dec. 529.

[19] Connecticut Mutual Life Ins. Co. v. Pyle, 44 Ohio St. 19, 4 N. E. 465, 58 Am. Rep. 781; Law v. London Indisputable Life Pol. Co. 1 Jur. N. S. 178, 1 Kay & J. 2231, 24 L. J. Ch. 196, 3 Eq. Rep. 338.

[20] Horn v. Amicable Mutual Life Ins. Co. 64 Barb. (N. Y.) 81. As to representations and warranties, see §§ 1882 et seq., 1942 et seq. herein.

of concealment in marine and other risks is important.[21] In a United States Supreme Court case[1] it is declared that "policies of life insurance are governed in some respects by different rules of construction from those applied by the courts in cases of policies against marine risks or policies against loss by fire," which are contracts of indemnity, while "life insurance is not necessarily one merely of indemnity for a pecuniary loss," and we apprehend that this is true whether life insurance be considered a contract of indemnity or only a contract for the payment of a fixed sum. So the court declares in an Alabama case that "a contract of life insurance is simpler in form in the relative rights and duties of the insurer and the assured, and differs in many respects from marine or from fire insurance, and yet the general principles applicable to marine or fire insurance are applied, so far as consistent with the nature and obligations of the contract, to the contract of life insurance."[2] But in a Georgia case, the court says: "All provisions of our code in reference to fire insurance, wherever applicable are equally the law of life insurance."[3] It is said by the court in Chartrand v. Brace,[4] that "a policy of life insurance is in the nature of a testament, and although not a testament, in construing it the courts will, so far as possible, treat it as a will."[5] And the question involved might arise in the construction of wills. So, under a North Carolina decision rules for interpreting the will of a testator may guide, as far as they are applicable, in ascertaining the legal effect of the clause in a life policy designating the beneficiaries. The difference in the cases consists in the fact that the interest vests under the policy at once upon its issue, but does not vest under the will until the death of the testator.[6] It is held in Jolly v. Baltimore Equitable Society[7] that in the construction of policies of fire insurance the same strictness is not to be observed as in the construction of policies of marine insurance.[8]

§ 206a. Rule as to standard policy.[8a]—Although a standard form

[21] See § 1844 herein.

[1] Phœnix Mutual Life Ins. Co. v. Bailey, 13 Wall. (80 U. S.) 616, 619, 20 L. ed. 501.

[2] Supreme Commandery Knights of the Golden Rule v. Ainsworth, 71 Ala. 436, 446, 46 Am. Rep. 332.

[3] Massachusetts Benefit Life Assoc. v. Robinson, 104 Ga. 256, 42 L.R.A. 261, 30 S. E. 910, 27 Ins. L. J. 1003, 1014; Civ. Code sec. 2117.

[4] 16 Colo. 19, 26 Pac. 152, 12 L.R.A. 209, 25 Am. St. Rep. 235, 32 Cent. L. J. 410.

[5] *Citing* Bolton v. Bolton, 73 Me. 299. See §§ 309, 738 herein.

[6] Hooker v. Sugg, 102 N. C. 115, 11 Am. St. Rep. 717, 3 L.R.A. 217, 8 S. E. 919. See § 738 herein.

[7] 1 Har. & G. (Md.) 295, 18 Am. Dec. 288.

[8] As to construction of marine and fire policies, see 17 Earl of Halsbury's Laws of England, pp. 342, 527.

[8a] See § 222d herein.

of policy is prescribed by statute, nevertheless upon its acceptance by the parties it becomes a voluntary contract between them which derives its force and efficacy from their consent. It constitutes their contract,[9] and it must be construed by the same rules as similar contracts voluntarily entered into.[10] And the fact that the legislature has prescribed a standard form of policy affords no reason for giving to a clause any different construction from that theretofore given by the courts to all similar contracts made without legislative sanction.[11] So where the terms employed in a standard policy have been in previous use in insurance contracts and have had a judicial construction, it will be assumed that said terms were used in the standard forms in the sense in which they were previously used and defined.[12] It is determined, however, in Wisconsin that its standard policy is to be treated and construed as a statutory law, as well as a contract.[13] A distinction also seems, impliedly at least, to be made under a Minnesota decision by the court in these words: "The rule of construction applicable to a contract of insurance in cases where, as in this one, the Legislature has not prescribed a standard policy is settled to the effect" etc., applying the rules of construction in case of ambiguity, etc.[14]

[9] Dunton v. Westchester Fire Ins. Co. 104 Me. 372, 71 Atl. 1037, 38 Ins. L. J. 600, 20 L.R.A.(N.S.) 1058 (*citing* Reed v. Washington Ins. Co. 138 Mass. 572). See also Leisen v. St. Paul Fire & Marine Ins. Co. 20 N. Dak. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837); Shawnee Mutual Fire Ins. Co. v. School Board, 44 Okla. 3, 143 Pac. 194.

[10] Kollitz v. Equitable Mutual Fire Ins. Co. 92 Minn. 234, 99 N. W. 892, 33 Ins. L. J. 755.

See also the following cases where this principle has been applied:

Chichester v. New Hampshire Fire Ins. Co. 74 Conn. 510, 51 Atl. 545; Cutler v. Royal Ins. Co. 70 Conn. 566, 41 L.R.A. 159, 40 Atl. 529; Sergent v. London & Liverpool & Globe Ins. Co. 155 N. Y. 349, 49 N. E. 935, 28 Ins. L. J. 59, rev'g 85 Hun, 31, 32 N. Y. Supp. 594; Matthews v. American Central Ins. Co. 154 N. Y. 449, 456, 31 L.R.A. 433, 61 Am. St. Rep. 627, 48 N. E. 751; Nelson v. Traders Ins. Co. 83 N. Y. Supp. 220, 86 App. Div. 66; Stage v. Home Ins. Co. 78 N. Y. Supp. 555, 76 App. Div. 509; Maisel v. Fire Assoc. of Phila. 69 N. Y. Supp. 181, 59 App. Div. 461; Gazzam v. German Union Fire Ins. Co. 155 N. Car. 330, Ann. Cas. 1913E, 282 note, 71 S. E. 434; Horton v. Life Ins. Co. of Va. (Horton v. Home Ins. Co.) 122 N. Car. 498, 65 Am. St. Rep. 717, 29 S. E. 944; Leisen v. St. Paul Fire & Marine Ins. Co. 20 N. Dak. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837.

[11] Dunton v. Westchester Fire Ins. Co. 104 Me. 372, 20 L.R.A.(N.S.) 1058, 71 Atl. 1037, 38 Ins. L. J. 600. See § 222a herein.

[12] John Davis & Co. v. Insurance Co. of North America, 115 Mich. 382, 73 N. W. 393, 27 Ins. L. J. 184.

[13] Temple v. Niagara Fire Ins. Co. 109 Wis. 372, 85 N. W. 361, 30 Ins. L. J. 549.

Standard policy; as to construction favorable to insured and rule contra proferentum, see § 222d herein.

[14] Hormel & Co. v. American Bonding Co. of Baltimore, 112 Minn. 288, 33 L.R.A.(N.S.) 513, 128 N. W. 12, 40 Ins. L. J. 137.

§ 206b. Where standard policy statute declares policy binding though not in form prescribed.—If a policy is issued not in conformity with the statutory standard form and the statute declares that such policies shall nevertheless be binding but does not provide any rule of interpretation of such a policy issued contrary to law, no statute is incorporated into it and it will be construed as it reads.[15] In the decision supporting the above point the court declares that an Ohio case,[16] and like decisions are not applicable as they hold that where a statute provides a certain rule for the interpretation of a policy the statute must be regarded as incorporated in a policy issued when the law was in force and being so incorporated must prevail over such cases as are inconsistent with it.

§ 206c. Rule as to guaranty or fidelity, contract, credit guaranty, title, and employers' liability insurance.[16a]—The rule as to Guaranty or Fidelity Insurance is that indemnity bonds, which are not ordinary obligations given by a surety, but which insure the fidelity or integrity of an employee and which are issued by a paid surety or for a money consideration are in the nature of or in effect a contract of insurance, and are to be construed by the same general rules which govern ordinary insurance contracts. In a Wisconsin case the court, per Barnes, J., says: "The bond in question was an indemnity contract entered into by the defendant for a money consideration. It has all the essential features of an insurance contract, and should be subject to the same rules of construction applicable to such contracts." [17] In a Minnesota case the court, per Start, C. J., says: "In considering the question whether the surety was entitled to a directed verdict for any of the reasons here urged, we must keep in view the character of contracts of suretyship of corporations organized for the purpose of engaging, for profit, in the business of guaranteeing the fidelity or contracts of a third party, and the rules of construction applicable to their contracts. While such contracts in form resemble those of suretyship, they are in effect contracts of insurance, to which the rules of construction peculiar to contracts of suretyship proper do not apply, but to which the rules governing ordinary insurance contracts are applicable." [18] In a Federal Supreme Court case the construction given to the bond in suit was based upon "a well-es-

[15] Hewins v. London Assur. Corp. (12 cases) 184 Mass. 177, 68 N. E. 62.

[16] Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 9 L.R.A. 45, 24 N. E. 1072.

[16a] See §§ 221b, 222a herein.

[17] United American Fire Ins. Co. v. American Bonding Co. 146 Wis. 573, 40 L.R.A.(N.S.) 661 and note, 131 N. W. 994, 40 Ins. L. J. 1805.

[18] Hormel & Co. v. American Bonding Co. 112 Minn. 288, 293, 33 L.R.A. (N.S.) 513 (annotated on character of and rules governing contracts by

tablished rule in the law of insurance." [19] So in another case in the Federal Circuit Court of Appeals such policies are declared to be policies of insurance and that they are to be treated as such.[20] In a Colorado case the court, per Campbell, J., declares that: "Learned counsel for both parties are in accord that this instrument, for a breach of whose conditions the action was brought, though denominated a bond is, in legal effect, analogous to a policy of insurance. Speaking generally, the same rules of interpretation and construction, therefore, that apply to fire and life policies are applicable to it." [1] So in a Washington case it is declared that: "While this class of suretyship is comparatively new, a distinction has been clearly announced by the courts, and that this character of suretyship is governed by rules governing insurance contracts. . . . This class of insurance cannot be distinguished in principle from what is called guaranty insurance, where the guaranty company guarantees the honesty and efficiency of employees. . . 'Bonds of this character are, in their nature, insurance contracts, to indemnify the employer against the dishonesty of employees. They are issued for profit, and the same rules of construction must apply thereto as apply to other insurance contracts.' " [2] So under an Illinois decision a bond guaranteeing fidelity of a bank employee is an insurance contract and as such is subject to same rules of construction applicable to insurance policies generally and not the rules applied to ordinary sureties for accommodations and the general principles applicable to other classes of insurance are also applicable.[3] The above-stated principles have also governed in numerous other cases of this class of guaranty insurance.[4]

corporations engaged for profit in business of guarantying the fidelity or contracts of other persons), 128 N. W. 12, 40 Ins. L. J. 137.

[19] American Surety Co. v. Pauly, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. 552, 29 Ins. L. J. 3.

[20] Tebbetts v. Mercantile Credit Guarantee Co. 73 Fed. 95, 19 C. C. A. 291.

[1] American Bonding & Trust Co. v. Burke, 36 Colo. 49, 85 Pac. 692, 35 Ins. L. J. 642.

[2] Cowles v. United States Fidelity & Guaranty Co. 32 Wash. 120, 124–126, 98 Am. St. Rep. 838, 72 Pac. 1032, per Dunbar, J., *citing* and *quoting* from Remington v. Fidelity & Deposit Co. 27 Wash. 429, 435, 67 Pac. 989, a case of guaranty bond for fidelity of employee.

[3] United States Fidelity & Guaranty Co. v. First Nat. Bank, 233 Ill. 475, 84 N. E. 670, *quoting* from People v. Rose, 174 Ill. 310, 313, 44 L.R.A. 124, 51 N. E. 246.

[4] *United States.*—Guarantee Co. of North America v. Merchants' Savings Bank & Trust Co. 80 Fed. 766, 26 C. C. A. 146, rehearing denied, 82 Fed. 545, rev'd 173 U. S. 582, 43 L. ed. 818, 19 Sup. Ct. 551; Jackson v. Fidelity & Casualty Co. 75 Fed. 359, 41 U. S. App. 552, 21 C. C. A. 394.

Arkansas.—Title Guaranty & Surety Co. v. Bank of Fulton, 89 Ark. 471, 33 L.R.A.(N.S.) 676, 117 S. W. 537, 38 Ins. L. J. 722; United States Fidelity & Guaranty Co. v. Bank of

So in a suit upon a contractors or sureties bond the same rule of interpretation has been applied as in insurance contracts.[5]

So under a New York decision a case of credit insurance was treated as a policy of insurance and the same rule of construction, in the case of ambiguity or uncertainty as to the meaning of conditions, was applied as in ordinary insurance contracts.[6]

Again the same rules governing the construction of other policies apply to title insurance.[7]

An employers' liability bond or policy is also subject to like rules

Batesville, 87 Ark. 348, 112 S. W. 957; American Bonding Co. v. Morrow, 80 Ark. 49, 96 S. W. 613.

Georgia.—John Church Co. v. Ætna Indemnity Co. 13 Ga. App. 826, 80 S. E. 1093.

Indiana.—American Surety Co. of N. Y. v. Pangburn, 182 Ind. 116, 105 N. E. 769.

Kentucky.—Fidelity & Deposit Co. of Md. v. Champion Ice Manufacturing & Cold Storage Co. 133 Ky. 74, 117 S. W. 393; Champion Ice Manufacturing & Cold Storage Co. v. American Bonding & Trust Co. 115 Ky. 863, 103 Am. St. Rep. 356, 75 S. W. 197.

Maryland—Union Central Life Ins. Co. v. United States Fidelity & Guaranty Co. 99 Md. 423, 105 Am. St. Rep. 313, 58 Atl. 413, 33 Ins. L. J. 808, per McSherry, C. J.

Missouri.—Fairbanks Canning Co. v. London Guaranty & Accident Co. 154 Mo. App. 327, 133 S. W. 664; Long Brothers Grocery Co. v. United States Fidelity & Guaranty Co. 130 Mo. App. 421, 110 S. W. 29; Roark v. City Trust, Safe Deposit & Surety Co. 130 Mo. App. 401, 110 S. W. 1.

North Carolina.—Bank of Tarboro v. Fidelity & Deposit Co. 128 N. Car. 366, 83 Am. St. Rep. 682, 38 S. E. 908.

Ohio.—Rankin v. United States Fidelity & Guaranty Co. 86 Ohio St. 267, 99 N. E. 314.

Oklahoma.—Guthrie National Bank v. Fidelity & Deposit Co. of Md., 17 Okla. 397, 79 Pac. 102.

South Carolina.—Walker v. Holtzclaw, 57 S. C. 459, 35 S. E. 754, a case, however, of a statutory bond which recited the requirements of the law, but also contained other conditions inserted for the benefit of defendants. The court said: "Upon the hearing of the case it was argued that a surety is a favorite of the law, and it should be strictly construed in his favor. While this is true as a general rule, it has no application to a case like this, where the surety receives compensation and the suretyship is in the line of its regular business." The surety was a banking and trust company.

South Dakota.—Farmers & Merchants State Bank of Verdon v. United States Fidelity & Guaranty Co. 28 S. Dak. 315, 36 L.R.A.(N.S.) 1152, 133 N. W. 247.

Tennessee.—Hunter v. United States Fidelity & Guaranty Co. 129 Tenn. 572, 167 S. W. 692; Louisville & Nashville Rd. Co. v. United States Fidelity & Guaranty Co. 125 Tenn. 408, 148 S. W. 671.

Wisconsin.—United American Fire Ins. Co. v. American Bonding Co. of Baltimore, 146 Wis. 573, 40 L.R.A. (N.S.) 661 note, 131 N. W. 994.

[5] Ætna Indemnity Co. v. Waters, 110 Md. 673, 73 Atl. 712; Fitzger Brewing Co. v. American Bonding Co. of Baltimore, 115 Minn. 78, 131 N. W. 1067.

[6] People v. Mercantile Credit Guarantee Co. 166 N. Y. 416, 60 N. E. 24, 30 Ins. L. J. 642. See also Mercantile Credit & Guaranty Co. v. Littleford Bros. 18 Cir. Ct. Rep. (42 Wkly. L. Bull.) 889.

[7] Trenton Potteries Co. v. Title Guarantee & Trust Co. 64 N. Y. Supp. 116, 50 App. Div. 490.

of construction as insurance contracts,[8] and this applies to a policy taken out under the *Workmen's Compensation Act of* England of 1906, against accidents to employees.[9]

§ 207. Construction: mutual companies: benefit societies.—It is a general rule that contracts of insurance with a mutual company or benefit etc., society or association are construed in most respects like other policies,[10] although it is said that "the business of insurance against fire has been greatly increased by the incorporation and establishment of mutual companies, and the mode of transacting business, as well as the property insured, differs very essentially from that of marine insurance. The method of doing business in these companies also varies materially in some respects from that which prevails in stock companies, as they are usually termed. And where courts now for the first time to lay down, without regard to authority, the rules of law that should govern contracts made between mutual companies and their members, I apprehend that in many jurisdictions they would differ essentially from the rules which at present prevail."[11] But the interpretation can be no dif-

[8] *United States.*—Ætna Indemnity Co. v. J. R. Crowe Coal & Mining Co. 154 Fed. 545, 83 C. C. A. 431.

Illinois.—London Guarantee & Accident Ins. Co. v. Morris, 156 Ill. App. 533.

Missouri.—Mears Mining Co. v. Maryland Casualty Co. 162 Mo. App. 178, 191, 144 S. W. 883; Fairbanks Canning Co. v. London Guarantee & Accident Co. 154 Mo. App. 327, 133 S. W. 664.

North Carolina.—Henderson Lighting & Power Co. v. Maryland Casualty Co. 153 N. C. 275, 30 L.R.A. (N.S.) 1105 and note, 69 S. E. 234.

Ohio.—Travelers Ins. Co. v. Meyers, 62 Ohio St. 529, 49 L.R.A. 760, 57 N. E. 458, 29 Ins. L. J. 894.

[9] Bradley & Essex & Suffolk Accident Indemnity Soc., In re, 81 L. J. K. B. 523, [1912] 1 K. B. 415, 105 L. T. 919, 28 T. L. R. 175, [1912] W. C. Rep. 6. See § 222b herein.

On what constitutes insurance, see extensive note in 47 L.R.A.(N.S.) 290; on construction of bond or policy indemnifying employer against loss from negligence of employee, see note in 31 L.R.A.(N.S.) 775.

[10] *Georgia.*—Warwick v. Supreme Conclave K of D. 107 Ga. 115, 32 S. E. 951.

Indiana.—Elkhart Mutual Aid, Benevolent & Relief Assn. v. Houghton, 103 Ind. 286, 2 N. E. 763, 53 Am. Rep. 514; Willcutts v. Northwestern Mutual Life Ins. Co. 81 Ind. 300.

Iowa.—Matthes v. Imperial Accident Assoc. 110 Iowa, 222, 81 N. W. 484, 29 Ins. L. J. 622.

Kentucky.—Metropolitan Plate Glass & Casualty Ins. Co. v. Hawes, 150 Ky. 52, 42 L.R.A.(N.S.) 700, 149 S. W. 1110 (principle applied).

Maine.—New England Mutual Fire Ins. Co. v. Butler, 34 Me. 451.

Missouri.—Small v. Court of Honor, 136 Mo. App. 434, 117 S. W. 116.

New Jersey.—Golden Starr Fraternity v. Martin, 29 N. J. L. 207, 35 Atl. 908.

Oregon.—Independent Order of Forester v. Keliher, 36 Oreg. 501, 59 Pac. 324, 1109, 60 Pac. 563, 78 Am. St. Rep. 785.

Texas.—Haywood v. Grand Lodge of Texas K. of P. — Tex. Civ. App. —, 138 S. W. 1194.

See Bacon's Benefit Societies & Life Ins. sec. 180.

On whether a benefit association is an insurance company, see note in 38 L.R.A. 33.

[11] Campbell v. Merchants' & Farm-

ferent in the policies or certificates in such companies than in other insurance contracts, where the words are used for a definite purpose, and relate to clearly defined transactions, as that a policy shall be void if the insured die in known violation of any law.[12] If the language of such contracts be plain, unambiguous, and well understood to have a fixed meaning, either generally or as technical terms of law, that meaning will be given the same as in case of other contracts of insurance,[13] and the courts will adjudicate the rights of members in reference to certificates in such companies upon the same principles as apply to insurance companies.[14] So the policy, the conditions annexed thereto, the charter, and by-laws of the company must be all construed together in cases of discrepancy,[15] and the by-laws, it is held, must receive the interpretation put upon the contracts of which they are a part.[16]

The contract, and constitution relating to it, should be construed according to the plain and obvious meaning of their provisions, and with a view to accomplish the purpose for which the association is maintained and persons become members thereof.[17] And the intent may be gathered from the language of the certificate read in the light of the surrounding circumstances under which it was issued, including the subject-matter to which the words relate and such matters as are incident thereto.[18] It is also held that the charter and by-laws must be liberally construed to effectuate the purposes contemplated,[19] although other courts have adhered to a different rule limiting the company or society strictly to the exercise of those

ers Mut. Fire Ins. Co. 37 N. H. 44, per Eastman, J.

[12] Cluff v. Mutual Benefit Life Ins. Co. 99 Mass. 317.

[13] Wiggin v. Knights of Pythias, 31 Fed. 122.

[14] Goodman v. Jedidjah Lodge, 67 Md. 117. See Chartrand v. Brace, 16 Col. 19, 26 Pac. 152, 32 Cent. L. J. 410.

[15] Hyatt v. Wait, 37 Barb. (N. Y.) 29. See cases in §§ 175, 176, 185–88 herein. See also Condon v. Mutual Reserve Fund Life Assoc. 89 Md. 99, 44 L.R.A. 149, 31 Chic. Leg. News, 273, 42 Atl. 944; Golden Star Fraternity v. Martin, 29 N. J. L. 207, 35 Atl. 908.

[16] Wiggins v. Knights of Pythias, 31 Fed. 122. See § 381 herein.

[17] Brotherhood of Locomotive Firemen & Enginemen v. Aday, 97 Ark. 425, 34 L.R.A.(N.S.) 126, 134 S. W. 928, 40 Ins. L. J. 737.

[18] Mullen v. Reed, 64 Conn. 240, 42 Am. St. Rep. 174, 24 L.R.A. 664, 29 Atl. 478; Daniel v. Modern Woodmen of America, 53 Tex. Civ. App. 570, 118 S. W. 311.

[19] *Indiana.* — Supreme Lodge Knights of Pythias v. Schmidt, 98 Ind. 374.

Massachusetts.—Elsey v. Odd Fellows' Mutual Relief Assn. 142 Mass. 224, 7 N. E. 844.

Oklahoma.—Woodmen of the World v. Gilliland, 11 Okla. 384, 67 Pac. 485.

Pennsylvania.—Maneely v. Knights of Birmingham, 115 Pa. St. 305, 7 Cent. Rep. 633, 9 Atl. 41, 43.

Wisconsin.—Ballou v. Gile, 50 Wis. 614, 7 N. W. 561; Erdman v. Mutual Ins. Co. of the Order of Herman's Sons, 44 Wis. 376. See § 381 herein.

powers conferred by their charter.[20] But it is held that a stipulation in the policy repugnant to a provision in the act of incorporation controls the latter,[1] and the same is held to be true where by-laws are inconsistent with the provisions of the policy, the company having power under its charter to issue such a policy.[2] And a condition in a certificate controls a different one in a by-law where the charter provides for such a condition in either the certificate or by-laws.[3] So where certain limitations upon liability are provided for by the certificate and the application such conditions prevail over by-laws which do not contain such limitations.[4]

Conditions of a by-law or constitution may be such as to require a strict construction even to the extent of a strained interpretation to avoid them,[5] and provisions for forfeiture will be strictly construed so as to prevent their enforcement where there are repugnant conditions and such as are in favor of assured will be given effect.[6]

The practice and opinion of the officers of such companies as to the meaning of words used in the rules, regulations, and by-laws cannot change by construction the plain terms of the policy or affect the rights of the parties,[7] although the acts of assured and such officers will, it is held, be considered.[8]

So the customs and usages adopted by the society are inadmissible to supersede the regularly adopted by-laws and thus change the contract.[9] So the interpretation which the officers of a benefit association which have been accustomed to give to certain words in certificates, but which have never been promulgated as a rule of the

[20] Supreme Lodge Knights of Honor v. Nairn, 60 Mich. 44, 26 N. W. 826; National Mut. Aid Assn. v. Gonser, 43 Ohio St. 1, 1 N. E. 11; and see Bacon's Benefit Societies and Life Ins. secs. 170, 244, 245.

[1] Howard v. Franklin Marine & Fire Ins. Co. 9 How. Pr. (N. Y.) 45. See Bacon's Mutual Benefit Societies and Life Ins. sec. 178.

[2] Davidson v. Old People's Mutual Benefit Soc. 39 Minn. 303, 1 L.R.A. 482, 39 N. W. 803. But see Bacon's Mutual Benefit Societies and Life Ins. sec. 178.

[3] Failey v. Fee, 83 Md. 83, 32 L.R.A. 311, 34 Atl. 839.

[4] McCoy v. Northwestern Mutual Relief Assoc. 92 Wis. 577, 47 L.R.A. 681, 66 N. W. 697.

On conflict between by-laws and certificate, or policy, of mutual benefit society, or insurance company, see note in 47 L.R.A. 681.

[5] Brotherhood of Railroad Trainmen v. Newton, 79 Ill. App. 500.

[6] Haywood v. Grand Lodge of Texas K. P. — Tex. Civ. App. —, 138 S. W. 1194. See § 220a herein.

[7] Wiggin v. Knights of Pythias, 31 Fed. 122; Manson v. Grand Lodge Ancient Order United Workmen, 30 Minn. 509, 16 N. W. 395. See also Morey v. Monk, 142 Ala. 175, 38 So. 265.

[8] Haynes v. Masonic Benefit Assoc. 98 Ark. 421, 136 S. W. 187. See Mutual Reserve Fund Life Assoc. v. Taylor, 99 Va. 208, 3 Va. Sup. Ct. Rep. 131, 37 S. E. 854. See § 309 herein.

[9] District Grand Lodge v. Cohn, 20 Ill. App. 335; Davidson v. Knights of Pythias, 22 Mo. App. 263.

association, is immaterial even though certain acts had, without notice to the members been based upon this custom.[10]

§ 208. Policies construed like other written contracts.—Generally stated, policies of insurance are subject to the rules of construction which are applicable to other contracts.[11] So Nelson, J., declares that "there is no more reason for claiming a strict literal compliance with its terms than in ordinary contracts."[12] The clause in a policy of in-

[10] Supreme Council Catholic Benevolent Legion v. Grove, 176 Ind. 356, 36 L.R.A.(N.S.) 913, 96 N. E. 159.

[11] *United States.*—Liverpool, London & Globe Ins. Co. v. Kearney, 180 U. S. 132, 45 L. ed. 460, 21 Sup. Ct. 326, aff'g 94 Fed. 314, 36 C. C. A. 265; Maryland Casualty Co. v. Finch, 147 Fed. 388, 77 C. C. A. 556; Delaware Ins. Co. of Phila. v. Greer, 120 Fed. 916, 57 C. C. A. 188, 61 L.R.A. 137; Crane v. City Ins. Co. 3 Fed. 558.

California.—Pacific Heating Ventilator Co. v. Williamsburgh City Fire Ins. Co. 158 Cal. 367, 111 Pac. 4; Schroeder v. Imperial Fire Ins. Co. 132 Cal. 18, 54 Am. St. Rep. 17, 63 Pac. 1074; Wells, Fargo Co. v. Pacific Ins. Co. 44 Cal. 397; Laventhal v. Fidelity & Casualty Co. 9 Cal. App. 275, 98 Pac. 1075.

Delaware.—Continental Ins. Co. v. Rosenberg, 7 Pen. (Del.) 174, 74 Atl. 1073.

Illinois.—Aurora Fire Ins. Co. v. Eddy, 49 Ill. 106.

Indiana.—Ohio Farmers Ins. Co. v. Vogel, 166 Ind. 239, 117 Am. St. Rep. 382, 76 N. E. 977.

Iowa.—Dahms & Sons Co. v. German Fire Ins. Co. 153 Iowa, 168, 40 Ins. L. J. 2133, 132 N. W. 870.

Kentucky.—See Ætna Ins. Co. v. Bowling Green Gaslight Co. 150 Ky. 732, 43 L.R.A.(N.S.) 1128n, 150 S. W. 994; Spring Garden Ins. Co. v. Imperial Tobacco Co. 132 Ky. 7, 136 Am. St. Rep. 164, 20 L.R.A.(N.S.) 277, 38 Ins. L. J. 446, 116 S. W. 234.

Maryland.—Ætna Indemnity Co. v. Waters, 110 Md. 673, 73 Atl. 712 (contract insurance); McEvoy v. Security Fire Ins. Co. 110 Md. 275, 132 Am. St. Rep. 428n, 22 L.R.A. (N.S.) 964, 38 Ins. L. J. 895, 73 Atl. 187.

Massachusetts.—Higginson v. Dall, 13 Mass. 96, 98.

Missouri.—Renshaw v. Missouri State Mutual Fire & Marine Ins. Co. 103 Mo. 595, 23 Am. St. Rep. 904, 15 S. W. 945; Hoover v. Mercantile Town Mutual Ins. Co. 93 Mo. App. 111, 69 S. W. 42.

New Hampshire.—Johnson v. Maryland Casualty Co. 73 N. H. 259, 111 Am. St. Rep. 609, 60 Atl. 1009.

New York.—Pindar v. Resolute Fire Ins. Co. 47 N. Y. 114, per Rappallo, J.; St. John v. American Mutual Life Ins. Co. 13 N. Y. 31, 39, 64 Am. Dec. 529; Goix v. Low, in Johns. Cas. (N. Y.) 341, per Kent, J.; Lamb v. Prudential Ins. Co. 48 N. Y. Supp. 123, 22 App. Div. 552.

Ohio.—Travelers' Ins. Co. v. Myers, 62 Ohio St. 529, 49 L.R.A. 760, 57 N. E. 458, 29 Ins. L. J. 894.

Oregon.—Weidert v. State Ins. Co. 19 Oreg. 261, 20 Am. St. Rep. 809, 19 Ins. L. J. 740, 24 Pac. 242.

Pennsylvania.—McCaffrey v. Knights & Ladies of Columbia, 213 Pa. St. 609, 63 Atl. 189.

South Dakota.—Ferguson v. Northern Assurance Co. of London, 26 S. Dak. 346, 128 N. W. 125.

Washington.—Hocking v. British America Assur. Co. 62 Wash. 73, 36 L.R.A.(N.S.) 1155n, 113 Pac. 259.

Wisconsin.—French v. Fidelity & Casualty Co. 135 Wis. 259, 17 L.R.A. (N.S.) 1011, 115 N. W. 869.

England.—Robertson v. French, 4 East 135, 14 Eng. Rul. Cas. 1, per Lord Ellenborough.

[12] Turley v. North American Fire Ins. Co. 25 Wend. (N. Y.) 376.

surance requiring the certificate of a magistrate as to the character of the assured and the amount of the loss is to be construed as liberally as ordinary contracts,[13] though a policy of insurance may be avoided by representations and concealments, which would not be allowed to affect the force of any other contract, if they materially affect the risk, yet with regard to its other incidents, it is subject to the same rules of construction as other contracts. Thus, it is no defense to an action on a premium note that false representations were made when such representations were plainly contradictory to the terms of the note itself.[14]

§ 209. Construction: intention of parties governs.—The cases are numerous which hold that the first object of construction is to ascertain the intention or meaning of the parties, and to interpret the contract accordingly.[15] It is said by Denman, C. J.,[16] that the

Examine McEvoy v. Security Fire Ins. Co. of Baltimore, 110 Md. 275, 73 Atl. 157, 38 Ins. L. J. 895, 132 Am. St. Rep. 428, 22 L.R.A.(N.S.) 964. See §§ 220–222 herein.

[13] Turley v. North American Fire Ins. Co. 25 Wend. (N. Y.) 375.

[14] Farmers' Mutual Fire Ins. Co. v. Marshall, 29 Vt. 23.

[15] Emerigon on Ins. (Meredith's ed. 1850) c. ii. sec. 7, p. 49. "The instrument avails nothing beyond the intention of the parties:" Id. c. i. sec. 5, p. 17.

See also the following cases:

United States.—Mauger v. Holyoke Ins. Co. 1 Holmes (U. S. C. C.) 287, 289, Fed. Cas. No. 9,305.

Arkansas.—Fidelity & Casualty Co. v. Meyer, 106 Ark. 91, 152 S. W. 995, 44 L.R.A.(N.S.) 493.

California.—Rankin v. Amazon Ins. Co. 89 Cal. 203, 23 Am. St. Rep. 460, 26 Pac. 872; Wells, Fargo Co. v. Pacific Ins. Co. 44 Cal. 397, 406.

Colorado.—Messenger v. German-American Ins. Co. 47 Colo. 448, 107 Pac. 643; German-American Ins. Co. v. Messenger, 25 Colo. App. 153, 136 Pac. 478.

Georgia.—North British & Mercantile Ins. Co. v. Tye, 1 Ga. App. 380, 58 S. E. 110.

Maine.—Blinn v. Dresden Mutual Fire Ins. Co. 85 Me. 389, 27 Atl. 263.

Maryland.—Maryland Ins. Co. v. Bossiere, 9 Gill & J. (Md.) 121; Patapsco Ins. Co. v. Biscoe, 7 Gill & J. (Md.) 293, 28 Am. Dec. 219.

New Hampshire.—Anderson v. Ætna Life Ins. Co. 75 N. H. 375, 74 Atl. 1051, 28 L.R.A.(N.S.) 730 (annotated on liability for indemnity against total disability which results from an injury for which an independent indemnity is provided); Johnson v. Maryland Casualty Co. 73 N. H. 259, 11 Am. St. Rep. 609, 60 Atl. 1009.

New York.—Schumacher v. Great Eastern Casualty & Indemnity Co. 197 N. Y. 58, 27 L.R.A.(N.S.) 480, and note, 90 N. E. 353, 39 Ins. L. J. 428 (intent and purpose of separate independent paragraph governs); Paul v. Travelers' Ins. Co. 112 N. Y. 472, 8 Am. St. Rep. 756, 3 L.R.A. 443, 20 N. E. 347; Marco v. Liverpool & London Ins. Co. 35 N. Y. 664; Ripley v. Ætna Ins. Co. 30 N. Y. 136, 86 Am. Dec. 362.

North Carolina.—Livingston Grocery Co. v. Philadelphia Casualty Co. 157 N. Car. 116, 72 S. E. 870; Henderson Lighting & Power Co. v. Maryland Casualty Co. 153 N. Car. 275, 30 L.R.A.(N.S.) 1105, 69 S. E. 224; Bray v. Virginia Fire & Marine Ins. Co. 139 N. Car. 390, 51 S. E. 922.

Ohio.—Rankin v. United States

question is "not what was the intention of the parties, but what is the meaning of the words they have used." [17] In this case the parties had failed, by apt and proper words, to express their intention, and the contract was construed in accordance with the meaning of the terms employed. In connection with this case we suggest that, if the words used are clear and precise, it is not an unreasonable presumption that the parties intended that meaning which the words used fairly express, even though the parties may have actually intended otherwise, and if the meaning of the words is obscure, it is but just that other aids should be resorted to to ascertain what meaning the parties intended to convey by the words they have used.[18] The general rule is, that the intent is to be obtained first from the language of the entire policy in connection with the risk or subject matter.[19]

Fidelity & Guaranty Co. 86 Ohio St. 267, 94 N. E. 314; Travelers' Ins. Co. v. Myers, 62 Ohio St. 529, 49 L.R.A. 760, 57 N. E. 458, 29 Ins. L. J. 894.

Oregon.—Mutual Benefit Life Ins. Co. v. Cummings, 66 Oreg. 272, 133 Pac. 1169; Weidert v. State Ins. Co. 19 Oreg. 261, 20 Am. St. Rep. 109, 24 Pac. 242.

Washington.—Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co. 59 Wash. 501, 140 Am. St. Rep. 863, 28 L.R.A.(N.S.) 596 and note, an effect of temporary condition which ceased before loss, under general provision against increase of risk, or specific provision against certain conditions. 110 Pac. 36.

England.—Parkhurst v. Smith, Willes, 332, per Willis, C. J.

See citations under third next following note, also 17 Earl of Halsbury's Laws of England, pp. 342 (marine) 527 (fire).

[16] Rickman v. Carstars, 5 Barn. & Adol. 651, 663.

[17] See, also, Holmes v. Charlestown Mutual Fire Ins. Co. 10 Met. (51 Mass.) 211; 43 Am. Dec. 428; J. I. Kelly Co. v. St. Paul Fire & Marine Ins. Co. 56 Fla. 456, 47 So. 742, 38 Ins. L. J. 215, 236.

[18] Emerigon says: "If the party who could and should have explained himself clearly and precisely has not done so, it is so much the worse for him . . . ; the just construction of an instrument should tend only to discover the meaning of its author or authors": Emerigon on Insurance (Meredith's ed. 1850) c. II. sec. 7, p. 49. This learned writer also declares that "the words of the contract are to be taken together with the intention of the parties. Verba contractus assecurationes et mentem contrahentium esse attendenda," Id. c. i. sec. 5, p. 17.

[19] *Colorado.*—Messenger v. German-American Ins. Co. 47 Colo. 448, 107 Pac. 643; German-American Ins. Co. v. Messenger, 25 Colo. App. 153, 136 Pac. 478; Goodrich v. Treat, 3 Colo. 408.

Iowa.—McCluer v. Girard Fire & Marine Ins. Co. 43 Iowa, 349, 22 Am. Rep. 249.

Kentucky.—Spring Garden Ins. Co. v. Imperial Tobacco Co. 132 Ky. 7, 136 Am. St. Rep. 164, 20 L.R.A. (N.S.) 177, 116 S. W. 234, 38 Ins. L. J. 277.

Maine.—Blinn v. Dresden Mutual Fire Ins. Co. 85 Me. 389, 27 Atl. 263; Moore v. Protection Ins. Co. 29 Me. 97, 48 Am. Dec. 514.

New York.—Foot v. Ætna Life Ins. Co. 61 N. Y. 571; Savage v. Howard Ins. Co. 44 How. Pr. (N. Y.) 40, 51, 52 N. Y. 502, 504, 11 Am. Rep. 741.

North Carolina—Lexington Groc-

Policies of insurance are to be considered with reference to the intentions of the parties, to be ascertained from the terms and conditions placed therein.[20] If the language used by the parties in writing, the contract is plain and susceptible of but one meaning, and the transaction is free from fraud or mistake, that language will control;[1] but if the language is ambiguous and obscure, and does not in itself discover the intent, then resort may be had to usage or to the surrounding circumstances existing at the time the contract was made.[2] And the rule applies to mutual benefit certificates.[3]

Again, a policy should be given effect according to the sense in which the parties mutually understood it when it was made,[4] and such mutual intention controls as it existed at the time of contracting so far as it may be ascertained [5] and is lawful.[6] And such mu-

ery Co. v. Philadelphia Casualty Co. 157 N. C. 116, 72 S. E. 870.

Ohio.—German Fire Ins. Co. v. Roost, 55 Ohio St. 581, 60 Am. St. Rep. 711, 36 L.R.A. 236, 45 N. E. 1097.

Oregon.—Weidert v. State Ins. Co. 19 Or. 261, 19 Ins. L. J. 740, 24 Pac. 242.

Pennsylvania.—Snyder v. Groff, 8 Pa. Dist. R. 291, 56 Leg. Intel. 237.

Texas.—Royal Ins. Co. v. Texas & G. R. Co. 53 Tex. Civ. App. 154, 115 S. W. 117.

Wisconsin.—French v. Fidelity & Casualty Co. 135 Wis. 259, 17 L.R.A. (N.S.) 1011, 115 N. W. 869.

See §§ 205, 210 herein.

[20] Continental Ins. Co. v. Kyle, 124 Ind. 132, 19 Am. St. Rep. 77, 9 L.R.A. 81, 24 N. E. 727.

[1] Warren v. Postal Life Ins. Co. 148 N. Y. Supp. 1024, 163 App. Div. 638.

[2] Savage v. Howard Ins. Co. 44 How. Pr. (N. Y.) 40, 51, 52 N. Y. 502, 504, 11 Am. Rep. 741; Marco v. Liverpool Ins. Co. 35 N. Y. 664; Philadelphia Tool Co. v. British American Assur. Co. 132 Pa. St. 236, 24; 25 Week. Not. Cas. 370, 19 Atl. 77, 19 Am. St. Rep. 596.

See also the following cases:

Colorado.—Messenger v. German-American Ins. Co. 47 Colo. 448, 107 Pac. 648; German American Ins. Co. v. Messenger, 25 Colo. App. 153, 136 Pac. 478.

Indiana.—Northern Assur. Co. of London v. Carpenter, 52 Ind. App. 432, 94 N. E. 779, 40 Ins. L. J. 1218.

Maine.—Bickford v. Ætna Ins. Co. 101 Me. 124, 63 Atl. 552.

Michigan.—Hoose v. Prescott Ins. Co. 84 Mich. 309, 11 L.R.A. 340, 47 N. W. 587.

Missouri.—Renshaw v. Missouri State Mutual Fire & Marine Ins. Co. 103 Mo. 595, 23 Am. St. Rep. 904, 15 S. W. 945; Pietri v. Seguent, 96 Mo. App. 258, 69 S. W. 1055.

New Hampshire.—Anderson v. Ætna Life Ins. Co. 75 N. H. 375, 74 Atl. 1051, 28 L.R.A.(N.S.) 730n.

Oklahoma.—Capital Fire Ins. Co. v. Carroll, 26 Okla. 286, 109 Pac. 535, 39 Ins. L. J. 1258, 1264.

See §§ 205, 210 herein.

The intention of the parties must primarily be sought in the contract itself even though extraneous evidence is permissible. Czerweny v. National Fire Ins. Co. 139 N. Y. Supp. 345.

[3] Mullen v. Reed, 64 Conn. 240, 42 Am. St. Rep. 174, 24 L.R.A. 664, 29 Atl. 478; Daniel v. Modern Woodmen of America, 53 Tex. Civ. App. 570, 118 S. W. 311. See § 207 herein.

[4] McCarthy v. Pacific Mutual Life Ins. Co. 178 Ill. App. 502.

[5] McCaffrey v. Knights & Ladies of Columbia, 213 Pa. 609, 63 Atl. 189; Miller v. St. Paul Fire & Marine Ins.

tual intention is to be deduced, if possible, from the language of the contract alone.[7] And it governs if it can be reasonably deduced from the terms of the contract.[8] And it is held that in the absence of a plea and showing of fraud or mistake the intention of the parties must be gathered not from what they said or did or thought they intended but from the contract itself.[9]

This intent should not be contrary to legal principles or rules of law,[10] and it should be looked to rather than to any grammatical accuracy in the use of language.[11] and is rather to be regarded than the strict literal sense of the words.[12] Where the language evidences that the assured intended to do or omit an act material to the risk, it will be so construed, and the assured must reserve the right to change his intention by explicit language.[13] Mr. Parsons[14] inquires, Which intent governs where there is reason to believe that one of the parties intended one thing and the other another thing? It would seem, however, that the intent ought to be a concurrent one, that is, not the intent alone of either the insurer or insured, but one upon which the minds of the parties met.[15] So it is said that there is no principle of law "which allows the understanding of one of the parties to determine the meaning of the contract."[16]

Co. 26 S. Dak. 454, 128 N. W. 609, 40 Ins. L. J. 80, Civ. Code. sec. 1245.

[6] Miller v. St. Paul Fire & Marine Ins. Co. 26 S. Dak. 454, 128 N. W. 609, 40 Ins. L. J. 80, sec. 1245 Civ. Code.

[7] Schroeder v. Imperial Fire Ins. Co. 132 Cal. 18, 84 Am. St. Rep. 17, 63 Pac. 1074; Miller v. St. Paul Fire & Marine Ins. Co. 26 S. Dak. 454, 128 N. W. 609, 40 Ins. L. J. 80, Civ. Code, secs. 1247, 1248.

[8] McEvoy v. Security Fire Ins. Co. of Baltimore, 110 Md. 275, 132 Am. St. Rep. 428n, 22 L.R.A.(N.S.) 964n, 38 Ins. L. J. 895.

[9] Prussian National Ins. Co. v. Terrell, 142 Ky. 732, 135 S. W. 416, 40 Ins. L. J. 944.

[10] Patapsco Ins. Co. v. Biscoe, 7 Gill & J. (Md.) 293, 28 Am. Dec. 219; Parkhurst v. Smith, Willes, 327, per Willes, C. J. See as to general rule in other contracts, Equitable Loan & Security Co. v. Waring, 117 Ga. 599, 62 L.R.A. 93, 44 S. E. 320.

[11] Palmer v. Warren Ins. Co. 1 Story (U. S. C. C.) 360, 365, Fed. Cas. No. 10,698, per Story, J.; Bradley v. Nashville Ins. Co. 3 La. Ann. 708, 48 Am. Dec. 465.

[12] Cross v. Shutliffe, 2 Bay (S. C.) 220, 1 Am. Dec. 645; Eyre v. Marine Ins. Co. 6 Whart. (Pa.) 249, 254.

[13] Bilbrough v. Metropolis Ins. Co. 5 Duer (N. Y.) 587.

[14] 1 Parsons on Ins. (ed. 1868) 75.

[15] See 1 Duer on Ins. (ed. 1845) 159, 160; Holmes v. Charlestown Mut. Fire Ins. Co. 10 Met. (51 Mass.) 211, 216, 43 Am. Dec. 428, where the court refused to apply insurance to certain chattels, although it appeared that the insured intended to cover them.

[16] Montgomery v. Firemen's Ins. Co. 16 B. Mon. (Ky.) 427, 441, per Marshall, C. J.; Stone v. Granite State Fire Ins. Co. 69 N. H. 438, 45 Atl. 235, 29 Ins. L. J. 250. See Equitable Loan & Security Co. v. Waring, 117 Ga. 599, 62 L.R.A. 93, 44 S. E. 320; Supreme Council Catholic Benevolent Legion v. Grove, 176 Ind. 356, 36 L.R.A.(N.S.) 913, 96 N. E. 1059 (mutual benefit certificate).

But this may be qualified, as where one party acquiesces in such understanding and complies with the other's demands based thereon.[17] And a policy should also be interpreted as the assured understood it and the company intended he should understand it, if all parts of the contract, taken together, admit of such construction.[18] But the construction to be given to an insurance policy will not be controlled by the fact that in correspondence relating to the loss the insured apparently sought to bring it within the policy as interpreted by the insurer.[19]

But when a person accepts insurance upon terms so written in the policy by the insurer, either intentionally or otherwise, as to be calculated to deceive, and in such ambiguous language that it is possible to construe them in more than one way, a construction in favor of the understanding of the insured at the time the policy was taken should be sustained.[20]

§ 209a. Same subject: cases generally.—If the applicant is a foreigner, with an imperfect knowledge of the language, that circumstance should be considered in determining the meaning of the words he has used.[1]

If all the conditions of fact expressly provided for have failed and the contract is silent as to anything further, regard must be had to the fundamental intent and effect of the contract. And where a primary intent exists the secondary question may depend upon the circumstances, such as who is the beneficiary.[2]

The intention of the parties procuring a life insurance determines its character. Hence, if one should take out such a policy to himself, and at once assign it to a person having no insurable interest in his life, the courts would unhesitatingly declare in accordance with the facts, reading the policy and the assignment together, as forming part of one transaction, for the purpose of frustrating a wagering policy.[3]

Adjudications, construing the same clause, made prior to the issuance of the policy by the courts of last resort in several states will be presumed to have been the construction intended to be adopted

[17] Mutual Reserve Fund Life Assoc. v. Taylor, 99 Va. 208, 3 Va. Sup. Ct. R. 131, 37 S. E. 854.

[18] Eddy v. Phœnix Mut. Life Ins. Co. 65 N. H. 27, 23 Am. St. Rep. 17, 18 Atl. 89.

As to construction placed upon contract by the parties themselves. See Missouri State Life Ins. Co. v. Hill, 109 Ark. 17, 159 S. W. 31; also § 205 herein.

[19] Jackson v. British American Assur. Co. 106 Mich. 47, 30 L.R.A. 636, 63 N. W. 899.

[20] Nellis v. Western Life Indemnity Co. 207 N. Y. 390, 100 N. E. 1119, aff'g 129 N. Y. Supp. 1126, 145 App. Div. 908.

[1] Knickerbocker Life Ins. Co. v. Trefz, 104 U. S. 197, 26 L. ed. 708.

[2] Smith v. Metropolitan Life Ins. Co. 222 Pa. 226, 20 L.R.A.(N.S.) 928, 123 Am. St. Rep. 799, 71 Atl. 11.

[3] Steinback v. Diepenbrock, 158 N.

by the parties, otherwise the language of the policy should have been modified to make the contrary intent clear.[4]

§ 209b. Same subject: construction of warranties.—The intention of the parties must control in the construction of the warranties contained in a policy of insurance, as the same is shown by the situation of the parties, the condition of the thing insured, and what was said or done at the time the insurance was effected.[5] But it is held that in contracts of insurance the rules of construction require that reference should be had to the real intention of the parties, *except in cases relating to warranties;* also that the whole contract be considered, and when one clause stands with others, its sense may be gathered from those which immediately precede and follow it.[6]

§ 209c. Same subject: application, proposal, policy, etc.—In case of ambiguity the application, policy and premium note may be considered together to ascertain the meaning.[7] And the application as well as the terms of the policy itself and facts known to the insurer's agent may be considered in ascertaining the intent of the parties.[8] But a stipulation in the policy may be paramount to one in the application.[9] Although in case of conflict between the provisions of a policy and statements contained in the application the former, it is held, controls,[10] still where the proposal is "considered as incorporated" in the policy, the court will, on construction of the two documents read together, give effect to the proposal as overriding the policy where they differ, for where a party receives a printed form of proposal, it is reasonable to assume that he reads and relies upon it and that he will receive in exchange for the form required a policy which such party is entitled to assume, and does assume in most cases, without careful reading of the document, to accord with the proposal form.[11] But questions and answers in the application

Y. 24, 70 Am. St. Rep. 424, 44 L.R.A. 417, 52 N. E. 662.

[4] Fidelity & Casualty Co. v. Lowenstein, 97 Fed. 17, 38 C. C. A. 29, 46 L.R.A. 450, 29 Ins. L. J. 111, aff'g Lowenstein v. Fidelity & Casualty Co. 88 Fed. 474, 28 Ins. L. J. 52.

[5] House v. Prescott Ins. Co. 84 Mich. 309, 11 L.R.A. 340, 47 N. W. 587. See § 1950 herein.

[6] Straus v. Imperial Fire Ins. Co. 94 Mo. 182, 4 Am. St. Rep. 368, 6 S. W. 698.

[7] Kimbro v. Continental Ins. Co. 101 Tenn. 245, 47 S. W. 413.

[8] Merchants' Mutual Fire Ins. Co. v. Harris, 51 Colo. 95, 116 Pac. 143, 40 Ins. L. J. 1733.

[9] Mutual Life Ins. Co. v. Hill, 193 U. S. 551, 24 Sup. Ct. 538, 48 L. ed. 788, rev'g 118 Fed. 708, 55 C. C. A. 536.

[10] Goodwin v. Provident Savings Life Assur. Assoc. 97 Iowa, 226, 59 Am. St. Rep. 411, 32 L.R.A. 473, 66 N. W. 157. See § 1935 herein.

[11] Bradley & Essex & Suffolk Accident Indemnity Soc., In re, 81 L. J. K. B. 523, 530, [1912] 1 K. B. 415, 165 L. T. 919, 28 T. L. R. 175, [1912] W. C. Rep. 6, per Farwell, L. J., applied in this case to *a policy taken out, un-*

should be construed together to determine the meaning.[12] Again, complicated and ambiguous conditions and qualifications of applications and policies may involve the construction of the terms actually employed, so as to effectuate their purpose to protect both insurer and insured from fraud.[13]

§ 209d. Contemporaneous agreements.—Where two contracts though separate in form are both applied for and agreed upon at the same time as one transaction they must be considered together for the purpose of determining the character of the transaction and the intention of the parties, and both instruments should be given effect when reasonably possible.[14]

§ 210. Construction: reference must be had to nature of risk and subject-matter.—The language of a policy must be construed with reference to the subject matter and the nature of the property to which it is applied, and with a view to the objects and intentions of the parties as the same may be gathered from the whole instrument.[15] And the existing law relating to the subject-matter must

der the workmen's compensation act, 1906, of England, against accidents to employees.

[12] Collins v. Catholic Order of Foresters, 43 Ind. App. 549, 88 N. E. 87. See § 222 herein.

[13] Rupert v. Supreme Court of United Order of Foresters, 94 Minn. 293, 102 N. W. 715, 34 Ins. L. J. 324.

[14] Urwan v. Northwestern National Life Ins. Co. 125 Wis. 349, 103 N. W. 1102, 34 Ins. L. J. 727; Farmers' Alliance Ins. Co. v. Atchison Topeka & Santa Fe Ry. Co. (Same v. Hanks) 83 Kan. 96, 110 Pac. 99.

In support of the general rule, see also the following cases:

California.—Getz Bros. & Co. v. Federal Salt Co. 147 Cal. 115, 109 Am. St. Rep. 114, 81 Pac. 416; Downing v. Rademacher, 133 Cal. 220, 85 Am. St. Rep. 160, 81 Pac. 416.

Illinois.—Chicago Trust & Savings Bank v. Chicago Title & Trust Co. 190 Ill. 404, 83 Am. St. Rep. 138, 60 N. E. 586.

Michigan.—Sutton v. Beckwith, 68 Mich. 303, 13 Am. St. Rep. 344, 36 N. W. 79.

Minnesota.—Myrick v. Purcell, 95 Minn. 133, 5 Amer. & Eng. Ann. Cas. 148, 103 N. W. 902.

Missouri.—Jennings v. Todd, 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148.

New York.—Palmer v. Palmer, 150 N. Y. 139, 55 Am. St. Rep. 653, 44 N. E. 966.

Oregon.—Bradtfeldt v. Cooke, 27 Oreg. 194, 50 Am. St. Rep. 701, 40 Pac. 1; Weber v. Rothschild, 15 Oreg. 385, 3 Am. St. Rep. 162, 15 Pac. 650.

Virginia.—Portsmouth Cotton Oil Refining Co. v. Oliver Refining Co. 109 Va. 513, 132 Am. St. Rep. 924, 64 S. E. 56.

Wisconsin.—Thorp v. Mindeman, 123 Wis. 149, 107 Am. St. Rep. 1003, 68 L.R.A. 146, 101 N. W. 417.

[15] Allegre v. Maryland Ins. Co. 2 Gill & J. (Md.) 136, 20 Am. Dec. 424; De Graff v. Queen Ins. Co. 38 Minn. 501, 8 Am. St. Rep. 685, 38 N. W. 696; Ripley v. Ætna Ins. Co. 30 N. Y. 136, 86 Am. Dec. 362. See 17 Earl of Halsbury's Laws of England, p. 342.

See also the following cases:

United States.—Ætna Ins. Co. v. Boon, 95 U. S. 117, 24 L. ed. 395 (*considered* in note to § 211 herein)

be presumed to have been considered by the parties.[16] An accident policy must be construed with reference to the subject to which it is applied,[17] and the general purpose and situation of the parties.[18]

The subject-matter, the risk and the various provisions of *an automobile accident policy* should be construed together to ascertain the controlling thought as to indemnity, and the thing contracted for.[19]

In case of a policy upon livestock it has been said that "such policies must be presumed to have been made with reference to the purposes for which such property is ordinarily used, as well as the manner in which it is usually kept.[20] It may be added as within this rule that the terms and conditions of a policy should be construed, if possible, so as to give them a meaning reasonably applicable to the kind of insurance upon the particular species of property insured, having in view the purposes for which it is ordinarily used, and the manner in which it is usually kept.[1] So the known character of insured's business must be considered, as where a policy is issued to a railroad transfer company engaged in handling foreign cars or cars of other railroads, leased and for which assured was liable.[2] So where the insurance is against loss from accidental damage to or destruction of property except by fire

California.—Raulet v. Northwestern National Ins. Co. 157 Cal. 213, 107 Pac. 292, 39 Ins. L. J. 742.

Colorado.—Messenger v. German-American Ins. Co. 47 Colo. 448, 107 Pac. 642; German-American Ins. Co. v. Messenger, 25 Colo. App. 153, 136 Pac. 478.

Minnesota.—Frost's Detroit Lumber & Wooden Ware Works v. Miller's & Manufacturers Mutual Ins. Co. 37 Minn. 300, 5 Am. St. Rep. 346, 34 N. W. 35.

Missouri.—Renshaw v. Missouri State Mutual Fire & Marine Ins. Co. 103 Mo. 595, 23 Am. St. Rep. 904, 15 S. W. 945.

Texas.—Royal Ins. Co. v. Texas & G. Ry. Co. 53 Tex. Civ. App. 154, 715 S. W. 117.

[16] Brooks v. Metropolitan Life Ins. Co. 70 N. J. L. 36, 56 Atl. 168. See §§ 194, 194a herein.

[17] Healey v. Mutual Accident Assn. 133 Ill. 556, 9 L.R.A. 371, 25 N. E. 52, 23 Am. St. Rep. 637, 31 Cent. L. J. 419, per Craig, J.; Rockford Ins. Co. v. Nelson, 65 Ill. 420.

[18] Anderson v. Ætna Life Ins. Co. 75 N. H. 375, 28 L.R.A.(N.S.) 730n, 74 Atl. 1051.

[19] Patterson v. Standard Accident Ins. Co. 178 Mich. 288, 144 N. W. 491, 51 L.R.A.(N.S.) 583n (on insurance covering automobiles, or indemnifying against injury, or liability for injury caused thereby, see notes in 44 L.R.A.(N.S.) 70; 51 L.R.A.(N.S.) 583; and L.R.A.1915E, 575).

[20] Citing Holbrook v. St. Paul Fire & Marine Ins. Co. 25 Minn. 229; Boright v. Springfield Fire & Marine Insurance Co. 34 Minn. 352, 25 N. W. 796.

On annual insurance see note in 44 L.R.A.(N.S.) 569.

[1] De Graff v. Queen Ins. Co. 38 Minn. 501, 8 Am. St. Rep. 685, 38 N. W. 696, per Mitchell, J.

[2] Phenix Ins. Co. v. Belt Ry. Co. 82 Ill. App. 265, aff'd 182 Ill. 33, 54 N. E. 1046.

or lightning, the character of the property, such as a mill, etc., and that which is obvious in regard to it including the natural perils to which it is exposed, and which the insurer is presumed to know, will all be considered.[3] So the evident objects to be accomplished by the insurance, the nature of the property or business, the conditions, uses, and methods reasonably applicable in view thereof and of which the insurer will be presumed to have knowledge, are all important factors in construing the contract.[4] And not only the evident objects of the contract should be considered but reference must also be had to the benefits to be secured and the perils or risks sought to be avoided.[5] Again, in considering the prohibitions and conditions in a policy of insurance, the parties must be presumed to have intended, the one to insure, and the other to obtain insurance on, the subject matter of insurance as it necessarily was at the time, and must continue to be during the life of the policy.[6] Construction should also be liberal, having in view in the case of marine policies, the nature of the voyage, and the intent of the parties.[7] And the risks excluded as well as those included are factors in construing a policy on goods insured against loss by fire, derailment of trains and perils of the sea.[8] So a provision in the policy against loss by fire avoiding the policy if the property becomes encumbered has been held not to include encumbrance by judgment, although within the terms used.[9] And in determining whether a bond to become effective as a lien was a "chattel mortgage" encumbrance, the circumstances surrounding the execution of the instrument, the situation of the parties to it and what was done under it, and also the general object or purpose of the entire insurance contract and the lawful conditions prescribed were considered and it was determined that the fact that the instrument was in the usual form and was called a "chattel mortgage" was not conclusive.[10] Again, the

[3] Hey v. Guarantors' Liability Indemnity Co. 181 Pa. 220, 49 Wkly. N. C. 423, 28 Pitts. L. J. N. S. 21, 37 Atl. 402, 26 Ins. L. J. 1012, 59 Am. St. Rep. 644.

Underwriter presumed to know causes which occasion natural perils; concealment, see § 1806 herein.

[4] Kauffman Bros. v. Western Ins. Co. 21 Lancaster Law Rev. 252; Kauffman Bros. v. Standard Fire Ins. Co. 21 Lancaster Law Rev. 249.

[5] Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co. 59 Wash. 501, 140 Am. St. Rep. 863, 28 L.R.A. (N.S.) 593n, 110 Pac. 36.

[6] Fraim v. National Fire Ins. Co. 170 Pa. St. 151, 50 Am. St. Rep. 753, 32 Atl. 613.

[7] Columbian Ins. Co. v. Catlett, 12 Wheat. (25 U. S.) 383, 386, 6 L. ed. 664, per Story, J.

[8] Stone v. Insurance Co. of North America, 56 Wash. 427, 105 Pac. 856.

[9] Baley v. Homestead Fire Ins. Co. 80 N. Y. 21, 36 Am. Rep. 570.

[10] Raulet v. Northwestern National Ins. Co. 157 Cal. 213, 107 Pac. 292, 39 Ins. L. J. 742.

court declares in a New York case that "this policy, like any other contract between parties, is to be construed not merely by the letter, but by the spirit. We must read it in connection with the whole subject matter to which it relates, and give to language its ordinary and natural meaning. If, then, the intention of the parties becomes manifest, such intention must prevail." [11]

§ 211. Construction must be reasonable.—The construction of policies of insurance must not be that which would lead to an absurdity, but must be reasonable with reference to the risk and subject-matter, and purposes of the entire contract,[12] so as not to defeat the intention of parties,[13] and if one interpretation of a contract of insurance capable of two interpretations would lead to an absurd

[11] Paul v. Travelers' Ins. Co. 112 N. Y. 472, 477, 3 L.R.A. 443, 8 Am. St. Rep. 758, 761, 20 N. E. 347.

[12] *California.*—Raulet v. Northwestern National Ins. Co. 157 Cal. 213, 107 Pac. 292, 29 Ins. L. J. 742.

Colorado.—Messenger v. German-American Ins. Co. 47 Colo. 448, 107 Pac. 643; Barclay v. London Guarantee & Accident Co. Ltd. 46 Colo. 558, 105 Pac. 865.

Indiana.—Indiana Life Endowment Co. v. Reed, 54 Ind. App. 450, 103 N. E. 77.

Maryland.—Ætna Indemnity Co. v. Waters, 110 Md. 673, 73 Atl. 712.

Missouri.—Tesson v. Atlantic Mutual Ins. Co. 40 Mo. 33, 93 Am. Dec. 293; Miller v. Missouri State Life Ins. Co. 168 Mo. App. 330, 153 S. W. 1080; Banta v. Continental Casualty Co. 134 Mo. App. 222, 113 S. W. 1140.

Nebraska.—Woodmen's Accident Assoc. v. Byers (Pratt.) 62 Neb. 673, 55 L.R.A. 291n, 89 Am. St. Rep. 777, 87 N. W. 546, 31 Ins. L. J. 183; Springfield Fire & Marine Ins. Co. v. McLimans, 28 Neb. 846, 45 N. W. 171.

New Hampshire.—Anderson v. Ætna Life Ins. Co. 75 N. H. 375, 28 L.R.A.(N.S.) 730n, 74 Atl. 1051.

New Jersey.—Melick v. Metropolitan Life Ins. Co. 84 N. J. L. 437, 87 Atl. 75.

New York.—Matthews v. American Central Ins. Co. 154 N. Y. 449, 39 L.R.A. 433, 61 Am. St. Rep. 627, 48 N. E. 751, 27 Ins. L. J. 193; Turley v. North America Fire Ins. Co. 25 Wend. (N. Y.) 374.

Ohio.—Travelers' Ins. Co. v. Myers, 62 Ohio St. 529, 49 L.R.A. 760, 57 N. E. 458.

Pennsylvania.—Eyre v. Marine Ins. Co. 5 Watts & S. (Pa.) 117.

Tennessee.—Insurance Co. v. Bennett, 90 Tenn. 256, 25 Am. St. Rep. 685, 16 S. W. 723.

Vermont.—Crosby v. Vermont Accident Ins. Co. 84 Vt. 510, 80 Atl. 817, 40 Ins. L. J. 2036; Duran v Standard Life & Accident Ins. Co. 63 Vt. 437, 25 Am. St. Rep. 773, 13 L.R.A. 637, 22 Atl. 530.

Washington.—Hocking v. British America Assur. Co. 62 Wash. 73, 36 L.R.A.(N.S.) 1155 note, 113 Pac. 259.

Policies of insurance must receive a reasonable interpretation, consonant with the apparent object and plain intent of the parties: and, to understand them as the parties understood them, the nature of the contract, the objects to be attained, and all the circumstances must be considered. Ætna Ins. Co. v. Boon, 95 U. S. 117, 24 L. ed. 395, *cited* in Kelley v. Mutual Life Ins. Co. 75 Fed. 639.

[13] Travelers Ins. Co. v. Myers, 62 Ohio St. 529, 49 L.R.A. 760, 57 N. E. 458; West v. Citizens' Ins. Co. 27 Ohio St. 1, 22 Am. Rep. 294.

conclusion, looking to the other provisions of the contract and its general scope and object, such interpretation must be abandoned and that adopted which will be more consistent with reason and probability.[14] And stipulations as to what insured must do after loss or which relate merely to the procedure after loss are to be reasonably and not rigidly construed.[15] And when a reasonable construction can be had without recourse to extrinsic evidence, such evidence is inadmissible.[16]

§ 212. Contract should be given effect if possible.—The whole policy with all its provisions, words and parts should be construed together as one entire contract,[17] and such meaning should be given thereto as to carry out and effectuate to the fullest extent the intention of the parties: no portion should receive such a construction as will defeat the obvious intent,[18] and the construction should be liberal rather than critical or technical,[19] for technical constructions

[14] L'Engle v. Scottish Union & National Fire Ins. Co. 48 Fla. 82, 111 Am. St. Rep. 70, 37 So. 462, 67 L.R.A. 581.

[15] Paltrovitch v. Phoenix Ins. Co. 143 N. Y. 73, 25 L.R.A. 198, 37 N. E. 639; Will & Baumer Co. v. Rochester German Ins. Co. 125 N. Y. Supp. 606, 140 App. Div. 691.

[16] Baltimore Fire Ins. Co. v. Loney, 20 Md. 20, 36.

[17] *United States.*—Employers Liability Assur. Corp. Ltd. of London v. Morrow, 143 Fed. 750, 74 C. C. A. 640.

Florida.—L'Engle v. Scottish Union & National Ins. Co. 48 Fla. 82, 67 L.R.A. 581, 111 Am. St. Rep. 70, 37 So. 462.

Georgia.—Royal Union Life Ins. Co. v. McLendon, 4 Ga. App. 620, 62 S. E. 101.

Kentucky.—Spring Garden Ins. Co. v. Imperial Tobacco Co. 132 Ky. 7, 20 L.R.A.(N.S.) 277, 136 Am. St. Rep. 164, 116 S. W. 234, 38 Ins. L. J. 446.

Missouri.—Straus v. Imperial Fire Ins. Co. 94 Mo. 182, 4 Am. St. Rep. 368, 6 S. W. 698.

Ohio.—German Fire Ins. Co. v. Roost, 55 Ohio St. 581, 36 L.R.A. 236, 45 N. E. 1097.

Oregon.—Chrisman v. State Ins. Co. 16 Or. 283, 18 Pac. 466. Cases under §§ 185–188 herein.

[18] Crane v. City Ins. Co. 3 Fed. 558; McEvoy v. Security Fire Ins. Co. 110 Md. 275, 132 Am. St. Rep. 428 note, 22 L.R.A.(N.S.) 964 note, 73 Atl. 157, 38 Ins. L. J. 895; Capital Fire Ins. Co. v. Carroll, 26 Okla. 286, 109 Pac. 535.

[19] *United States.*—Palmer v. Warren Ins. Co. 1 Story (U. S. C. C.) 360, 365, per Story, J.; Crane v. City Ins. Co. 3 Fed. 558.

Alabama.—Alabama Gold Life Ins. Co. v. Johnston, 80 Ala. 467, 2 So. 125, 60 Am. Rep. 112.

Georgia.—Royal Union Life Ins. Co. v. McLendon, 4 Ga. 620, 62 So. 101.

Maryland.—Riggin v. Patapsco Ins. Co. 7 Har. & J. (Md.) 279, 16 Am. Dec. 302; Allegre v. Maryland Ins. Co. 2 Gill & J. (Md.) 136, 20 Am. Dec. 424.

New York.—Sergent v. Liverpool & London & Globe Ins. Co. 155 N. Y. 349, 49 N. E. 935, 28 Ins. L. J. 59, rev'g 85 Hun, 31, 32 N. Y. Supp. 594; Matthews v. American Central Ins. Co. 154 N. Y. 449, 39 L.R.A. 433, 61 Am. St. Rep. 627, 48 N. E. 751, 27 Ins. L. J. 193; Paul v. Travelers Ins. Co. 112 N. Y. 472, 479, 8 Am. St. Rep. 758, 762.

are not favored.[20] The contract should be given effect if possible, rather than made void, for only a stern legal necessity will warrant a construction that would nullify the policy [1] or defeat a recovery if the contract is susceptible of a meaning which will permit one, and this also applies to a benefit certificate.[2] Doubtful clauses should not be considered separately, and discrepancies must, if possible, be reconciled. Resort may be had to other parts to ascertain the meaning and intent of the parties.[3] And in case of repugnant clauses the evident purpose of the parties to the contract should not be defeated

South Dakota.—McNamara v. Dakota Fire & Marine Ins. Co. 1 S. Dak. 342, 47 N. W. 288.

[20] Miller v. Mutual Benefit Life Ins. Co. 31 Iowa, 226, 7 Am. Rep. 122, per the Court; Union Mutual Ins. Co. v. Wilkinson, 13 Wall. (80 U. S.) 222, 20 L. ed. 617; Sergent v. Liverpool & London & Globe Ins. Co. 155 N. Y. 349, 49 N. E. 935, 28 Ins. L. J. 59, rev'g 85 Hun, 31, 32 N. Y. Supp. 594; Porter v. Casualty Co. of America, 70 Misc. 246, 126 N. Y. Supp. 669.

[1] *Indiana.*—Ætna Life Ins. Co. v. Fitzgerald, 165 Ind. 317, 112 Am. St. Rep. 232, 1 L.R.A.(N.S.) 422 note, 6 Am. & Eng. Ann. Cas. 551, 75 N. E. 262; Indiana Life Endowment Co. v. Reed, 54 Ind. App. 450, 103 N. E. 77; Franklin Life Ins. Co. v. Wallace, 93 Ind. 7.

Kentucky.—Spring Ins. Co. v. Imperial Tobacco Co. 132 Ky. 7, 136 Am. St. Rep. 164, 20 L.R.A.(N.S.) 277, 116 S. W. 234, 38 Ins. L. J. 446.

Maryland.—Phœnix Ins. Co. v. Tomlinson, 125 Md. 84, 21 Am. St. Rep. 203, 211; McEvoy v. Security Fire Ins. Co. 110 Md. 275, 132 Am. St. Rep. 428 note, 22 L.R.A.(N.S.) 964 note, 73 Atl. 157, 38 Ins. L. J. 895.

Missouri.—Mitchell v. German Commercial Accident Co. 179 Mo. App. 1, 161 S. W. 32; Roseberry v. American Benevolent Assoc. 142 Mo. App. 552, 121 S. W. 785.

New Jersey.—Carson v. Jersey City Ins. Co. 43 N. J. L. (14 Vroom) 300, 39 Am. Rep. 584, 586.

New York.—Darrow v. Family Fund Society, 116 N. Y. 537, 15 Am. St. Rep. 430, 6 L.R.A. 495, 22 N. E. 1093; Baley v. Homestead Fire Ins. Co. 80 N. Y. 21, 36 Am. Rep. 570.

Pennsylvania.—Burkhard v. Travelers' Ins. Co. 102 Pa. St. 262, 48 Am. Rep. 205; Evans v. Phœnix Mut. Relief Assur. (Pa. 1892), 49 Leg. Intell. 15, 9 Lancaster Law Rev. 59; Stacey v. Franklin Fire Ins. Co. 2 Watts & S. (Pa.) 506.

Washington.—Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co. 59 Wash. 501, 140 Am. St. Rep. 863, 28 L.R.A.(N.S.) 593 note, 110 Pac. 36; McNamara v. Dakota Fire & Marine Ins. Co. 1 S. Dak. 342, 47 N. W. 288; Brink v. Merchants' & Mechanics' Ins. Co. 49 Vt. 442.

[2] Brotherhood of Locomotive Firemen & Enginemen v. Aday, 97 Ark. 425, 34 L.R.A.(N.S.) 126, 134 S. W. 928, 40 Ins. L. J. 737. See §§ 207, 221, 222 herein.

[3] 1 Duer on Insurance (ed. 1845) 165, sec. 10. "Indeterminate forms of expression . . . are to be understood in a sense subservient to the general purposes of the contract." Hoffman v. Ætna Fire Ins. Co. 32 N. Y. 413, 88 Am. Dec. 337; Cutler v. Royal Ins. Co. 70 Conn. 566, 41 L.R.A. 159, 40 Atl. 529; Crosby v. Vermont Accident Ins. Co. 84 Vt. 510, 80 Atl. 817, 40 Ins. L. J. 2036 (should be interpreted by context).

by construction.[4] And clauses should not be construed as repugnant unless irreconcilable with any reasonable interpretation which incorporates them as forming a harmonious plan for insurance of the nature contemplated by the parties; and the construction must, if possible, give force and effect to each clause.[5] The premium may be resorted to to discover the amount intended to be insured,[6] for the intent is to be gathered from the surrounding clauses and from all parts of the instrument, and the words should be taken in that sense to which the apparent object and intention of the parties limit them.[7]

Where a policy agreed to indemnify a contractor against loss from liability for damages on account of bodily injuries, fatal or otherwise, accidentally suffered to any employee or employees and an agreement attached to the policy extended it to cover the liability of assured to the public only for personal injuries, only caused by assured or his workmen the two clauses must be construed together as an agreement to indemnify the assured against loss from liability for damages on account of accidental injuries to employees and injuries to the public caused by assured or their employees.[8]

§ 213. **Construction: rejection of words and clauses.**—Every word and every sentence should be given effect, and no part be ineffectual or rejected as superfluous, in order that the whole contract may stand together,[9] no provision is to be wholly disregarded because it is inconsistent with other provisions, unless no other reasonable construction is possible;[10] and if the words are susceptible of a rational and intelligible meaning which is consistent with the object and purposes evidenced by the entire policy, no part should be rejected as inoperative,[11] so it is said in an Iowa case: "While we are authorized to construe the policy we are not at liberty to strike out absolutely a carefully inserted and detailed provision thereof." [12] Again, if it can be avoided, no clause should be de-

[4] Employer's Liability Ins. Corp. Ltd. of London v. Morrow, 143 Fed. 750, 74 C. C. A. 640.

[5] Ferguson v. Union Mutual Life Ins. Co. 187 Mass. 8, 72 N. E. 358, 34 Ins. L. J. 53, 54.

[6] Port v. Phœnix Ins. Co. 10 Johns. (N. Y.) 79, 84.

[7] Paul v. Travelers' Ins. Co. 112 N. Y. 472, 479, 8 Am. St. Rep. 758, 762, per the Court, *citing* Yeaton v. Fry, 5 Cranch (9 U. S.) 335, 3 L. ed. 117; Hoffman v. Ætna Fire Ins. Co. 32 N. Y. 405, 88 Am. Dec. 337; White v. Hudson River Ins. Co. 15 How. Pr. (N. Y.) 288.

[8] Creem v. Fidelity & Casualty Co. 126 N. Y. Supp. 555, 141 App. Div. 493.

[9] Chrisman v. State Ins. Co. 16 Or. 284, 18 Pac. 466.

[10] German Fire Ins. Co. v. Roost, 55 Ohio St. 581, 60 Am. St. Rep. 711, 36 L.R.A. 236, 45 N. E. 1097, 26 Ins. L. J. 699.

[11] Stettiner v. Granite Ins. Co. 5 Duer (N. Y.) 594, 597.

[12] Dahms & Sons Co. v. German

clared nugatory,[13] for a construction should be given that will carry into effect, if possible, all the provisions of the policy,[14] and each clause.[15] Again, the policy should also be interpreted by the context, so as, if possible, to give a sensible meaning and effect to all its provisions; and so as to avoid rendering portions of it contradictory and inoperative, by giving effect to some clauses to the exclusion of others.[16] But although clauses apparently repugnant must be reconciled if it can be done by any reasonable construction, yet a proviso utterly repugnant to the body of the contract and irreconcilable with it will be rejected.[17]

Where printed and written portions of the policy are contradictory, the printed will be rejected.[18] And the last of two repugnant irreconcilable clauses will be rejected and the first will stand, especially so where a different construction would defeat the evident purpose of the contract.[19] Words in the policy will not be so construed as to lead to unreasonable results.[20] Portions of the description which are false will be disregarded if enough remains to identify the property.[1]

§ 214. General and special clauses.—The general clauses, says Emerigon, are to be interpreted, generally, as they are written.[2]

Fire Ins. Co. 153 Iowa, 168, 132 N. W. 870, 40 Ind. L. J. 2133, 2138, *quoting* from Insurance Co. v. Ayers, 88 Tenn. 728, 13 S. W. 1000.

[13] Mutual Life Ins. Co. v. New, 125 La. 41, 27 L.R.A.(N.S.) 431, 136 Am. St. Rep. 326, 51 So. 61, Civ. Code Art. 1951. See as to general principle, State (ex rel. Davis) v. Mortensen, 69 Neb. 376, 5 Am. & Eng. Ann. Cas. 291, 95 N. W. 831.

[14] Springfield Fire & Marine Ins. Co. v. McLimans, 28 Neb. 846, 45 N. W. 171; Spring Garden Ins. Co. v. Imperial Tobacco Co. 132 Ky. 7, 136 Am. St. Rep. 164, 20 L.R.A.(N.S.) 277, 116 S. W. 234, 38 Ins. L. J. 446.

[15] Ferguson v. Union Mutual Life Ins. Co. 187 Mass. 8, 72 N. E. 358, 34 Ins. L. J. 53, 54, *considered* under § 212 herein.

[16] Crosby v. Vermont Accident Ins. Co. 84 Vt. 510, 80 Atl. 817, 40 Ins. L. J. 2036.

[17] Jones v. Pennsylvania Casualty Co. 140 N. Car. 262, 111 Am. St. Rep. 843, 52 S. E. 578, 5 L.R.A. (N.S.) 932 note.

[18] Hernandez v. Sun Mut. Ins. Co. 6 Blatchf. (U. S. C. C.) 317, Fed. Cas. No. 6415. See § 223 herein.

On typewritten matter as written or as printed matter within rule that written shall prevail over printed provisions in case of conflict, see note in L.R.A.1915D, 1084.

[19] Employer's Liability Ins. Corp. Ltd. of London v. Morrow, 143 Fed. 750, 74 C. C. A. 640; Bean v. Ætna Life Ins. Co. 111 Tenn. 186, 78 S. W. 104; Wisconsin Marine & Fire Ins. Co. Bank v. Wilkin, 95 Wis. 111, 60 Am. St. Rep. 86, 69 N. W. 354. See also as to general rule Vickers v. Electrozone Commercial Co. 67 N. J. L. 665, 52 Atl. 467; Brady v. Carolina Steel Bridge & Construction Co. 76 S. Car. 297, 56 S. E. 964.

[20] Ogden v. Columbia Ins. Co. 10 Johns. (N. Y.) 273.

[1] Hatch v. New Zealand Ins. Co. 67 Cal. 122, 7 Pac. 411.

[2] "The contracting parties are to impute to themselves the inconvenience of not having affixed any instructions. These rules are taught us by all our doctors." Emerigon on

But general words, says Lord Bacon,[3] "not express and precise, shall be restrained unto the fitness of the matter and the person," and general words may be aptly restrained according to the subject-matter or person to which they relate.[4] If both clauses are general one does not control the other.[5] But it is also held in construing a like clause (incontestable) that it controls.[6] A special clause in a policy which creates an exception to a general clause governs the latter,[7] and a special stipulation in a certificate will control a general stipulation therein.[8] So the meaning of general words, phrases and stipulations will be restricted when it is evident from the special or particular provisions of the contract that they were not intended to have the broad signification of which they are fairly susceptible.[9] But a special provision will override a general provision only where the two are irreconcilable and cannot stand together, for if both can be given reasonable effect they will be retained.[10] The clauses are to be taken literally when clear in themselves,[11] but the literal application of words may be controlled by other parts of the policy.[12]

§ 214a. General provisions not referred to in separate, independent paragraph nor limited by prior clause: accident policy.—If a clause in an accident policy is not expressly connected by words of limitation with those which precede it, but is a separate, independent paragraph and does not include words in any way expressly or impliedly relating to the prior general provisions, it has been in-

Insurance (Meredith's ed. 1850) 48, 49.

"The general clauses are to be construed as they are written, and because it depends on the parties either not to stipulate them or to modify them." Emerigon on Insurance, (Meredith's ed. 1850) c. xii. sec. 45, p. 513.

[3] Bacon's Law Max. Reg. 10.

[4] Sawyer v. Dodge County Mutual Ins. Co. 37 Wis. 503.

[5] Mutual Life Ins. Co. v. New, 125 La. 41, 136 Am. St. Rep. 926, 27 L.R.A.(N.S.) 431, 51 So. 61 (incontestable clause).

[6] Massachusetts Benefit Life Assoc. v. Robinson, 104 Ga. 256, 42 L.R.A. 261, 30 S. E. 910, 27 Ins. L. J. 1023. See also Goodwin v. Provident Savings Life Assur. Soc. 97 Iowa, 226, 32 L.R.A. 473, 66 N. W. 157. This question of incontestable clauses is, however, considered elsewhere herein.

[7] Bowman v. Pacific Ins. Co. 27 Mo. 152; Mitchell Furniture Co. v. Imperial Fire Ins. Co. 17 Mo. App. 627. See 17 Earl of Halsbury's Laws of England, p. 528.

Exception of loss from specified cause followed by qualifying clause, see § 2675 herein.

[8] Northwestern Mutual Ins. Co. v. Hazelett, 105 Ind. 212, 55 Am. Rep. 192, 4 N. E. 582.

[9] Sun Insurance Office v. Varble, 103 Ky. 758, 41 L.R.A. 792, 27 Ins. L. J. 798, 46 S. W. 486.

[10] German Fire Ins. Co. v. Roost, 55 Ohio St. 581, 36 L.R.A. 236, 60 Am. St. Rep. 711, 45 N. E. 1097, 26 Ins. L. J. 699.

[11] "In contractu assecurationis inspici debit in tantum, quod certum est inter contrahentes." Emerigon on Insurance (Meredith's ed. 1850) c. ii. sec. 7, p. 49; c. i. sec. 2, p. 16.

[12] Grant v. Delacour, 1 Taunt. 466.

dependently construed as embracing loss of life from causes specified therein, though not within the prior statement covering loss from general and specified injuries.[13]

§ 215. Construction will be given to uphold the law.—When a law is susceptible of two constructions, the one which will give effect to the law, rather than the one which would render the law unconstitutional, must be adopted.[14] So it is declared that the law does not presume that the parties to a contract intend by it to accomplish an illegal object; but it rather presumes that they intended to accomplish a legal purpose.[15] And it is held that a statute controls where the terms of the policy conflict therewith.[16]

§ 216. Words are to be construed in ordinary and popular sense.—Words are to be construed in their plain, ordinary, usual, and popular sense, unless they have been given a contrary, legal construction, or have acquired a distinct commercial meaning by usage, or are peculiar to some art, trade, or science, and have thereby acquired a technical meaning, or unless it is apparent from the context that a distinct and particular meaning was intended;[17] and this applies

[13] Schumacher v. Great Eastern Casualty & Indemnity Co. 197 N. Y. 58, 27 L.R.A.(N.S.) 480 (annotated on whether general requirement as to external, violent, and accidental means applies to a separate provision as to liability in case of death or injury from certain specified causes) 90 N. E. 353, 39 Ins. L. J. 428 note.

[14] New Orleans v. Salamander Co. 25 La. Ann. 650.

[15] Page v. Metropolitan Life Ins. Co. 98 Ark. 340, 135 S. W. 911, 40 Ins. L. J. 1144, per Hart, J.

[16] Fletcher v. New York Life Ins. Co. 4 McCrary (U. S. C. C.) 440, 13 Fed. 526, 528; Wall v. Equitable Life Assur. Soc. 32 Fed. 273, aff'd 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. 822; Marsden v. Hotel Owners' Ins. Co. 85 Iowa, 584, 52 N. W. 509; Taylor v. Merchants' & Bankers Ins. Co. 83 Iowa, 402, 49 N. W. 994; Fidelity Mutual Life Assn. v. Fichlin, 74 Md. 172, 23 Atl. 197. But see §§ 194, 194(g)–194a herein.

[17] *United States.*—Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. ed. 231; Maryland Casualty Co. v. Finch, 8 L.R.A.(N.S.) 308, 147 Fed. 388, 77 C. C. A. 566, s. c. 203 U. S. 592, 51 L. ed. 331, 27 Sup. Ct. 780; Delaware Ins. Co. v. Green, 120 Fed. 916, 921, 57 C. C. A. 188, 193, 61 L.R.A. 137, 140; Liverpool & London & Globe Ins. Co. v. Kearney, 94 Fed. 314, 319, 36 C. C. A. 265, 270; McGlother v. Provident Mutual Accident Co. 89 Fed. 685, 689, 32 C. C. A. 318, 322, 60 U. S. App. 705; Fred. J. Kiesel v. Sun Ins. Office, 88 Fed. 243, 60 U. S. App. 10, 31 C. C. A. 518, s. c. 171 U. S. 688, 43 L. ed. 1170, 19 Sup. Ct. 885.

Arkansas.—Monongahela Ins. Co. v. Batson, 111 Ark. 144, 163 S. W. 512.

District of Columbia.—Mitchell v. Potomac Ins. Co. 16 App. D. C. 270.

Georgia.—Melson v. Phenix Ins. Co. 97 Ga. 722, 727, 25 S. E. 189; Hartford Fire Ins. Co. v. Wimbish, 12 Ga. App. 712, 78 S. E. 265.

Illinois.—Peoria Marine & Fire Ins. Co. v. Whitehill, 25 Ill. 466.

Indiana.—Ætna Life Ins. Co. v. Fitzgerald, 165 Ind. 317, 112 Am. St. Rep. 232, 6 Am. & Eng. Ann. Cas. 551, 1 L.R.A.(N.S.) 422 note, 75 N. E. 262.

Iowa.—Vorse v. Jersey Plate

to the laws of a fraternal or mutual benefit society,[18] also to an accident policy,[19] and to an automobile fire policy.[20] The rule is in accordance with all the authorities. So Emerigon says: "The true meaning of an expression in its ordinary use is the idea that people are accustomed to attach to it." [1] And Lord Ellenborough declares that the policy "is to be construed according to its sense and meaning as collected, in the first place, from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense." [2] So Chancellor Walworth declares that "a policy of insurance, like any other contract, is to be construed by the popular understanding or the plain and ordinary sense of the terms

Glass Co. 119 Iowa, 555, 97 Am. St. Rep. 330, 93 N. W. 569, 60 L.R.A. 838.

Kansas. — Fire Association of Phila. v. Taylor, 76 Kan. 392, 91 Pac. 1070.

Maine.—Rumford Falls Paper Co. v. Fidelity & Casualty Co. 92 Me. 574, 586, 43 Atl. 503.

Maryland.—Mutual Life Ins. Co. of N. Y. v. Murray, 111 Md. 600, 75 Atl. 348.

Massachusetts. — Whitmarsh v. Conway Ins. Co. 16 Gray (82 Mass.) 359, 77 Am. Dec. 414.

Minnesota.—Bader v. New Amsterdam Gas Co. 102 Minn. 186, 120 Am. St. Rep. 613, 112 N. W. 1065.

Missouri.—Renshaw v. Missouri State Mutual Fire & Marine Ins. Co. 103 Mo. 595, 23 Am. St. Rep. 904, 153 S. W. 945; Hoover v. Mercantile Town Mutual Fire Ins. Co. 93 Mo. App. 111, 118, 69 S. W. 42.

New Hampshire.—Thorp v. Aetna Ins. Co. 75 N. H. 251, 72 Atl. 690, 38 Ins. L. J. 800; Stone v. Granite State Fire Ins. Co. 69 N. H. 438, 45 Atl. 235, 29 Ins. L. J. 250.

New York. — DeLonguemere v. New York Fire Ins. Co. 10 Johns. (N. Y.) 120.

Effect must be given to an insurance contract according to the fair meaning of the words used. Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 8 Sup. Ct. 1360. *Cited* in Mutual Life Ins. Co. v. Kelly, 32 L. ed. 308, 114 Fed. 268, 281, 52 C. C. A. 154, 164.

Language is to be given its usual and ordinary meaning where there is nothing to indicate a contrary intent. McCarthy v. Pacific Mutual Life Ins. Co. 178 Ill. App. 502.

[18] Mund v. Rehaume, 51 Colo. 129, Ann. Cas. 1913A, 1243, 117 Pac. 159; Beile v. Travelers' Protective Assoc. of America, 155 Mo. App. 629, 135 S. W. 497. See § 381 herein.

[19] Houlihan v. Preferred Accident Ins. Co. 196 N. Y. 337, 25 L.R.A. (N. S.) 1261, 89 N. E. 927.

[20] Preston v. Aetna Ins. Co. 193 N. Y. 142, 19 L.R.A.(N.S.) 133, 85 N. E. 1006.

[1] Emerigon on Insurance (Meredith's ed. 1850) c. ii. sec. 7, p. 50. And this presumption cannot be overcome but by a stronger presumption contra. Id.

[2] Robertson v. French, 4 East, 135, 14 Eng. Rul. Cas. 1, per Lord Ellenborough.

employed, unless those terms have received a legal construction or have acquired a technical meaning in reference to the subject matter of the contract." [3] So answers to questions must be taken in the popular sense of the language used,[4] and the words "jewelry and clothing, being stock in trade," will be construed in their ordinary and popular sense, and as not including musical and surgical instruments, etc., in the absence of evidence that a particular meaning has attached to the words by usage.[5]

But the settled construction given by the commercial world to stipulations in an insurance policy, will, though differing from the natural import of the words, be sanctioned by the courts.[6]

§ 217. Construction: technical, etc., words.—Where a word has acquired by usage in trade or commerce a meaning peculiar thereto, or is a word of technical [7] application, as where used in some art, trade, or science, or where it appears from the context that words are used in a particular sense to compass the intent of the parties, such meaning may be shown by proper evidence, and the exact technical and commercial meaning or particular meaning will govern; [8] and "technical terms or terms proper to the arts and sciences are ordinarily to be understood according to the definition given them by masters in the art." [9] So where technical terms have a well recognized legal meaning they should be understood in their technical and legal sense, where there is no context in the contract nor any statute or provision in the charter of the insurer to indicate that such words are used in a broader sense.[10] Illustrations under this

[3] Dow v. Whitten, 8 Wend. (N. Y.) 160, 167, per Chancellor Walworth. (See criticism 1 Duer on Insurance [ed. 1845] 229, et seq.) See also 17 Earl of Halsbury's Laws of England, pp. 342, et seq. 527.

[4] Ripley v. Ætna Ins. Co. 30 N. Y. 136, 86 Am. Dec. 362.

[5] Rafel v. Nashville Marine & Fire Ins. Co. 7 La. Ann. 244.

[6] Maryland Ins. Co. v. Woods, 6 Cranch (10 U. S.) 29, 3 L. ed. 143, *cited* in General Mutual Ins. Co. v. Sherwood, 14 How. (55 U. S.) 352, 362, 14 L. ed. 452, 456; Ocean Steamship Co. v. Ætna Ins. Co. 121 Fed. 882, 884; Hernandez v. Sun Mutual Ins. Co. 6 Blatchf. (C. C.) 317, 325, Fed. Cas. No. 6,415; Pride v. Providence-Washington Ins. Co. 6 Pa. Dist. R. 227, 231.

[7] See §§ 246–255 herein.

[8] Whitmarsh v. Conway Ins. Co. 16 Gray (82 Mass.) 359, 77 Am. Dec. 414; Rose v. Franklin Life Ins. Co. 153 Mo. App. 90, 132 S. W. 613, 40 Ins. L. J. 180; Fowler v. Ætna Fire Ins. Co. 7 Wend. (N. Y.) 270; Hone v. Mutual Safety Ins. Co. 1 Sand. (N. Y.) 137, 2 N. Y. (2 Comst.) 235, per Sandford, J.; Robertson v. Money, 1 Ry. & M. 75; 1 Phillips on Insurance (3d ed.) sec. 143, et seq.; Bacon's Benefit Societies and Life Insurance (1st ed.) secs. 256, 264; 17 Earl of Halsbury's Laws of England p. 342, et seq.

[9] Emigeron on Insurance (Meredith's ed. 1850) c. ii. sec. 7, p. 50.

[10] Page v. Metropolitan Life Ins. Co. 98 Ark. 340, 135 S. W. 911, 40 Ins. L. J. 1144 ("legal representatives.") See §§ 786, 793 herein.

rule will be found throughout this work under the several heads to which they properly belong.

§ 218. Addition of words by construction.—In the case of Davis v. Boardman [11] the words "or either of them" were inserted by construction after the word "cargo" in the clause "should this vessel and cargo be insured in England in time to attach," etc., the court saying that it was not unusual "to find 'and' used for 'or' and 'or' for 'and.'" [12] But in a California case it is held that the court could not interpolate the word "intentionally" before a clause in an accident policy and so extend the insurers liability.[13]

§ 219. Courts cannot extend or enlarge by construction.—If the terms of the contract are express, the court cannot extend or enlarge the contract by implication so as to embrace an object distinct from that originally contemplated.[14] In insurance contracts the insurer undertakes to guarantee the insured against loss or damage upon the exact terms and conditions specified in the agreement, and upon no other, and therefore, courts cannot change the contract nor make a new one for the parties. It is their duty to enforce and carry out the one already made [15] and nothing ought to be imported into the contract by construction contrary to its express terms.[16] So a benefit certificate payable to certain children cannot be enlarged by construction so as to include a posthumous child by a second marriage

[11] 12 Mass. 80.

[12] See United Life Fire & Marine Ins. Co. v. Foote, 22 Ohio St. 340, 10 Am. Rep. 735. The words "by fire" were added by construction. Contra, Commercial Insurance Co. v. Robinson, 64 Ill. 265, 16 Am. Rep. 557.

[13] Blunt v. Fidelity & Casualty Co. 145 Cal. 268, 104 Am. St. Rep. 34, 78 Pac. 729, 67 L.R.A. 793.

[14] "It is never allowed to stretch the contract from one case to another, nor to make it embrace an object really distinct from that originally contemplated." Emerigon on Insurance (Meredith's ed. 1850) c. i. sec. 7, p. 16; Waxahachie Bank v. Lancashire Ins. Co. 62 Tex. 461.

[15] Glendale Woolen Mfg. Co. v. Protection Ins. Co. 21 Conn. 19, 30, 31, 54 Am. Dec. 309, per Ellsworth, J. See Blunt v. Fidelity & Casualty Co. 145 Cal. 268, 104 Am. St. Rep. 34, 67 L.R.A. 793, 78 Pac. 729.

Construction must not make a new contract for the parties. Schuerman v. Dwelling-House Ins. Co. 161 Ill. 437, 52 Am. St. Rep. 377, 43 N. E. 1093.

A policy, and the conditions therein, fix the relation between the parties thereto and furnish the measure of their respective rights and liabilities. Courts cannot go outside of such agreement of the parties to determine their mutual or reciprocal obligations. Dover Glass Co. v. American Fire Ins. Co. 1 Marv. (Del.) 32, 65 Am. St. Rep. 264.

When a contract of insurance is unambiguous in its terms, it will be enforced, for courts will not construe plain language so as to make a contract to embrace that which it was intended not to include. British America Assurance Co. v. Miller, 91 Tex. 414, 66 Am. St. Rep. 901, 39 L.R.A. 545, 44 S. W. 60.

[16] Mutual Life Ins. Co. of N. Y. v. Murray, 111 Md. 600, 75 Atl. 348.

contracted after the insured became a member of the society,[17] nor will conditions limiting the insurer's liability be extended to include cases not reasonably and clearly within the words,[18] nor will a construction be given which would enlarge or diminish the risk to an unreasonable extent,[19] nor can the court apply the insurance to chattels not insured, even though the policy holder intended to insure them.[20]

§ 220. Forfeitures and exceptions not favored by construction.—Where the intent of conditions or stipulations involving disabilities or forfeitures is doubtful, they should be construed against the party for whose benefit they were imposed, and forfeitures should, if possible, be avoided, and the contract sustained;[1] for the right to in-

[17] Spry v. Williams, 82 Iowa, 61, 47 N. W. 890, 10 L.R.A. 863.

[18] Rann v. Home Ins. Co. 59 N. Y. 387.

[19] Eyre v. Marine Ins. Co. 6 Whart. (Pa.) 247.

[20] Holmes v. Charlestown Mutual Fire Ins. Co. 10 Met. (51 Mass.) 211, 43 Am. Dec. 428.

[1] *United States.*—Yeaton v. Fry, 5 Cranch (9 U. S.) 335, 3 L. ed. 117; Cotton v. Fidelity & Casualty Co. 41 Fed. 506.

Alabama.—Queen Ins. Co. v. Young, 86 Ala. 424, 11 Am. St. Rep. 51, 5 So. 116; Burnett v. Eufaula Ins. Co. 46 Ala. 11, 7 Am. Rep. 581; Alabama Gold Life Ins. Co. v. Johnston, 80 Ala. 467, 2 So. 125, 128, per the Court, 60 Am. Rep. 112.

Arkansas.—Maloney v. Maryland Casualty Co. 113 Ark. 174, 167 S. W. 845; Arkansas Fire Ins. Co. v. Wilson, 67 Ark. 533, 48 L.R.A. 510, 77 Am. St. Rep. 129, 55 S. W. 933.

Georgia.—New York Life Ins. Co. v. Babcock, 104 Ga. 67, 42 L.R.A. 88, 69 Am. St. Rep. 134, 30 S. E. 273; Clay v. Phoenix Ins. Co. 97 Ga. 44, 25 S. E. 417.

Illinois.—Commercial Union Assur. Co. v. Scammon, 126 Ill. 355, 9 Am. St. Rep. 607, 18 N. E. 562; Williamson v. Warfield, Pratt, Howell Co. 136 Ill. App. 168; Crete Farmers' Mutual Twp. Ins. Co. v. Miller, 70 Ill. App. 599.

Indiana.—Glens Falls Ins. Co. v. Michael, 167 Ind. 659, 74 N. E. 964, 79 N. E. 905, 8 L.R.A.(N.S.) 708; Metropolitan Life Ins. Co. v. Johnson, 49 Ind. App. 233, 94 N. E. 785; Northern Assur. Co. v. Carpenter, 52 Ind. App. 432, 94 N. E. 779, 40 Ins. L. J. 1218.

Kentucky.—Mutual Benefit Life Ins. Co. v. Dunn, 106 Ky. 591, 51 S. W. 20. See American Central Ins. Co. v. Heaverin, 18 Ky. L. Rep. 190, 35 S. W. 922.

Michigan.—Liverpool London & Globe Ins. Co. v. Verdier, 33 Mich. 138, 35 Mich. 395.

Minnesota.—Bridges v. National Union, 73 Minn. 486, 77 N. W. 411, rev'g 76 N. W. 270, 409.

Nebraska.—Haas v. Mutual Life Ins. Co. 84 Neb. 682, 26 L.R.A. (N.S.) 747 (annotated on effect of failure to pay periodical premium on policy of life insurance to terminate the same, in the absence of a provision for forfeiture) 121 N. W. 996.

New Jersey.—Snyder v. Dwelling-House Ins. Co. 59 N. J. L. 544, 56 Am. St. Rep. 625, 37 Atl. 1022.

New York.—Paul v. Travelers' Ins. Co. 112 N. Y. 472, 8 Am. St. Rep. 756, 3 L.R.A. 443, 20 N. E. 347 (conditions construed strictly against those for whose benefit they are reserved); Livingston v. Stickless, 7 Hill (N. Y.) 253; Fitzpatrick v. Knights of Columbus, 128 N. Y. Supp. 366, 143 App. Div. 540; Hayes v. New York Life Ins. Co. 68 Misc. 558, 124 N. Y. Supp. 792.

sist upon forfeitures is stricti juris, and courts will not favor forfeitures by literal intendments and enlarged constructions,[2] nor will they declare forfeitures by implication,[3] as they are not favored in

Pennsylvania.—Evans v. Phœnix Mut. Assn. (Pa. 1892), 49 Leg. Intell. 15.

South Dakota.—Bolte & Jansen v. Equitable Fire Assoc. 23 S. Dak. 240, 121 N. W. 773, 38 Ins. L. J. 386; McNamara v. Dakota Fire & Marine Ins. Co. 1 S. Dak. 342, 47 N. W. 288.

Texas.—Home Mutual Ins. Co. v. Tompkies, & Co. 30 Tex. Civ. App. 404, 71 S. W. 812.

Virginia.—Mutual Ins. Soc. v. Scottish Union & Mutual Ins. Co. 84 Va. 116, 10 Am. St. Rep. 119, 4 S. E. 178.

Wisconsin.—Siemers v. Meeme Mutual Home Protection Ins. Co. 143 Wis. 114, 126 N. W. 669; French v. Fidelity & Casualty Co. 135 Wis. 259, 17 L.R.A.(N.S.) 1011, 115 N. W. 869.

Construction of policy is strictly against insurer and must always be in favor of upholding the contract, and no construction working a forfeiture will be given if any other is permissible from the language used. Darrow v. Family Fund Soc. 116 N. Y. 537, 15 Am. St. Rep. 430, 6 L.R.A. 495, 22 N. E. 1093.

That construction of an insurance contract should be adopted which will prevent a forfeiture, where it is susceptible of two constructions, one of which will work a forfeiture and the other will not. Hilmer v. Western Travelers' Accident Assoc. 86 Neb. 285, 27 L.R.A. 319, 125 N. W. 535; Hamann v., Nebraska Underwriters Ins. Co. 82 Neb. 429, 118 N. W. 65.

[2] Aurora Fire Ins. Co. v. Eddy, 55 Ill. 213.

See also the following cases:

Georgia.—Clay v. Phœnix Ins. Co. 97 Ga. 44, 25 S. E. 417.

Illinois.—Hardesty v. Forest City Ins. Co. 77 Ill. App. 413, aff'd Forest City Ins. Co. v. Hardesty, 182 Ill. 39, 55 N. E. 139.

Indiana.—Metropolitan Life Ins. Co. v. Johnson, 49 Ind. App. 233, 94 N. E. 785; Iowa Life Ins. Co. v. Haughton, 46 Ind. App. 467, 87 N. E. 702.

Kansas.—Home Ins. Co. v. Feyerabend, 7 Kan. App. 231, 52 Pac. 899.

Louisiana.—Fitzpatrick v. Mutual Benevolent Life Ins. Co. 25 La. Ann. 443.

Nebraska.—Haas v. Mutual Life Ins. Co. 84 Neb. 682, 26 L.R.A.(N.S.) 747 note, 121 N. W. 996; Hamann v. Nebraska Underwriters' Ins. Co. 82 Neb. 429, 118 N. W. 65; Connecticut Fire Ins. Co. v. Jeary, 60 Neb. 338, 51 L.R.A. 698 note, 83 N. W. 78.

New York.—L. Black & Co. v. London Guarantee & Accident Co. 144 N. Y. Supp. 424, 159 App. Div. 186.

South Dakota.—Bolte & Jansen v. Equitable Fire Assoc. 23 S. Dak. 240, 121 N. W. 773, 38 Ins. L. J. 886.

Tennessee.—McNutt v. Virginia Fire & Marine Ins. Co. — Tenn. Ch. —, 45 S. W. 61.

Texas.—Mutual Life Ins. Co. v. Ford, — Tex. Civ. App. —, 130 S. W. 769.

Virginia.—Georgia Home Ins. Co. v. Bartlett, 91 Va. 305, 30 Am. St. Rep. 832, 21 S. E. 476.

Wisconsin.—Pagel v. United States Casualty Co. 158 Wis. 278, 148 N. W. 878.

[3] Connecticut Fire Ins. Co. v. Colorado Leasing, Mining & Milling Co. 50 Colo. 424, 116 Pac. 154, 40 Ins. L. J. 1717.

Courts have always limited provisions for forfeiture strictly to the exact import of the words used and there is equally strong reason, where the literal meaning of such a pro-

the law.[4] And especially are forfeitures not favored in the law

vision is broader than its reason, for restricting its operation to the mischief sought to be guarded against. Where the reason and the letter of a clause do not coincide, it is the universal rule of construction to limit the latter by the former. Henton v. Farmers' & Merchants' Ins. Co. 1 Neb. (unoffic.) 425, 95 N. W. 670, 32 Ins. L. J. 838, per Pound, C.

[4] *Alabama.*—Queen Ins. Co. v. Young, 86 Ala. 424, 11 Am. St. Rep. 51, 5 So. 116.

California. — Welch v. British American Assur. Co. 148 Cal. 223, 113 Am. St. Rep. 223, 82 Pac. 964.

Colorado.—Connecticut Fire Ins. Co. v. Colorado, Leasing Mining & Milling Co. 50 Colo. 424, 116 Pac. 154, 40 Ins. L. J. 1717.

Indiana.—American Central Life Ins. Co. v. Rosenstein, 46 Ind. App. 537, 92 N. E. 380.

Missouri. — Mathews v. Modern Woodmen of America, 236 Mo. 326, 139 S. W. 151; Roseberry v. American Benevolent Assoc. 142 Mo. App. 552, 121 S. W. 785.

Nebraska.—Hamann v. Nebraska Underwriters' Ins. Co. 82 Neb. 429, 118 N. W. 65; Henton v. Farmers' & Merchants' Ins. Co. 1 Neb. (Unoffic.) 425, 95 N. W. 670, 32 Ins. L. J. 838; Connecticut Fire Ins. Co. v. Jeary, 60 Neb. 338, 51 L.R.A. 698, 83 N. W. 78; Farmers' & Merchants' Ins. Co. v. Newman, 58 Neb. 504, 78 N. W. 933.

New Jersey.—Melick v. Metropolitan Life Ins. Co. 84 N. J. L. 437, 87 Atl. 75; Hampton v. Hartford Fire Ins. Co. 65 N. J. L. 265, 52 L.R.A. 344, 47 Atl. 433, 30 Ins. L. J. 141.

Texas.—Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co. — Tex. Civ. App. —, 167 S. W. 816; Hartford Fire Ins. Co. v. Walker. — Tex. Civ. App. —, 153 S. W. 398; Mutual Life Ins. Co. v. Ford, — Tex. Civ. App. —, 130 S. W. 769; Norwich Union Fire Ins. Soc. v. Cheaney Bros. — Tex. Civ. App. —, 128 S. W. 1163.

Virginia.—Stratton v. New York Life Ins. Co. 115 Va. 257, 78 S. E. 636.

Forfeitures do not readily find favor in the law, and courts are reluctant to declare and enforce them if, by reasonable interpretation, it can be avoided. Coleman v. New Orleans Ins. Co. 49 Ohio St. 310, 16 L.R.A. 174, 34 Am. St. Rep. 565, 31 N. E. 279.

Since forfeitures are not favored in the law, courts should be liberal in construing the transaction, so as to avoid a forfeiture. Knickerbocker Life Ins. Co. v. Norton, 96 U. S. 234, 24 L. ed. 689.

Cited in *United States.*—New York Life Ins. Co. v. Eggleston, 96 U. S. 572, 577, 24 L. ed. 841, 843; Foley v. Grand Hotel Co. 121 Fed. 509, 512, 57 C. C. A. 629, 632; Mutual Reserve Fund Life Assoc. v. Cleveland Woolen Mills, 82 Fed. 508, 516, 27 C. C. A. 212, 220, 54 U. S. App. 290; McMaster v. New York Life Ins. Co. 78 Fed. 36; Small v. Westchester Fire Ins. Co. 51 Fed. 791; Pendleton v. Knickerbocker Life Ins. Co. 7 Fed. 173; Seamens v. Northwestern Mutual Life Ins. Co. 1 McCrary, 511, 3 Fed. 327.

Arkansas.—Little Rock Granite Co. v. Shall, 59 Ark. 405, 409, 27 S. W. 562.

Illinois.—Railway Passenger & Freight Conductors Mutual Aid & Benefit Assoc. v. Tucker, 157 Ill. 194, 200, 46 Am. St. Rep. 796, 42 N. E. 398.

Indiana.—Germania Fire Ins. Co. v. Pitcher, 160 Ind. 392, 395, 64 N. E. 921, 32 Ins. L. J. 69, 71; Peele v. Provident Fund Soc. 147 Ind. 543, 553, 44 N. E. 661.

Iowa.—Hollis v. State Ins. Co. 65 Iowa, 454, 459, 21 N. W. 774.

Louisiana.—Maclin v. New Eng-

where they are induced by the conduct of the agent representing the insurer.[5]

In a Delaware decision the rule stated is that conditions of forfeiture in a policy are not favored, and these and like conditions are always construed strictly, so that a party claiming a forfeiture by reason of a violation thereof is not permitted to deprive the other party of the benefits of the right of indemnity for which he contracted if there is any doubt or uncertainty as to the terms of such conditions, the extent of their application, or the acts which constitute the alleged breach.[6] So it is held in a Federal Supreme Court case that on the question purely of forfeiture the rule is that if a policy contains provisions that are inconsistent, or which is so framed as to be fairly open to construction, the view should be adopted, if possible, which will sustain rather than forfeit the contract.[7]

land Mutual Life Ins. Co. 33 La. Ann. 803.

Missouri.—McMahon v. Supreme Tent Knights of Maccabees of the World, 151 Mo. 522, 542, 52 S. W. 384; Fink v. Lancashire Ins. Co. 66 Mo. App. 515.

New Hampshire.—Appleton v. Phenix Mutual Life Ins. Co. 59 N. H. 541, 545, 47 Am. Rep. 220.

New York.—Kiernan v. Dutchess County Mutual Ins. Co. 150 N. Y. 190, 194, 44 N. E. 698; Toplitz v. Bauer, 55 N. Y. Supp. 29, 34 App. Div. 526, 533.

South Carolina.—Wilson v. Commercial Union Assur. Co. 51 S. Car. 540, 547, 64 Am. St. Rep. 700, 29 S. E. 245.

South Dakota.—Enos v. St. Paul Fire & Marine Ins. Co. 4 S. Dak. 639, 656, 46 Am. St. Rep. 796, 57 N. W. 919.

Tennessee.—American Central Ins. Co. v. McCrea, 8 Lea. 513, 526, 41 Am. Rep. 647.

Texas.—Mullen v. Mutual Life Ins. Co. 89 Tex. 259, 262, 34 S. W. 605.

Virginia.—Easley v. Valley Mutual Life Assoc. 91 Va. 161, 169, 21 S. E. 235.

[5] Eagle Fire Ins. Co. v. Lewallen, 56 Fla. 246, 47 So. 947, 38 Ins. L. J. 320, 343. See also Kendrick v. Mutual Benefit Life Ins. Co. 124 N. Car. 315, 70 Am. St. Rep. 592, 32 S. E. 728.

[6] Dover Glass Co. v. American Fire Ins. Co. 1 Marv. (Del.) 32, 65 Am. St. Rep. 264.

Forfeitures are not favored; and in contracts of insurance a construction resulting in a loss of the indemnity for which the insured has contracted will not be adopted, except to give effect to the obvious intention of the parties, and the plain requirements of the contract. Woodmen's Accident Assoc. v. Byers (Pratt) 62 Neb. 673, 89 Am. St. Rep. 777, 55 L.R.A. 291, 87 N. W. 546, 31 Ins. L. J. 183; Mellen v. United States Health & Accident Ins. Co. 83 Vt. 242, 75 Atl. 273.

[7] *United States.*—McMaster v. New York Life Ins. Co. 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. 10, 31 Ins. L. J. 555, *cited* in Hunt v. Springfield Fire & Marine Ins. Co. 196 U. S. 47, 49, 49 L. ed. 382, 25 Sup. Ct. 179; Lefler v. New York Life Ins. Co. 143 Fed. 814, 819, 74 C. C. A. 488, 493; Atlas Reduction Co. v. New Zealand Ins. Co. 9 L.R.A.(N.S.) 433, 138 Fed. 497, 512, 71 C. C. A. 21, 36; Mutual Reserve Life Ins. Co. of N. Y. v. Dobler, 137 Fed. 550, 554, 70 C. C. A. 134, 138.

Florida.—L'Engle v. Scottish Union & National Fire Ins. Co. 48

And it is declared in a New Jersey case that: "The court will never seek for a construction of a forfeiture clause in a policy which will sustain it, if one which will defeat it is reasonably deducible from the terms or words used to express it." [8] But the court cannot go beyond a fair construction of language of the contract in order to avoid a forfeiture.[9]

And it is also decided that insurance policies should not be construed to work a forfeiture of either party's rights, or to defeat the object of the contract unless it plainly appears that such was the intention of both contracting parties, and that the effect of the language was well understood by them when the contract was entered into.[10]

It is also held that as a forfeiture is not favored, it will not be enforced unless specifically and definitely provided for in the contract; and waiver thereof will be treated as unconditional, unless it clearly appears that it was otherwise understood by the parties.[11] And the courts, not favoring forfeitures, are usually inclined to take hold of any circumstances which indicate an election to waive a forfeiture.[12] It is also declared that where a waiver prevents a forfeiture, the law ordinarily permits a liberal construction to be placed on the acts of the party waiving with the view of bringing about a waiver of such forfeiture.[13]

Fla. 82, 92, 67 L.R.A. 581, 586, 111 Am. St. Rep. 70, 77, 37 So. 462.

Indiana.—Northern Assur. Co. v. Carpenter, 52 Ind. App. 432, 94 N. E. 779, 40 Ins. L. J. 1218, 1221.

Nebraska.—German Ins. Co. v. Shader, 68 Neb. 1, 9, 60 L.R.A. 918, 922, 93 N. W. 972.

Oregon. — Stinchcombe v. New York Life Ins. Co. 46 Oreg. 316, 80 Pac. 213.

[8] Hampton v. Hartford Fire Ins. Co. 65 N. J. L. 265, 52 L.R.A. 344, 47 Atl. 433, per Fort, J. Quoted in Johnson v. Grand Lodge Ancient Order United Workmen, 81 N. J. L. 511, 79 Atl. 333, 40 Ins. L. J. 924.

[9] Behling v. Northwestern National Life Ins. Co. 117 Wis. 24, 93 N. W. 800; Globe & Rutgers Fire Ins. Co. of N. Y. v. David Moffatt Co. 154 Fed. 13, 83 C. C. A. 91.

[10] Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co. 59 Wash. 501, 140 Am. St. Rep. 863, 28 L.R.A.(N.S.) 596n, 110 Pac. 36, 56 Wash. 681, 28 L.R.A. (N.S.) 593, 106 Pac. 194.

[11] Murray v. Home Benefit Life Assoc. 90 Cal. 402, 25 Am. St. Rep. 133; Roseberry v. American Benovelent Assoc. 142 Mo. App. 552, 121 S. W. 785. *Compare* Brignac v. Pacific Mutual Life Ins. Co. 112 La. 574, 36 So. 595, 66 L.R.A. 322; Smoot v. Bankers Life Assoc. 138 Mo. App. 438, 120 S. W. 719.

[12] Queen Ins. Co. v. Young, 86 Ala. 424, 11 Am. St. Rep. 51, 5 So. 116, *quoted* from in Germania Fire Ins. Co. v. Pitcher, 160 Ind. 392, 64 N. E. 921, 34 Ins. L. J. 69; Arnold v. Empire Mutual Annuity & Life Ins. Co. 3 Ga. App. 685, 60 S. E. 470; American Central Life Ins. Co. v. Rosenstein, 45 Ind. App. 537, 92 N. E. 380; Montano v. Missanellese Society of Mutual Aid, 72 Misc. 515, 130 N. Y. Supp. 455.

[13] Loftis v. Pacific Mutual Life Ins. Co. 38 Utah, 532, 114 Pac. 134, 40 Ins. L. J. 1048, 1058, per Frick, C. J.

Provisos and exceptions are to be strictly construed against the insurer.[14] So exceptions of certain specified risks are construed strictly against the insurer.[15]

Words of limitation in the nature of an exception will be construed against the party preferring them,[16] and a prohibition against

[14] *California.*—Pacific Heating & Ventilating Co. v. Williamsburgh City Fire Ins. Co. 158 Cal. 367, 111 Pac. 4, 39 Ins. L. J. 1706; Pacific Union Club v. Commercial Union Assur. Co. 12 Cal. App. 503, 107 Pac. 728.

Colorado.—Travelers Ins. Co. v. Murray, 16 Colo. 296, 25 Am. St. Rep. 267, 25 Pac. 74.

Georgia.—Thornton v. Travelers' Ins. Co. 116 Ga. 121, 94 Am. St. Rep. 99, 42 S. E. 287; Empire Life Ins. Co. v. Einstein, 12 Ga. App. 380, 77 S. E. 209.

Kentucky.—Farmers' Mutual Equity Ins. Soc. v. Smith, 158 Ky. 459, L.R.A.1915B, 844, 165 S. W. 675.

Pennsylvania. — Montgomery v. Southern Mutual Ins. Co. 242 Pa. 86, 51 L.R.A.(N.S.) 518, 86 Atl. 924.

Vermont.—Duran v. Standard Life & Accident Ins. Co. 63 Vt. 437, 25 Am. St. Rep. 773, 13 L.R.A. 637, 22 Atl. 530.

Virginia.—Fidelity & Casualty Co. v. Chambers, 93 Va. 138, 40 L.R.A. 432, 24 S. E. 896.

West Virginia.—Beard v. Indemnity Ins. Co. 65 W. Va. 283, 64 S. E. 119.

An exception of uncertain import must be construed most strongly against the insurer. Furry v. General Accident Assoc. 80 Vt. 526, 130 Am. St. Rep. 1012, 15 L.R.A.(N.S.) 206 (annotated on scope and effect of provisions in policies of insurance forbidding use of intoxicating liquor) 68 Atl. 655.

[15] Yeaton v. Fry, 5 Cranch (9 U. S.) 335, 3 L. ed. 117, *cited* in United States Ocean Steamship Co. v. Ætna Ins. Co. 121 Fed. 882, 884; Canton Ins. Office v. Woodside, 90 Fed. 301, 305, 33 C. C. A. 63, 68, 61 U. S. App. 214; Koons v. La Fonciere Compagnie D'Assurances, 71 Fed. 978, 983; Northwest Transportation Co. v. Boston Marine Ins. Co. 41 Fed. 793, 801; Pearl, The, Fed. Cas. No. 10,874; Palmer v. Warren Ins. Co. 1 Story, 360, 364, Fed. Cas. No. 10,698; Hernandez v. Sun Mutual Ins. Co. 6 Blatchf. 317, 325, Fed. Cas. No. 6,415.

Indiana.—Grant v. Lexington Fire Life & Marine Ins. Co. 5 Ind. 23, 61 Am. Dec. 74.

Missouri.—Laker v. Royal Fraternity Union, 95 Mo. App. 353, 368.

New York.—Paul v. Travelers' Ins. Co. 112 N. Y. 472, 479, 3 L.R.A. 443, 446, 8 Am. St. Rep. 758, 20 N. E. 347; Hoffman v. Ætna Fire Ins. Co. 32 N. Y. 405, 414, 88 Am. Dec. 337; Hood v. Manhattan Fire Ins. Co. 11 N. Y. 532, 541; Wright v. Williams, 20 Hun, 320, 323.

Ohio.—Webster v. Dwelling House Ins. Co. 53 Ohio St. 558, 564, 30 L.R.A. 719, 720, 53 Am. St. Rep. 658, 42 N. E. 546.

Texas.—Warren v. Springfield Fire & Marine Ins. Co. 13 Tex. Civ. App. 466, 469, 35 S. W. 810.

Virginia.—United States Mutual Accident Assoc. v. Newman, 84 Va. 52, 59, 3 S. E. 805.

Wisconsin.—Wakefield v. Orient Ins. Co. 50 Wis. 532, 536, 7 N. W. 647; Blumer v. Phœnix Ins. Co. 45 Wis. 633, 641.

[16] Schroeder v. Stock & Mut. Ins. Co. 46 Mo. 174; Bullen v. Denning, 5 Barn. & C. 842; Palmer v. Warren Ins. Co. 1 Story (C. C.) 360, Fed. Cas. No. 10,698, per Story, J.; Donnel v. Columbian Ins. Co. 2 Sum (C. C.) 366, 380, 381, Fed. Cas. No. 3987; Earl of Cardigan v. Armitage, 2 Barn. & C. 197.

the transfer of a policy will be construed strictly.[17] So conditions in a policy of insurance which create restrictions on the remedy of the insured thereon, as that he shall sue within a certain time, are to be strictly construed.[18]

The rule, however, which calls for a strict construction against the insurer so as to avoid a forfeiture where there are words of exception or limitation in a policy is qualified by the rule that effect must be given to language which has a plain meaning and is not inconsistent with other clauses or provisions of the contract.[19] And an exception containing a plain, simple and unambiguous provision pointing clearly to a just and practicable criterion is not to be so construed as to deprive the insurer of the protection for which it stipulates.[20]

§ 220a. Same subject: benefit certificates.—The rule of strict construction against the insurer of conditions for forfeiture and that forfeitures are not favored in law applies also to benefit certificates.[1] So forfeitures in beneficiary certificates dealing with property rights are not favored, and constructions of written instruments of that character against such result will be preferred, if the instrument will bear it, rather than the adoption of an interpretation giving the opposite effect. A destructive result should not be adopted, where it is possible otherwise to glean from the order's own terms, preferred in avoidance of it, and where its by-laws may rea-

[17] Griffey v. New York Cent. Ins. Co. 30 Hun (N. Y.) 299, 100 N. Y. 417, 53 Am. Rep. 202, 3 N. E. 309.

[18] State Ins. Co. v. Maackens, 38 N. J. L. 564.

[19] Gilchrist Transportation Co. v. Phœnix Ins. Co. 170 Fed. 279, 95 C. C. A. 475. See Globe & Rutgers Fire Ins. Co. of N. Y. v. David Moffat Co. 154 Fed. 13, 83 C. C. A. 91; Rye v. New York Life Ins. Co. 88 Neb. 707, 130 N. W. 434, 40 Ins. L. J. 910 (contract to be enforced as made). *Examine* Travelers' Ins. Co. v. Thornton, 119 Ga. 455, 46 S. E. 678.

Contract to be enforced as made, see § 205 herein.

[20] Furry v. General Accident Ins. Co. 80 Vt. 526, 15 L.R.A.(N.S.) 206n, 130 Am. St. Rep. 1012, 68 Atl. 655.

[1] Brotherhood of Painters, Decorators & Paperhangers of America v. Barton, 46 Ind. App. 160, 92 N. E. 64; Supreme Tent Knights of Maccabees of the World v. Ethridge, 43 Ind. App. 475, 87 N. E. 1049; Gunther v. New Orleans Cotton Exchange Mutual Aid Assoc. 40 La. Ann. 776, 2 L.R.A. 118, 8 Am. St. Rep. 554, 5 So. 65; Mathews v. Modern Woodmen of America, 236 Mo. 326, 139 S. W. 151; Burchard v. Western Commercial Travelers' Assoc. 139 Mo. App. 606, 123 S. W. 973; Montano v. Missanellese Society of Mutual Aid, 72 Misc. 515, 130 N. Y. Supp. 455; Fitzpatrick v. Knights of Columbus, 128 N. Y. Supp. 366, 143 App. Div. 540; Woodmen of the World v. Gilliland, 11 Okla. 384, 67 Pac. 485; Haywood v. Grand Lodge of Texas Knights of Pythias, — Tex. Civ. App. —, 138 S. W. 1194; Daniel v. Modern Woodmen of America, 53 Tex. Civ. App. 570, 118 S. W. 211.

sonably be read so as to preserve property rights.[2] But where on the back of the certificate and made a part thereof, and in fine type under the head of "Privileges and Requirements," and not found under a separate paragraph but put between matters entirely foreign to it, are restrictions or limitations of liability which are inconsistent with the terms of the contract appearing on the face of the policy, and with the application, constitution and by-laws which are made a part of the contract the latter prevail over the said limitations.[3]

§ 220b. Same subject: guaranty or fidelity insurance: employers' liability policy.—The rule that construction will be most strongly against forfeiture of the indemnity applies to a fidelity insurance bond when it is capable of two constructions and is essentially an insurance contract.[4] An employers liability or indemnity policy is also within the rule.[5]

§ 221. Construction should be liberal in favor of assured and for benefit of trade.—It has long been determined with an almost unwavering unanimity that insurance contracts, when susceptible of more than one interpretation, shall be construed in favor of the assured. This rule is imperative and undoubted, since to hold otherwise, without an absolute necessity therefor, would tend to subvert the very object and purposes of insurance, which is that of indemnity to the assured in case of loss, or the payment of money on the happening of a contingency, and this indemnity should be effectuated rather than defeated.[6] And this is true of certificates in

[2] Johnson v. Grand Lodge Ancient Order United Workmen, 81 N. J. L. 511, 79 Atl. 333, 40 Ins. L. J. 924.

[3] Hall v. Royal Fraternal Union, 130 Ga. 820, 61 So. 977.

[4] Bank of Tarboro v. Fidelity & Deposit Co. 128 N. Car. 366, 38 S. E. 908, 83 Am. St. Rep. 682; United American Fire Ins. Co. v. American Bonding Co. 146 Wis. 573, 40 L.R.A. (N.S.) 661, 131 N. W. 994, 40 Ins. L. J. 1805. See § 206c herein.

[5] Home Mixture Guano Co. v. Ocean Accident & Guaranty Corp. Ltd. (U. S. C. C.) 176 Fed. 600.

[6] *United States.*—Hagan v. Scottish Union & National Ins. Co. 186 U. S. 423, 46 L. ed. 1229, 22 Sup. Ct. 862; Liverpool & London & Globe Ins. Co. v. Kearney, 180 U. S. 132, 45 L. ed. 460, 21 Sup. Ct. 326, case affirms 94 Fed. 314, 36 C. C. A. 265; London Assur. Co. v. Companhia de Moagens do Barreiro, 167 U. S. 149, 42 L. ed. 113, 17 Sup. Ct. 785; Imperial Fire Ins. Co. v. Coös County, 151 U. S. 452, 28 L. ed. 231, 14 Sup. Ct. 379; Thompson v. Phenix Ins. Co. 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. 1019; Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. 1360; Moulor v. American Life Ins. Co. 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. 466; Grace v. American Central Ins. Co. 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. 207; Phœnix Ins. Co. v. Slaughter, 12 Wall. (79 U. S.) 404, 20 L. ed. 444; O'Brien v. North River Ins. Co. of N. Y. 212 Fed. 102, — C. C. A. —; Maryland Casualty Co. v. Finch, 8 L.R.A.(N.S.) 308, 147 Fed. 388, 77 C. C. A. 566, s. c. 203 U. S. 592, 51 L. ed. 331, 27 Sup. Ct. 780; McClain v. Providence Savings Life Assur. Co. 110 Fed. 80, 49 C. C. A. 31, s. c. 184 U. S. 699, 46 L. ed. 765, 23 Sup. Ct. 938; American

Steamship Co. Ltd. v. Indemnity Mutual Marine Ins. Co. Ltd. (U. S. D. C.) 108 Fed. 421, aff'd 118 Fed. 1014, 56 C. C. A. 56; Cannon Ins. Office, Ltd. v. Woodside, 90 Fed. 301, 33 C. C. A. 63, 61 U. S. App. 214, 28 Ins. L. J. 269; Kiesel v. Sun Insurance Office of London, 88 Fed. 243, 60 U. S. App. 10, 31 C. C. A. 518, s. c. 171 U. S. 688, 43 L. ed. 1170, 19 Sup. Ct. 885. See Guarantee Co. v. Mechanics' Savings Bank & Trust Co. 80 Fed. 766, 47 U. S. App. 91, 26 C. C. A. 146, 82 Fed. 545, 27 C. C. A. 373, s. c. 173 U. S. 585, 43 L. ed. 818, 19 Sup. Ct. 551.

Alabama.—Pennsylvania Fire Ins. Co. v. Draper, 187 Ala. 103, 65 So. 923; Queen Ins. Co. v. Young, 86 Ala. 424, 11 Am. St. Rep. 51, 5 So. 116; Alabama Gold Life Ins. Co. v. Johnson, 80 Ala. 467, 2 So. 128, per the Court, 60 Am. Rep. 112.

Arkansas.—Maloney v. Maryland Casualty Co. 113 Ark. 174, 167 S. W. 845; Monongahela Ins. Co. v. Batson, 111 Ark. 144, 163 S. W. 512.

California.—Anderson v. Mutual Life Ins. Co. of N. Y. 164 Cal. 712, 130 Pac. 720; Pacific Heating & Ventilating Co. v. Williamsburg City Fire Ins. Co. of Brooklyn, 158 Cal. 367, 111 Pac. 4, 39 Ins. L. J. 1706; Pacific Union Club v. Commercial Union Assur. Co. 12 Cal. App. 503, 107 Pac. 728; Raulet v. Northwestern National Ins. Co. 157 Cal. 213, 107 Pac. 292, 39 Ins. L. J. 742; Welch v. British American Ins. Co. 148 Cal. 223, 113 Am. St. Rep. 223, 82 Pac. 964; Berliner v. Travelers' Ins. Co. 121 Cal. 458, 41 L.R.A. 467, 66 Am. St. Rep. 49, 53 Pac. 918; National Bank v. Union Ins. Co. 88 Cal. 497, 22 Am. St. Rep. 324, 26 Pac. 509; Wells, Fargo Co. v. Pacific Ins. Co. 44 Cal. 397; Brickell v. Atlas Ins. Co. Ltd. 10 Cal. App. 17, 101 Pac. 16.

Colorado.—Connecticut Fire Ins. Co. v. Colorado Leasing, Mining & Milling Co. 50 Colo. 424, 116 Pac. 154, 40 Ins. L. J. 1717; Barclay v. London Guarantee & Accident Co. Ltd. 46 Colo. 558, 105 Pac. 865; German Ins. Co. v. Hayden, 21 Colo. 124, 52 Am. St. Rep. 206, 40 Pac. 453; Travelers' Ins. Co. v. Murray, 16 Colo. 296, 25 Am. St. Rep. 267, 25 Pac. 74; Lampkin v. Travelers' Ins. Co. 11 Colo. App. 249, 52 Pac. 1040; Strauss v. Phenix Ins. Co. 9 Colo. App. 386, 48 Pac. 822.

District of Columbia.—Mays v. New Amsterdam Casualty Co. 40 App. D. C. 249, 46 L.R.A.(N.S.) 1108.

Florida.—L'Engle v. Scottish Union & National Ins. Co. 48 Fla. 82, 92, 67 L.R.A. 581, 586, 111 Am. St. Rep. 70, 77, 37 So. 462.

Georgia.—McEachern v. New York Life Ins. Co. 15 Ga. App. 222, 82 S. E. 820; Mutual Life Ins. Co. v. Durden, 9 Ga. App. 797, 72 S. E. 295; North American Accident Ins. Co. v. Watson, 6 Ga. App. 193, 64 S. E. 693; Arnold v. Empire Mutual Annuity & Life Ins. Co. 3 Ga. App. 685, 60 So. 470; Missouri State Life Ins. Co. v. Lovelace, 1 Ga. App. 446, 58 S. E. 93.

Illinois.—Monahan v. Fidelity Life Ins. Co. 242 Ill. 488, 134 Am. St. Rep. 337, 90 N. E. 213; Peterson v. Manhattan Life Ins. Co. 244 Ill. 329, 91 N. E. 466; State National Bank of Springfield v. United States Life Ins. Co. 238 Ill. 148, 87 N. E. 396; Forest City Ins. Co. v. Hardesty, 182 Ill. 39, 55 N. E. 139, 74 Am. St. Rep. 161, aff'g Hardesty v. Forest City Ins. Co. 77 Ill. App. 413; Schuermann v. Dwelling-House Ins. Co. 161 Ill. 437, 52 Am. St. Rep. 377, 43 N. E. 1093; Healey v. Mutual Acc. Assn. 133 Ill. 556, 561, 25 N. E. 52, 23 Am. St. Rep. 637, 638, 9 L.R.A. 371; Western Tube Co. v. Ætna Indemnity Co. 181 Ill. App. 502; Coen v. Denver Township Mutual Fire Ins. Co. 155 Ill. App. 332; Provident Savings Life Assur. Soc. v. Marshall, 125 Ill. App. 101; Smith v. Bankers' Life Assoc. 123 Ill. App. 392; Szymkus v. Eureka Fire & Marine Ins. Co. 114 Ill. App. 401; Northwestern Life Assur. Co.

v. Schulz, 94 Ill. App. 156; Niagara Fire Ins. Co. v. D. Heenan & Co. 81 Ill. App. 678; Getman v. Guardian Fire Ins. Co. 46 Ill. App. 489.

Indiana.—American Surety Co. of N. Y. v. Pangborn, 182 Ind. 116, 105 N. E. 769; Northwestern Mutual Life Ins. Co. v. Hazelett, 105 Ind. 212, 55 Am. Rep. 192, 4 N. E. 582; Grant v. Lexington Fire, Life & Marine Ins. Co. 5 Ind. 23, 61 Am. Dec. 74; Indiana Life Endowment Co. v. Reed, 54 Ind. App. 450, 103 N. E. 77; Ohio Farmers Ins. Co. v. Glaze, 55 Ind. App. 147, 101 N. E. 734; Metropolitan Life Ins. Co. v. Johnson, 49 Ind. App. 233, 94 N. E. 785; Iowa Life Ins. Co. v. Haughton, 46 Ind. App. 467, 87 N. E. 762. See also Germania Fire Ins. Co. v. Deckhard, 3 Ind. App. 361, 28 N. E. 868.

Iowa.—Allen v. Travelers' Protective Assoc. of America, 163 Iowa, 217, 48 L.R.A.(N.S.) 600, 143 N. W. 574; Layton v. Interstate Business Mens Assoc. 158 Iowa, 356, 139 N. W. 463; Krell v. Chickasaw Farmers Mutual Fire Ins. Co. 127 Iowa, 748, 104 N. W. 364; Vorse v. Jersey Plate Glass Ins. Co. 119 Iowa, 55, 60 L.R.A. 838, 97 Am. St. Rep. 330, 93 N. W. 569.

Kansas.—Fire Association of Phila. v. Taylor, 76 Kan. 392, 91 Pac. 1070.

Kentucky.—Pacific Mutual Life Ins. Co. v. McCabe, 157 Ky. 270, 162 S. W. 1136; Jefferson v. New York Life Ins. Co. 151 Ky. 609, 152 S. W. 780; Fidelity & Casualty Co. of N. Y. v. Hart, 142 Ky. 25, 133 S. W. 996; Ætna Life Ins. Co. v. Bethal, 140 Ky. 609, 131 S. W. 523; Spring Garden Ins. Co. v. Imperial Tobacco Co. 132 Ky. 7, 136 Am. St. Rep. 164, 116 S. W. 234, 20 L.R.A.(N.S.) 277, 38 Ins. L. J. 446; Mutual Benefit Life Ins. Co. v. Dunn, 106 Ky. 591, 51 S. W. 20.

Louisiana.—Mutual Life Ins. Co. v. New, 125 La. 41, 27 L.R.A.(N.S.) 431, 136 Am. St. Rep. 326, 51 So. 61.

Maine.—Bickford v. Ætna Ins. Co. 101 Me. 124, 63 Atl. 552; McGlinchey v. Fidelity & Casualty Co. 80 Me. 251, 14 Atl. 13, 6 Am. St. Rep. 190.

Maryland. — McEvoy v. Security Fire Ins. Co. 110 Md. 275, 22 L.R.A. (N.S.) 942n, 132 Am. St. Rep. 428n, 73 Atl. 157, 38 Ins. L. J. 895.

Massachusetts.—Elliott v. Hamilton Ins. Co. 13 Gray (79 Mass.) 139.

Michigan.—Turner v. Fidelity & Casualty Ins. Co. of N. Y. 112 Mich. 425, 38 L.R.A. 529, 67 Am. St. Rep. 426, 70 N. W. 898; Utter v. Travelers' Ins. Co. 65 Mich. 545, 8 Am. St. Rep. 913, 32 N. W. 812.

Minnesota.—Zeitler v. National Casualty Co. 124 Minn. 478, 145 N. W. 395; Minneapolis Threshing Machine Co. v. Firemen's Ins. Co. 57 Minn. 35, 23 L.R.A. 576, 47 Am. St. Rep. 572, 58 N. W. 819; Pettit v. State Ins. Co. 41 Minn. 299, 43 N. W. 378; DeGraff v. Queen Ins. Co. 38 Minn. 501, 38 N. W. 696, 8 Am. St. Rep. 685.

Mississippi.—Shivers v. Farmers Mutual Fire Ins. Co. 99 Miss. 744, 55 So. 965, 40 Ins. L. J. 1706, 1708.

Missouri. — Wertheimer-Swarts Shoe Co. v. United States Casualty Co. 172 Mo. 135, 61 L.R.A. 766, 95 Am. St. Rep. 500, 72 S. W. 635; Renshaw v. Missouri State Mutual Fire & Marine Ins. Co. 103 Mo. 595, 23 Am. St. Rep. 904, 15 S. W. 945; Century Realty Co. v. Frankfort Marine Accident & Plate Glass Ins. Co. 179 Mo. App. 144, 161 S. W. 624, 630, 631; Mitchell v. German Commercial Accident Co. 179 Mo. App. 1, 161 S. W. 32; Stark v. John Hancock Mutual Life Ins. Co. 176 Mo. App. 574, 159 S. W. 758; Stix v. Travelers' Indemnity Co. of Hfd. 175 Mo. App. 171, 157 S. W. 870; Roseberry v. American Benevolent Assoc. 142 Mo. App. 552, 121 S. W. 785; Cunningham v. Union Casualty & Surety Co. 82 Mo. App. 607.

Montana.—McAuley v. Casualty Co. of America, 39 Mont. 185, 102 Pac. 586.

Nebraska.—Haas v. Mutual Life

Ins. Co. 84 Neb. 682, 121 N. W. 996, 26 L.R.A.(N.S.) 747n.

New Jersey.—Bohles v. Prudential Ins. Co. of America, 84 N. J. L. 315, 86 Atl. 438, aff'g 83 N. J. L. 240, 83 Atl. 904; Brooks v. Metropolitan Life Ins. Co. 70 N. J. L. 36, 56 Atl. 168; Snyder v. Dwelling-House Ins. Co. 59 N. J. L. 544, 56 Am. St. Rep. 625, 37 Atl. 1022.

New York.—Michael v. Prussian National Ins. Co. 171 N. Y. 25, 63 N. E. 810; Kratzenstein v. Western Assur. Co. 116 N. Y. 54, 22 N. E. 221, 5 L.R.A. 799; Paul v. Travelers Ins. Co. 112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 756, 20 N. E. 347; Foot v. Ætna Fire Ins. Co. 61 N. Y. 571, aff'g 4 Daly (N. Y.) 285; Hoffman v. Ætna Fire Ins. Co. 32 N. Y. 405, 88 Am. Dec. 337, 339; Hood v. Manhattan Fire Ins. Co. 11 N. Y. (1 Kern.) 532, per Parker, J.; Rocker v. Great Western Ins. Co. 4 Abb. App. Dec. 76; Marvin v. Stone, 2 Cow. (N. Y.) 781, 806; Gallagher v. Fidelity & Casualty Co. of N. Y. 163 App. Div. 556, 148 N. Y. Supp. 1016; Darling v. Protective Assur. Soc. 71 Misc. 113, 127 N. Y. Supp. 486; Porter v. Casualty Co. of America, 126 N. Y. Supp. 669, 70 Misc. 246; Lite v. Firemens' Ins. Co. 104 N. Y. Supp. 434, 119 App. Div. 410.

North Carolina.—Arnold v. Indemnity Fire Ins. Co. 152 N. Car. 232, 67 S. E. 574; Jones v. Pennsylvania Casualty Co. 140 N. Car. 262, 111 Am. St. Rep. 843, 52 S. E. 578, 5 L.R.A.(N.S.) 932n; Bray v. Virginia Fire & Marine Ins. Co. 139 N. Car. 390, 51 S. E. 922; Kendrick v. Mutual Benefit Life Ins. Co. 124 N. Car. 315, 70 Am. St. Rep. 592, 32 S. E. 728. *Compare* Powell v. North State Mutual Life Ins. Co. 153 N. Car. 124, 69 S. E. 12.

Oklahoma. — Standard Accident Ins. Co. v. Hite, 37 Okla. 305, 132 Pac. 333, 46 L.R.A.(N.S.) 986; Capital Fire Ins. Co. v. Carroll, 26 Okla. 286, 109 Pac. 535, 39 Ins. L. J. 1258, 1264; Taylor v. Insurance Co. of North America, 25 Okla. 92, 138 Am. St. Rep. 906, 105 Pac. 354.

Oregon. — Stinchcombe v. New York Life Ins. Co. 46 Oreg. 316, 80 Pac. 213.

Pennsylvania. — Central Market Street Co. v. North British & Mercantile Ins. Co. 245 Pa. 272, 91 Atl. 662; Francis v. Prudential Ins. Co. of America, 243 Pa. 380, 90 Atl. 205; Bingell v. Royal Ins. Co. 240 Pa. 412, 87 Atl. 955; Western & Atlantic Pipe Lines v. Home Ins. Co. 145 Pa. St. 346, 27 Am. St. Rep. 703, 22 Atl. 665, 21 Ins. L. J. 24, 48 Leg. Intell. 440; Philadelphia Tool Co. v. British American Assur. Co. 132 Pa. St. 236, 19 Am. St. Rep. 596, 19 Atl. 77; Teutonia Fire Ins. Co. v. Mund, 102 Pa. St. 89; Franklin Fire Ins. Co. v. Brock, 57 Pa. St. 74.

South Carolina. — Henderson v. Abbeville & Greenwood Mutual Ins. Assoc. 96 S. Car. 430, 81 S. E. 171; Bennettsville & Cheraw Ry. Co. v. Glens Falls Ins. Co. 96 S. Car. 44, 79 S. E. 717; Rawl v. American Central Ins. Co. 94 S. Car. 299, 45 L.R.A.(N.S.) 463n, 77 S. E. 1037.

South Dakota.— Farmers' & Merchants' State Bank of Verdon v. United States Fidelity & Guaranty Co. 28 S. Dak. 315, 138 N. W. 247, 36 L.R.A.(N.S.) 1152; Bolte v. Equitable Fire Assoc. 23 S. Dak. 240, 121 N. W. 773, 38 Ins. L. J. 886.

Tennessee.—Pacific Mutual Life Ins. Co. v. Galbraith, 115 Tenn. 471, 112 Am. St. Rep. 862, 91 S. W. 204.

Texas.—Indiana & O. Live Stock Ins. Co. v. Keiningham (1913) — Tex. Civ. App. —, 161 S. W. 384; Royal Ins. Co. v. Texas & G. R. Co. 53 Tex. Civ. App. 154, 115 S. W. 117.

Vermont.—Duran v. Standard Life & Accident Ins. Co. 63 Vt. 437, 13 L.R.A. 637, 25 Am. St. Rep. 773, 22 Atl. 530.

Virginia.—Fidelity & Casualty Co. v. Chambers, 93 Va. 138, 40 L.R.A. 432n, 24 S. E. 896; Georgia Home Ins. Co. v. Bartlett, 91 Va. 305, 50 Am. St. Rep. 832, 21 S. E.

mutual benefit etc., societies or associations.[7] So the questions and

476; Mutual Assurance Soc. v. Scottish Union & National Ins. Co. 84 Va. 116, 10 Am. St. Rep. 119, 4 S. E. 178.

Washington.—Montana Stables v. Union Assur. Soc. of London, 53 Wash. 274, 101 Pac. 882.

West Virginia.—Tucker v. Colonial Fire Ins. Co. 58 W. Va. 30, 51 S. E. 86; Logan v. Provident Savings Life Assur. Soc. 57 W. Va. 384, 50 S. E. 529; Cleavenger v. Franklin Fire Ins. Co. 47 W. Va. 595, 35 S. E. 998, 29 Ins. L. J. 528, 540.

Wisconsin.—Kresge v. Maryland Casualty Co. 154 Wis. 627, 143 N. W. 668; Andrews v. United States Casualty Co. 154 Wis. 82, 142 N. W. 487; Siemers v. Meeme Mutual Home Protection Ins. Co. 143 Wis. 114, 126 N. W. 669; Patterson v. Natural Premium Mutual Life Ins. Co. 100 Wis. 118, 42 L.R.A. 253, 69 Am. St. Rep. 899, 75 N. W. 980.

England.—Doe v. Dixon, 9 East, 15.

"It is an accepted canon of interpretation that if there is any uncertainty as to whether given words were used in an enlarged or restricted sense, that construction should be adopted which is most beneficial to the covenantee." Paul v. Travelers' Ins. Co. 112 N. Y. 472, 479, 20 N. E. 347, 3 L.R.A. 443, 8 Am. St. Rep. 758, 762.

Insurance policies must be liberally construed in favor of the assured, so as not to defeat, without a plain necessity, his claim for indemnity, and where words used may, without violence, be given two interpretations, that which will sustain the claim and cover the loss should be adopted. Goodwin v. Provident Savings Life Assn. 97 Iowa, 226, 59 Am. St. Rep. 411, 32 L.R.A. 473, 66 N. W. 157; American Accident Co. v. Reigert, 94 Ky. 547, 21 L.R.A. 651, 42 Am. St. Rep. 374, 23 S. W. 191.

If there is doubt or uncertainty as to the meaning of terms employed in a policy of insurance, the language must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to indemnity, which, in effecting the insurance it was his object to secure. Travelers' Ins. Co. v. Dunlap, 160 Ill. 642, 52 Am. St. Rep. 355, 43 N. E. 765.

When an injury approximately proceeds from a cause which falls within the limits of a policy according to the ordinary interpretation of the force of words, that interpretation is to be preferred, rather than one which defeats the protection of the assured in a large class of cases. Ætna Life Ins. Co. v. Fitzgerald, 165 Ind. 317, 112 Am. St. Rep. 232, 1 L.R.A.(N.S.) 422n, 6 Amer. & Eng. Ann. Cas. 551, 75 N. E. 262.

A liberal construction of an insurance policy, if it is a reasonable one and will prevent injustice, should be adopted when a literal construction would lead to manifest injustice. Matthews v. American Central Ins. Co. 154 N. Y. 449, 39 L.R.A. 433, 61 Am. St. Rep. 627, 48 N. E. 751, 27 Ins. L. J. 193. Case modifies 41 N. Y. Supp. 304, 9 App. Div. 339.

[7] *California.*—O'Connor v. Grand Lodge Ancient Order United Workmen of Cal. 146 Cal. 484, 80 Pac. 688.

Georgia.—Hall v. Royal Fraternal Union, 130 Ga. 820, 61 S. E. 977; Warwick v. Supreme Conclave K. of D. 107 Ga. 115, 32 S. E. 951.

Illinois.—Royal Circle v. Achterrath, 204 Ill. 549, 98 Am. St. Rep. 224, 68 N. E. 492, 63 L.R.A. 452; Semour v. Mutual Protective League, 155 Ill. App. 21; Marren v. North American Union, 145 Ill. App. 375; Mutual Protective League v. McKee, 122 Ill. App. 376, aff'd 223 Ill. 364, 79 N. E. 25; Supreme Lodge, Order of Mutual Protection v. Meister, 105 Ill. App. 471, aff'd 68 N. E. 454.

Indiana.—Supreme Lodge Knights of Honor v. Abbott, 82 Ind. 1, 6;

answers in an application, which is attached to the certificate and expressly made a part of the contract, are to be construed most strongly against insurer.[8] Since indemnity is the ultimate object of insurance,[9] the construction should also be in favor of indemnity and likewise for the benefit of trade; [10] for in case of doubtful con-

Brotherhood of Painters, Decorators & Paperhangers of America v. Barton, 45 Ind. App. 160, 92 N. E. 64; Supreme Tent Knights of the Maccabees of the World v. Ethridge, 43 Ind. App. 475, 87 N. E. 1049.

Iowa.—Binder v. National Masonic Accident Assoc. 127 Iowa, 25, 102 N. W. 190; Peterson v. Modern Brotherhood of America, 125 Iowa, 562, 67 L.R.A. 631, 101 N. W. 289; Matthes v. Imperial Accident Assoc. 110 Iowa, 222, 81 N. W. 484, 29 Ins. L. J. 622.

Kentucky. — Metropolitan Plate Glass & Casualty Ins. Co. v. Howes, 150 Ky. 52, 42 L.R.A.(N.S.) 700n, 149 S. W. 1110.

Missouri.—Mathews v. Modern Woodmen of America, 236 Mo. 326, 139 S. W. 151; Beile v. Travelers' Protective Assoc. of America, 155 Mo. App. 629, 135 S. W. 497.

Nebraska.—Soehner v. Grand Lodge of Order of Sons of Herman, 74 Neb. 399, 104 N. W. 871.

New York.—Fitzpatrick v. Knights of Columbus, 128 N. Y. Supp. 366, 143 App. Div. 540.

North Dakota.—Clemens v. Royal Neighbors of America, 14 N. Dak. 116, 103 N. W. 402.

Oklahoma.—Woodmen of the World v. Gilliland, 11 Okla. 384, 67 Pac. 485.

Texas.—Roth v. Travelers' Protective Assoc. 102 Tex. 241, 132 Am. St. Rep. 871, 115 S. W. 31; Haywood v. Grand Lodge of Texas Knights of Pythias, — Tex. Civ. App. —, 138 S. W. 1194; Daniel v. Modern Woodmen of America, 53 Tex. Civ. App. 570, 118 S. W. 211.

Vermont.—Brock v. Brotherhood Accident Co. 75 Vt. 249, 54 Atl. 176.

[8] Modern Woodmen of America v. Wilson, 76 Neb. 344, 107 N. W. 568, 35 Ins. L. J. 582; Keatley v. Grand Fraternity, 2 Boyce's (25 Del.) 267, 78 Atl. 874. See Sargent v. Modern Brotherhood of America, 148 Iowa, 600, 127 N. W. 52.

[9] Manger v. Holyoke Fire Ins. Co. 1 Holmes (U. S. C. C.) 287, Fed. Cas. No. 9305; Fire Association of Philadelphia v. Taylor, 76 Kan. 392, 91 Pac. 1070.

[10] Dow v. Hope Ins. Co. Hall (N. Y.) 166, 174.

See also the following cases:

Colorado.—Jennings v. Brotherhood Accident Co. 44 Colo. 130, 130 Am. St. Rep. 109, 96 Pac. 982.

Florida.—L'Angle v. Scottish Union & National Ins. Co. 48 Fla. 82, 67 L.R.A. 581, 111 Am. St. Rep. 70, 37 So. 462.

Illinois.—Forest City Ins. Co. v. Hardesty, 182 Ill. 39, 74 Am. St. Rep. 161, 55 N. E. 139, aff'g Hardesty v. Forest City Ins. Co. 77 Ill. App. 413; Schroeder v. Trade Ins. Co. 109 Ill. 157; Zeigler v. Clinton Mutual Fire Ins. Co. 84 Ill. App. 442; Railway Officials & Employee's Accident Assoc. v. Coady, 80 Ill. App. 563.

Iowa.—McCluer v. Girard Fire & Marine Ins. Co. 43 Iowa, 349, 22 Am. Rep. 249.

Kansas.—Fire Association of Philadelphia v. Taylor, 76 Kan. 392, 91 Pac. 1070.

Kentucky.—Spring Garden Ins. Co. v. Imperial Tobacco Co. 132 Ky. 7, 20 L.R.A.(N.S.) 277, 116 S. W. 234, 38 Ins. L. J. 446.

Nebraska.—Phœnix Ins. Co. v. Barnd, 16 Neb. 89, 20 N. W. 105.

Pennsylvania.—Grandin v. Rochester Ins. Co. 107 Pa. St. 26; Teutonia Ins. Co. v. Mund, 102 Pa. St. 89.

struction insurance is held to be a contract uberrimae fidei.[11] And every presumption in favor of good faith will be indulged in in construing policy clauses.[12] So it is held that policies of insurance create reciprocal rights and obligations which require the utmost good faith in both parties,[13] and "the strictum jus or apex juris is not to be laid hold on." [14] The fact that contracts were drawn up generally in a loose and inartificial manner gave a reason for the rule that policies are to be construed liberally.[15] It was early stated, however, by Emerigon, in considering whether the contract was one stricti juris or bonae fidei,[16] that "so far as the nature of the contract will allow, the chance of the insurer and of the insured must be the same," and the courts frequently show a disposition to somewhat modify the rule of liberal construction,[17] and to do in these contracts, as in others, equal justice between the parties as far as the nature of the contract renders it possible.[18] There are numerous cases, however, where a rule which contemplates less than a liberal

Vermont.—Brink v. Merchants' & Mechanics Ins. Co. 49 Vt. 442.

West Virginia.—Miller v. Citizens Fire, Marine & Life Ins. Co. 12 W. Va. 116, 29 Am. Rep. 452.

England.—Pelly v. Royal Exch. Assur. Co. 1 Burr. 341, 349, 14 Eng. Rul. Cas. 30; Bond v. Gonzales, 2 Salk. 445, per Lee, C. J.

[11] Goram v. Sweeting, 2 Saund. 550, note; Wolff v. Horncastle, 1 Bos. & P. 316, 322, 13 Eng. Rul. Cas. 265. "Iste contractus assecurationi est bonæ fidei . . . et practicandus non est cum juris apicibus et rigoribus": Emerigon on Insurance, (Meredith's ed. 1850) c. i. sec. 5, p. 17, *citing* Casaregis, disc. 1, n. 2.

[12] Northern Assur. Co. v. Carpenter, 52 Ind. App. 432, 94 N. E. 779, 40 Ins. L. J. 1218.

[13] Natchez Ins. Co. v. Stanton, 2 Smedes & M. (Miss.) 340, 375, 41 Am. Dec. 592.

[14] Pelly v. Royal Exch. Assur. Co. 1 Burr. 341, 349, 14 Eng. Rul. Cas. 30, per Lord Mansfield, adopting opinion of Lee, C. J.

[15] "Policies of insurance are generally drawn up in loose and inartificial language, and indeed in the language of common life, and therefore are always construed liberally:" Palmer v. Warren Ins. Co. 1 Story (C. C.) 360, 365, Fed. Cas. No. 10,658.

[16] Emerigon on Insurance (Meredith's ed. 1850) c. i. sec. 5, p. 18.

[17] See § 221 herein. See McEvory v. Security Fire Ins. Co. 110 Md. 275, 22 L.R.A.(N.S.) 942n, 132 Am. St. Rep. 428n, 73 Atl. 157, 38 Ins. L. J. 895, 898, per Pearce, J., who declares that in Maryland the rigor of the prevailing rule to construe all insurance policies strictly against the company has been relaxed to a certain extent.

[18] Phœnix Ins. Co. v. Slaughter, 12 Wall. (79 U. S.) 404; Merchants' Ins. Co. v. Davenport, 17 Gratt. (Va.) 138, "We should, however, have great doubts whether this rule of liberal construction has been invariably followed. It has certainly been modified and restrained in recent cases by a disposition to treat these contracts like all other contract, in such a way as shall do equal justice to all interested." 1 Parsons on Marine Insurance, ed. 1868, 67, 68, citing several cases criticising Mr. Duer's statement (1 Duer on Insurance [ed. 1845] 212) that a liberal construction had been invariably followed.

construction in favor of the insured and of indemnity would result in gross injustice to the insured.[19]

Although a construction as favorable to the insured as reasonably may be, must be given to a policy of insurance, still it should be only a natural and logical construction, not a strained or sophistical one.[20] And the rule that all ambiguities, obscurities, and uncertainties in a policy of fire insurance are to be resolved most favorably to the assured has no application whatever to plain language used in such connection as to leave no room to say reasonably that the parties might have intended either of two meanings.[1]

§ 221a. Same subject.—That part of a policy which relates to preliminary proofs of loss should be construed liberally in favor of assured.[2] And in construing conditions of a policy, to be complied with subsequent to an event resulting in loss or injury for which indemnity is claimed, with respect to the giving of notice of the loss or injury, and preliminary proofs thereof, a more liberal construction will be given in favor of the beneficiary than when the conditions are to be complied with prior to loss or injury, for the purpose of continuing the policy in force and effect.[3] So it is declared that it is well settled that when liability has become fixed by the capital fact of loss within the range of the responsibility assumed in the contract, courts are reluctant to deprive assured of the benefit of that liability by any narrow or technical construction of the condi-

[19] See § 248 herein; Anderson v. Fitzgerald, 4 H. L. Cas. 484, 507; 17 Jur. 995, 24 Eng. L. & E. 1, per Lord St. Leonards. "Many early adjudications may be found, and not a few recent ones also, in which contracts of insurance, and especially of life insurance, have been construed in such a manner as to operate with great harshness and injustice to policy holders." Alabama Gold Life Ins. Co. v. Johnson, 80 Ala. 467, 59 Am. Rep. 816, 2 So. 125. And see remarks on this point in Bacon's Benefit Societies and Life Insurance, (1st ed.) sec. 192.

[20] Bader v. New Amsterdam Casualty Co. 102 Minn. 186, 120 Am. St. Rep. 613, 112 N. W. 1065.

[1] Thurston v. Barnett & Beaver Dam Farmers' Mutual Fire Ins. Co. 98 Wis. 476, 41 L.R.A. 316, 74 N. W. 131; Brickell v. Atlas Assur. Co. Ltd. 10 Cal. App. 17, 101 Pac. 16; German Ins. Co. v. Hayden, 21 Colo. 124, 52 Am. St. Rep. 206, 40 Pac. 453; Union Life Ins. Co. v. Jameson, 31 Ind. App. 28, 67 N. E. 199; Dahms & Sons Co. v. German Fire Ins. Co. 153 Iowa, 168, 132 N. W. 870, 40 Ins. L. J. 2133, 2138.

The rule that an insurance policy is to be construed in favor of the insured does not apply when there is no ambiguity in the policy, no inconsistent or conflicting provisions, and nothing requiring construction or interpretation. Holmes v. Phenix Ins. Co. 39 C. C. A. 45, 98 Fed. 240, 47 L.R.A. 308.

[2] Farrell v. Farmers' & Merchants Ins. Co. 84 Neb. 72, 120 N. W. 929, 38 Ins. L. J. 685; Dakin v. Queen City Fire Ins. Co. 59 Oreg. 269, 117 Pac. 419, 40 Ins. L. J. 1892. See § 3275.

[3] Woodmens Accident Assoc. v. Byers (Pratt) 62 Neb. 673, 55 L.R.A. 291, 87 N. W. 546.

tions and stipulations which prescribe the formal requisites by means of which this accrued right is to be made available for his indemnification.[4] And this applies to formalities for ascertaining or adjusting a marine loss.[5] So a demand in writing for appraisers will when ambiguous be construed strongly against the insurer.[6]

§ 221b. Same subject: kinds of insurance to which rule applicable.[6a]—The rule above given that construction should be liberal in favor of assured when the contract is reasonably susceptible of two constructions applies to accident policies;[7] automobile policies;[8] employers liability or indemnity insurance contracts;[9] tornado insurance against loss of live stock;[10] fidelity or guaranty insurance;[11]

[4] Sergent v. London & Liverpool & Globe Ins. Co. 155 N. Y. 349, 49 N. E. 935, 28 Ins. L. J. 59, case reverses 85 Hun, 31, 32 N. Y. Supp. 594.

[5] Porter v. Traders Ins. Co. 164 N. Y. 504, 52 L.R.A. 424, 58 N. E. 641, 53 N. Y. Supp. 1112.

[6] Grand Rapids Fire Ins. Co. v. Finn, 60 Ohio St. 513, 42 Ohio L. J. 213, 42 Wkly. L. Bull. 213, 71 Am. St. Rep. 736, 54 N. W. 545, 50 L.R.A. 555.

[6a] See also §§ 206c, 222a herein.

[7] *United States.*—Sudduth v. Travelers Ins. Co. (U. S. C. C.) 106 Fed. 822.

Georgia.—Thornton v. Travelers' Ins. Co. 116 Ga. 121, 94 Am. St. Rep. 99, 42 S. E. 287.

Illinois.—National Masonic Accident Assoc. v. Geed, 95 Ill. App. 43.

North Carolina.—Rayburn v. Pennsylvania Casualty Co. 138 N. Car. 379, 107 Am. St. Rep. 548, 50 S. E. 762.

Pennsylvania.—Gavnia v. United States Health & Accident Ins. Co. 63 Leg. Intell. 288, 15 Dist. Rep. 432.

West Virginia.—Beard v. Indemnity Co. 65 W. Va. 283, 64 S. E. 119.

Wisconsin.—French v. Fidelity & Casualty Co. 135 Wis. 259, 17 L.R.A. (N.S.) 1011, 115 N. W. 869.

An accident policy should be interpreted so as to extend its protection over as wide a field of accidental injury as is consistent with its language, but its natural meaning must not be violated. Banta v. Continental Casualty Co. 134 Mo. App. 222, 113 S. W. 1140, 39 Ins. L. J. 243. See Beile v. Travelers Protective Assoc. of America, 155 Mo. App. 629, 135 S. W. 497, 40 Ins. L. J. 1028, 1037 (accident policy issued by mutual benefit society); Moest v. Continental Casualty Co. 104 N. Y. Supp. 553, 55 Misc. 128.

[8] Dougherty v. Insurance Co. of North America, 38 Pa. County Ct. Rep. 119.

[9] Home Mixture Guano Co. v. Ocean Accident & Guarantee Co. Ltd. of London, 176 Fed. 600; United Zinc Cos. v. General Accident Assur. Corp. Ltd. of Perth, 144 Mo. App. 380, 128 S. W. 836, 39 Ins. L. J. 1177; Mears Mining Co. v. Maryland Casualty Co. 162 Mo. App. 178, 191, 144 S. W. 883; Henderson Lighting & Power Co. v. Maryland Casualty Co. 153 N. Car. 275, 30 L.R.A.(N.S.) 1105 note, 69 S. E. 234; Fenton v. Fidelity & Casualty Co. 36 Oreg. 283, 48 L.R.A. 770, 56 Pac. 1006. See § 220b herein.

[10] Jordan v. Iowa Mutual Tornado Ins. Co. of Des Moines, 151 Iowa, 73, Ann. Cas. 1913A, 266, 130 N. W. 177.

[11] *United States.*—American Surety Co. v. Pauly, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. 552.

Arkansas.—Title Guaranty & Surety Co. v. Bank of Fulton, 89 Ark. 471, 33 L.R.A. (N.S.) 676, 117 S. W. 537, 38 Ins. L. J. 722; American Bonding Co. v. Morrow, 80 Ark. 49, 117 Am. St. Rep. 72, — S. W. —.

contract guaranty insurance;[12] and a Lloyds policy.[13]

A contract indemnifying a merchant against a credit loss should also be construed most strongly against the insurer. Ambiguities should be reconciled if possible by gathering the intent of the parties to the whole instrument and if the particular clause requiring interpretation cannot be thus brought into harmony with the rest of the contract touching the precise loss which the policy covers, that meaning is to be given to it which is most favorable to insured.[14]

§ 222. **Same subject: the rule contra proferentem.**—It is a settled rule of construction that in cases of doubt policies of assurance shall be construed strictly against the insurer in accordance with the rule "verba fortius accipiuntur contra proferentem." So of two interpretations equally reasonable that construction most favorable to the assured must be adopted, for the language is that of the insurers,[15] and if the terms of the policy are such that reasonable and

Colorado.—American Bonding & Trust Co. of Balt. v. Burke, 36 Colo. 99, 55 Pac. 692, 35 Ins. L. J. 642.

Georgia.—See Moorefield v. Fidelity Mutual Life Ins. Co. 135 Ga. 186, 69 S. E. 119.

Indiana.—American Surety Co. of N. Y. v. Pangburn, 180 Ind. 116, 105 N. E. 768.

Kentucky.—Champion Ice Manufacturing & Cold Storage Co. v. American Bonding & Trust Co. 115 Ky. 863, 103 Am. St. Rep. 356, 75 S. W. 197.

Missouri.—Long Bros. Grocery Co. v. United States Fidelity & Guaranty Co. 130 Mo. App. 421, 110 S. W. 29.

North Carolina.—Bank of Tarboro v. Fidelity & Deposit Co. 126 N. Car. 366, 83 Am. St. Rep. 682, 38 S. E. 908.

Tennessee.—Hunter v. United States Fidelity & Guaranty Co. 129 Tenn. 572, 167 S. W. 692.

Texas.—Griffin v. Zuber, 52 Tex. Civ. App. 288, 113 S. W. 961.

Washington.—Remington v. Fidelity & Deposit Co. of Md. 27 Wash. 429, 67 Pac. 989.

Wisconsin. — United American Fire Ins. Co. v. American Bonding Co. of Balt. 146 Wis. 573, 40 L.R.A. (N.S.) 661, 131 N. W. 994.

[12] Hormel & Co. v. American Bonding Co. of Balt. 112 Minn. 288, 33 L.R.A.(N.S.) 513 and note, 128 N. W. 12, 40 Ins. L. J. 137.

[13] Imperial Shale Brick Co. v. Jewett, 169 N. Y. 143, 62 N. E. 167.

[14] Lexington Grocery Co. v. Philadelphia Casualty Co. 157 N. Car. 116, 72 S. E. 870, *citing* Mercantile Credit Guarantee Co. of N. Y. v. Wood, 68 Fed. 529, 15 C. C. A. 563. See also Mercantile Credit & Guaranty Co. v. Littleford Bros. (Ohio) 18 Cir. Ct. Rep. (42 Wkly. L. Bull.) 889. *Compare* Philadelphia Casualty Co. v. Cannon & Byers Millinery Co. 133 Ky. 745, 118 S. W. 1004.

[15] *United States.*—Royal Ins. Co. v. Martin, 192 U. S. 149, 48 L. ed. 385, 24 Sup. Ct. 347. (If such interpretation is not inconsistent with the words used. *Cited* in Lefler v. New York Life Ins. Co. 143 Fed. 814, 819, 74 C. C. A. 488, 493; Atlas Reduction Co. v. New Zealand Ins. Co. 9 L.R.A.(N.S.) 433, 138 Fed. 497, 512, 71 C. C. A. 21, 36); Accident Ins. Co. v. Crandal, 120 U. S. 527, 30 L. ed. 740, 7 Sup. Ct. 685; Grace v. American Central Ins. Co. 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. 207; Phœnix Ins. Co. v. Slaughter, 12 Wall. (79 U. S.) 404, 20 L. ed. 444; Orient Mutual Ins. Co. v. Wright, 1 Wall. (68 U. S.) 456, 17 L. ed. 505;

intelligent men would honestly differ as to its meaning, it will be

Palatine Ins. Co. v. Ewing, 92 Fed. 111, 114, 34 C. C. A. 236, 239; Fidelity Mutual Life Ins. Co. v. Miller, 92 Fed. 63, 73, 34 C. C. A. 211, 220, 63 U. S. App. 717; McMaster v. New York Life Ins. Co. (U. S. C. C.) 90 Fed. 40, 28 Ins. L. J. 960, 99 Fed. 856, 878, 40 C. C. A. 119, 131 s. c. 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. 10, 31 Ins. L. J. 555; Liverpool London & Globe Ins. Co. v. McNeill, 89 Fed. 131, 137, 32 C. C. A. 173, 180, 59 U. S. App. 499; Wallace v. German American Ins. Co. 41 Fed. 742; Teutonia Ins. Co. v. Boylston Mut. Ins. Co. 20 Fed. 148; Catlin v. Springfield Ins. Co. 1 Sum. (C. C.) 440.

Delaware.—Continental Ins. Co. v. Rosenberg, 7 Penn. (Del.) 174, 74 Atl. 1073, 39 Ins. L. J. 392.

Georgia.—Mutual Life Ins. Co. v. Durden, 9 Ga. App. 797, 72 S. E. 295. See Royal Union Life Ins. Co. v. McLendon, 4 Ga. App. 620, 62 S. E. 101.

Illinois.—Healey v. Mutual Accident Assoc. 133 Ill. 556, 9 L.R.A. 371, 23 Am. St. Rep. 637, 25 N. E. 52; American Cent. Ins. Co. v. Rothchild, 82 Ill. 166; Travelers' Preferred Acci. Ins. v. Kelsey, 46 Ill. App. 371.

Indiana.—Hay v. Meridian Life & Trust Co. 57 Ind. App. 536, 101 N. E. 651, 105 N. E. 919; Northern Assurance Co. of London v. Carpenter, 52 Ind. App. 432, 94 N. E. 779, 40 Ins. L. J. 1218, 1222.

Kansas.—Citizens State Bank of Chautauqua v. Shawnee Fire Ins. Co. 91 Kan. 18, 49 L.R.A.(N.S.) 972, 137 Pac. 78.

Kentucky.—Montgomery v. Firemen's Ins. Co. 16 B. Mon. (Ky.) 427.

Maine.—Wright v. Fraternities Health & Accident Assoc. 107 Me. 418, 32 L.R.A.(N.S.) 461, 78 Atl. 475, 40 Ins. L. J. 551, 553, 554; Bartlett v. Union Insurance Co. 46 Me. 500.

Maryland.—McEvoy v. Security Fire Ins. Co. 110 Md. 275, 132 Am. St. Rep. 428 note, 22 L.R.A.(N.S.) 942, note, 73 Atl. 157, 38 Ins. L. J. 895, 898.

Louisiana.—Weil v. New York Life Ins. Co. 47 La. Ann. 1416, 17 So. 853.

Minnesota.—Olson v. St. Paul Fire & Marine Ins. Co. 35 Minn. 432, 29 N. W. 125, 59 Am. St. Rep. 333; Broadwater v. Lion Fire Ins. Co. 34 Minn. 466, 26 N. W. 455; Chandler v. St. Paul Fire & Marine Ins. Co. 21 Minn. 85, 18 Am. Rep. 385.

Mississippi.—Shivers v. Farmers Mutual Fire Ins. Co. 99 Miss. 744, 55 So. 965, 40 Ins. L. J. 1706.

Missouri.—Burnett v. American Casualty Ins. Co. 63 Mo. App. 343.

Nebraska.—Connecticut Fire Ins. Co. v. Jeary, 60 Neb. 338, 51 L.R.A. 698, 83 N. W. 78.

New York.—Matthews v. American Central Ins. Co. 154 N. Y. 449, 39 L.R.A. 443, 61 Am. St. Rep. 627, 48 N. E. 751, 27 Ins. L. J. 193, 195, per Van, J.; Darrow v. Family Fund Soc. 116 N. Y. 537, 27 N. Y. 474, 15 Am. St. Rep. 430, 6 L.R.A. 495, 22 N. E. 1093; Paul v. Travelers' Ins. Co. 112 N. Y. 479, 8 Am. St. Rep. 758, 762, 3 L.R.A. 443, 20 N. E. 347; Allen v. St. Louis Ins. Co. 85 N. Y. 473; Foot v. Ætna Life Ins. Co. 61 N. Y. 571, 575, 4 Daly, 285; Hoffman v. Ætna Ins. Co. 32 N. Y. 405, 88 Am. Dec. 337; Christy v. American Temperance Life Ins. Assoc. 68 Misc. 178, 123 N. Y. Supp. 740.

North Carolina.—Higson v. North River Ins. Co. 152 N. Car. 206, 67 S. E. 509.

Ohio.—Farmers National Bank v. Delaware Ins. Co. 83 Ohio St. 309, 94 N. E. 834, 40 Ins. L. J. 1248, 1258.

Pennsylvania.—Philadelphia Tool Co. v. British American Assur. Co. 132 Pa. St. 236, 19 Am. St. Rep. 596, 25 Week. Not. Cas. 370; White v. Smith, 33 Pa. St. 186, 75 Am. Dec. 589; Western Co. v. Cropper, 32 Pa. St. 351, 75 Am. Dec. 561; Alemania

construed against the insurer;[16] and this is so of equivocal expressions which would narrow the range of the insurer's obligations,[17] and the rule applies to clauses restrictive of the company's liability in an accident policy,[18] and to accident policies generally,[19] and to exceptions,[20] and to conditions and provisions which would narrow the range and limit the force of the principal obligation or lessen the indemnity.[1] And where a clause in a policy of reinsurance provided: "This insurance to be on the excess which the T. Insurance Company may have on all their policies on cotton, sugar, and molasses and cotton seed, issued at their office in New Orleans, or at their Shreveport agency, as follows, viz., on the excess of ten thousand dollars on boats from places on the Mississippi river, but said excess not to exceed five thousand dollars by any one boat," it was decided that the words "on boats" indicated that more than

Fire Ins. Co. v. Pittsburg Exposition Soc. — Pa. —, 11 Atl. 572, 4 Pa. (L. ed.) 718, 10 Cent. Rep. 292; Primrose v. Casualty Cos. of America, 67 Leg. Intell. 308, 37 Pa. Co. Ct. Rep. 441.

Texas.—Dorroh-Kelly Mercantile Co. v. Orient Ins. Co. 104 Tex. 199, 135 S. W. 1165, 40 Ins. L. J. 1211, 1214; Mutual Life Ins. Co. v. Ford, — Tex. Civ. App. —, 130 S. W. 769; London & Lancaster Fire Ins. Co. v. Davis, 37 Tex. Civ. App. 348, 84 S. W. 260.

Rhode Island.—Wilson v. Conway Fire Ins. Co. 4 R. I. 141.

Vermont.—Brink v. Merchants' & Mechanics Ins. Co. 49 Vt. 442.

Virginia.—Stratton's Admr. v. New York Life Ins. Co. 115 Va. 257, 78 S. E. 636.

Washington.—Burbank v. Pioneer Mutual Ins. Assoc. 60 Wash. 253, 110 Pac. 1005, Ann. Cas. 1912B, 762; Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co. 59 Wash. 501, 28 L.R.A.(N.S.) 596 note, 140 Am. St. Rep. 863, 110 Pac. 36.

West Virginia.—Bryan v. Peabody Ins. Co. 8 W. Va. 605.

England.—Fowkes v. Manchester & London Life Assur. & Loan Assoc., 3 Best & S. 917.

The policy being prepared by the underwriter under the canon contra proferentum, any ambiguity is resolved against him. No word in the policy should be disregarded, no ambignity should be resolved in favor of the company. New York & Porto Rico Steamship Co. v. Aetna Ins. Co. (U. S. D. C.) 192 Fed. 212.

[16] Kratzenstein v. Western Assur. Co. 116 N. Y. 54, 26 N. Y. 453, 456, 5 L.R.A. 799, 22 N. E. 221.

[17] Commercial Ins. Co. v. Robinson, 64 Ill. 265, 16 Am. Rep. 557.

[18] United States Mut. Acci. Assn. v. Newman, 84 Va. 52, 3 S. E. 805.

[19] Burkheiser v. Mutual Accident Assoc. 61 Fed. 816, 10 C. C. A. 94, 18 U. S. App. 704, 26 L.R.A. 112; Fidelity & Casualty Co. v. Meyer, 106 Ark. 91, 44 L.R.A.(N.S.) 493, 152 S. W. 995; Industrial Mutual Indemnity Co. v. Hawkins, 94 Ark. 417, 29 L.R.A.(N.S.) 635, 127 S. W. 457; Wilkinson v. Aetna Life Ins. Co. 240 Ill. 205, 25 L.R.A.(N.S.) 1256, 88 N. E. 550; Schumacher v. Great Eastern Casualty & Indemnity Co. 197 N. Y. 58, 27 L.R.A.(N.S.) 480 note, 90 N. E. 353, 39 Ins. L. J. 428, 432. See § 221b herein.

[20] Grant v. Lexington Fire, Life & Marine Ins. Co. 5 Ind. 23, 61 Am. Dec. 74. See § 220 herein.

[1] Hoffman v. Ætna Fire Ins. Co. 32 N. Y. 405, 88 Am. Dec. 337; Aurora Fire Ins. Co. v. Eddy, 49 Ill. 106.

the freight was included.[2] So the clause in a policy requiring notice of loss and a particular account of the same will be construed liberally against the insurer.[3] But it is said by Lord Bacon [4] that "this rule contra proferentem is the last to be resorted to, and is never to be relied upon, but where all other rules of exposition fail;" and it is held in a New York case [5] that the rule that an insurance contract is to be construed most strongly against the insurer is to be resorted to only where the language or some of the terms of the contract remain of doubtful import after the use of such other helps in construction as are proper. Story, J., recognizes the rule in Palmer v. Warren Insurance Company,[6] where he holds that a clause in the nature of an exception, if supposed to be ambiguous, must be construed most strongly against the insurer. So Lord Lyndhurst, in Blackett v. Royal Exchange Assurance Company,[7] says: "The rule of construction as to exceptions is that they are to be taken most strongly against the party for whose benefit they are introduced. The words in which they are expressed are considered as his words; and if he do not use words clearly to express his meaning, he is the person who ought to be the sufferer." Mr. Duer [8] distinguishes in the application of this rule between words introduced "for the benefit of the insurers" and the "words of the insurer," and says: "If the words of a clause are to be construed strictly against the party for whose benefit it is introduced, the main provisions of the policy must be construed strictly against the assured . . . and his indemnity reduced to the narrowest possible limits." [9] In another case, Story, J.,[10] speaks of this rule as "a mere technical rule of construction." But that this expression should be regarded as obiter accords clearly with the opinion of Mr. Duer.[11] Mr. Parsons [12] thinks that the rule contra proferentem has been "pressed quite too far in favor of the insured," since insurance contracts are the result of negotiations and an agreement, and that "it is difficult to see how the words can be regarded as any more the words of the insurer than

[2] Teutonia Ins. Co. v. Boylston Mut. Ins. Co. 20 Fed. 148.

[3] McLaughlin v. Washington County Mut. Ins. Co. 23 Wend. (N. Y.) 524; Barker v. Phœnix Ins. Co. 8 Johns. (N. Y.) 307, 5 Am. Dec. 339. See § 221a herein.

[4] Bacon's Max. Reg. 3.

[5] Foot v. Ætna Life Ins. Co. 61 N. Y. 571.

[6] 1 Story (C. C.) 360, Fed. Cas. No. 10,698.

[7] 2 Cromp. & J. 244, 250, 14 Eng. Rul. Cas. 179.

[8] 1 Duer on Ins. (ed. 1845) 214. See also Id. 209–11.

[9] *Citing* Yeaton v. Fry, 5 Cranch (9 U. S.) 335, 3 L. ed. 117.

[10] Donnell v. Columbia Ins. Co. 2 Sum. (C. C.) 366, 381, Fed. Cas. No. 3,987.

[11] 1 Duer on Ins. (ed. 1845) 214.

[12] 1 Parsons on Ins. (ed. 1868) 69 et seq.

of the assured." Considered from a strictly legal standpoint this is true, for the contract of insurance, when consummated, is supposed to be one upon the terms of which the minds of the parties have met or concurred, and the insured is on general principles presumed to know the contents of a policy which he has accepted, and should therefore be bound by its terms.[13] But an examination of the cases discovers that the rule of construction against the insurer obtains, because the applications and policies are framed by insurers in their interest, and the insured is in a measure bound to accept them. The terms of these contracts are seldom, if ever, the result of negotiations in the same sense that other contracts are. Very strong terms have been used at various times against the practice of many insurance companies to issue applications and policies which "are illegible and unintelligible to the generality of mankind," [14] and the abuses which have arisen in consequence and the injustice resulting to the insured have been the occasion for legislative interposition in many states, and a rule of liberal interpretation in favor of indemnity and the assured and against the insurer has been followed as far as possible. Thus it is said by the court in Brink v. Merchants' & Mechanics' Insurance Company [15] that "it is a fundamental rule in the law of insurance that the policy shall be construed most strongly against the insurer and liberally in favor of the insured. . . . They use their own language, and surround and barricade their liability under it with such defenses as they choose to adopt. . . . There is obvious reason for the rule of liberal construction in favor of the man whose legal rights are to be extracted from such a labyrinth of mysticism." And in an Iowa case [16] the court declares: "It is quite time that the technical constructions which have pertained, with reference to contracts of this kind blocking the pathway to justice and leading to decisions opposed to the general sense of mankind, should be abandoned." To the same effect, although expressed in much stronger terms, are the words of Doe, C. J., in Rockingham

[13] Moore v. State Ins. Co. 72 Iowa, 414, 34 N. W. 183; Brown v. Massachusetts Mut. Life Ins. Co. 59 N. H. 298, 47 Am. Rep. 205; Hawkins v. Rockfort Ins. Co. 70 Wis. 1, 35 N. W. 34, per Cassody, J.; Herbst v. Lowe, 65 Wis. 321, 26 N. W. 751; Morrison v. Phelps, 44 Wis. 410.

[14] De Lancey v. Rockingham Mut. Fire Ins. Co. 52 N. H. 581, per Doe, C. J. See opinion of Adams, J. in Northern Assurance Co. of London v. Carpenter, 52 Ind. App. 432, 94 N. E. 779, 40 Ins. L. J. 1218, 1222, quoting from Glens Falls Ins. Co. v. Michael, 167 Ind. 659, 8 L.R.A.(N.S.) 708, 74 N. E. 964, 79 N. E. 905, see also Wright v. Fraternities Health & Accident Assoc. 107 Me. 418, 32 L.R.A. (N.S.) 461, 78 Atl. 475, 40 Ins. L. J. 551, 554, per King, J.

[15] 49 Vt. 457.

[16] Miller v. Mutual Benefit Life Ins. Co. 31 Iowa, 226; 7 Am. Rep. 122.

v. Mutual Fire Insurance Company,[17] who refers to the policies prepared by the companies and to the numerous conditions against forfeiture, and says: "These provisions were of such bulk and character that they would not be understood by men in general, even if subjected to a careful and laborious study." [18] So in the case of warranties, which we shall consider hereafter,[19] the courts will not favor them by construction;[20] and in this connection it is said by the court in another case [1] that "the rapid growth of the business of life insurance in the past quarter of a century, with the tendency of insurers to exact increasingly rigid and technical constructions, and the evils resulting from an abuse of the whole system, justify, if they do not necessitate, a departure from the rigidity of our earlier jurisprudence on this subject of warranties." And in the same case the court also declares that "all the conditions of the contract and the obligations imposed" will be construed "liberally in favor of the assured and against the insurer."

§ 222a. Same subject.[1a]—The rule contra proferentem, above given, applies to a life policy renewal receipt and a printed clause on the back thereof written on forms prepared by the insurer.[2] The rule also applies to answers in an application to questions prepared by insurer;[3] a policy providing for payment of a weekly indemnity;[4] a burglary insurance contract;[5] employers liability or indemnity insurance contracts;[6] fidelity or guaranty insur-

[17] 52 N. H. 581, 587.

[18] And see also Kausal v. Minnesota Farmers' Mut. Fire Ins. Assn. 31 Minn. 17, 21, 47 Am. Rep. 776, 16 N. W. 430.

[19] See c. 45, §§ 1942 et seq. herein. See also § 209b herein.

[20] Vivar v. Supreme Lodge Knights of Pythias, 52 N. J. L. 455, 20 Atl. 36. *Examine* McClain v. Provident Savings Life Assur. Soc. 110 Fed. 80, 49 C. C. A. 31, s. c. 184 U. S. 699, 46 L. ed. 765, 23 Sup. Ct. 938; O'Connor v. Grand Lodge Ancient Order United Workmen, 146 Cal. 484, 80 Pac. 688.

[1] Alabama Gold Life Ins. Co. v. Johnson, 80 Ala. 467, 472, 60 Am. Rep. 112, 2 So. 128.

[1a] See also §§ 206c, 220b, 221b herein.

[2] Ætna Life Ins. Co. v. Smith, 88 Fed. 440, 31 C. C. A. 575, 28 Ins. L. J. 36.

[3] Diamond v. Metropolitan Life Ins. Co. 116 N. Y. Supp. 617. See § 221 herein.

[4] Porter v. Casualty Co. of America, 126 N. Y. Supp. 669, 70 Misc. 246.

[5] Rosenthal v. American Bonding Co. of Balt. 124 N. Y. Supp. 905, case rev'd 128 N. Y. Supp. 553, 143 App. Div. 362, which was rev'd 207 N. Y. 162, 100 N. E. 716.

[6] London Guarantee & Accident Ins. Co. v. Morris, 156 Ill. App. 533; Fairbanks Canning Co. v. London Guaranty & Accident Co. 154 Mo. App. 327, 133 S. W. 664, 40 Ins. L. J. 583, 585, 586. The court, per Ellison, J., said: "The contract, . . . is not alone with Nelson Morris & Co., but is with others mentioned in the schedule, in which plaintiff's name is found. Plaintiff is thereby named as one of the contracting parties. But even if it should be conceded that there was some ambiguity as to whether plain-

ance,[7] and certificates in mutual benefit, etc., societies or associations.[8]

§ 222b. Same subject: employers' liability policy.—The rule that the insurer is responsible for the language used in the policy, and that the meaning most favorable to insured must be accepted applies to an employers' liability policy.[9]

§ 222c. Same subject: accident policy under workmen's compensation act.—Where a policy is taken out, under the Workmen's Compensation Act of England of 1906, against accidents to employees, it ought, in case of ambiguity, to be construed against the society issuing the policy and in favor of the claimant. Conditions precedent to the insurers liability to pay should be made especially clear both in the proposal form and in the policy based thereon, for such conditions have the same effect as forfeiture clauses, and may inflict loss and injury to assured and those claiming under him out of all proportion to any damage that could possibly accrue to the company from nonobservance or nonperformance of the conditions. It is therefore established that the doctrine that policies are to be construed contra proferentes applies strongly to the insurer.[10]

tiff was contracted with direct, or only through Nelson Morris & Co. we, under a familiar rule of construction of contract, should resolve the doubt against the defendant for the reason that it prepared the policy and selected the words used to express its meaning."

[7] *United States.*—American Surety Co. v. Pauly, 170 U. S. 133, 160 (2 cases) 42 L. ed. 977, 18 Sup. Ct. 552, construction against surety company when capable of two constructions, since bond prepared by insurance company: law well settled, *cited* in United States Fidelity & Guaranty Co. v. First National Bank, 233 Ill. 475, 84 N. E. 670); Guarantee Co. of North America v. Merchants Savings Bank & Trust Co. 80 Fed. 766, 26 C. C. A. 146.

Georgia.—Moorefield v. Fidelity Mutual Life Ins. Co. 135 Ga. 186, 69 S. E. 119.

Missouri.—Roark v. City Trust Safe Deposit & Surety Co. 130 Mo. App. 401, 110 S. W. 1.

Texas.—Griffin v. Zuber, 52 Tex. Civ. App. 288, 113 S. W. 961.

Wisconsin.—United American Fire Ins. Co. v. American Bonding Co. 146 Wis. 573, 131 N. W. 994, 40 Ins. L. J. 1805, 1811, 40 L.R.A. (N.S.) 661 note.

[8] Brotherhood of Locomotive Firemen & Enginemen v. Aday, 97 Ark. 425, 34 L.R.A.(N.S.) 126, 134 S. W. 928, 40 Ins. L. J. 737; Graves v. Knights of the Maccabees of the World, 112 N. Y. Supp. 948, 128 App. Div. 660, case rev'd 199 N. Y. 397, 92 N. E. 792, although the general rule was not denied, it was held not applicable. See §§ 207, 221 herein.

[9] Cary Brick Co. v. Fidelity & Casualty Co. of N. Y. 147 N. Y. Supp. 414, 162 App. Div. 873.

[10] Bradley & Essex & Suffolk Accident Indemnity Soc. In re, 81 L. J. K. B. 523, 530, [1912] 1 K. B. 415, 165 L. T. 919, 28 T. L. R. 175, [1912] W. C. Rep. 6, per Farwell L. J. proviso here was for keeping wages book. In this case it was said: "It is the universal practice for the companies to prepare both the forms of proposal and the form of policy. Both are issued by them on printed forms kept ready for use. It is their duty

§ 222d. Same subject: reinsurance.—The rule that all doubts are to be resolved liberally in favor of insured since the insurer prepared the policy applies to a reinsurance contract.[11] In a peculiar case of reinsurance decided in New York the terms of insurance, including the description of the risk, were wholly prepared by the original insurer and the policy was issued by the reinsurer, without seeing the original policies, in the exact language which the reinsured had so used, and it was held that the responsibility for any ambiguity should be borne by the reinsured, and that the rule that as insurance policies are unilateral contracts prepared by the insurers they are responsible for any ambiguity in the language used, all doubt is resolved against them because they created it, applied with the same force to the reinsurance contract.[12]

§ 222e. Rule as to standard policy.[12a]—The rule that doubtful terms are to receive a construction favorable to the insured has not been changed by the adoption of a standard form for a fire insurance policy.[13] And this rule has apparently been impliedly conceded in numerous decisions involving the construction of standard policies. In a New York case it is said, and so held, that "the policy, though of the standard form was prepared by insurers, who are presumed to have had their own interests primarily in view; and hence, when the meaning is doubtful, it should be construed most favorably to insured who had nothing to do with the preparation thereof." [14] But under a New Jersey

to make the policy accord with and not exceed the proposal, and to express both in clear and unambiguous terms, lest—as Lord Justice Fletcher Moulton, quoting Lord St. Leonards, says in Joell v. Law Union & Crown Insurance Co., [1908] 77 L. J. K. B. 1108, 1120, [1908] 2 K. B. 863, 886, — provisions should be introduced into policies which 'unless they are fully explained to the parties, will lead a vast number of persons to suppose that they have made a provision for their families by an insurance on their lives, and by payment of perhaps a very considerable portion of their income, when in point of fact from the very commencement, the policy was not worth the paper upon which it was written.' . . . Accordingly it has been established that the doctrine that policies are to be construed contra proferentes applies strongly to the company. Etherington & Lancashire & Yorkshire Accident Insurance Co., In re, [1900] 78 L. J. K. B. 684, [1909] 1 K. B. 591."

[11] Federal Life Ins. Co. v. Kerr, 173 Ind. 613, 89 N. E. 398, 91 N. E. 230, aff'g (1908) — Ind. App. —, 85 N. E. 796, 82 N. E. 943.

[12] London Assurance Corp. v. Thompson, 170 N. Y. 94, 62 N. E. 1066, 31 Ins. L. J. 351.

[12a] See also § 206a herein.

[13] Gazzam v. German Union Fire Ins. Co. 155 N. C. 330, Ann. Cas. 1913E, 282 note, 71 S. E. 434. See Dahms & Sons Co. v. German Fire Ins. Co. 153 Iowa, 168, 132 N. W. 870, 40 Ins. L. J. 2133, 2138, point [2].

[14] Matthews v. American Central Ins. Co. 154 N. Y. 449, 39 L.R.A. 433, 61 Am. St. Rep. 627, 48 N. E.

decision when a policy of fire insurance is written in a standard form approved by governmental authority, the maxim verba chartarum fortius accipiuntur contra proferentum, has no special applicability.[15] In a Wisconsin case it is held that although it has been ruled many times that policies of insurance are to be liberally construed in favor of the insured because the insurer has prepared the contract still the reason for such construction would seem not to apply in case of a contract prescribed by statute, at least so far as the statute covered such details.[16] But the court, per Timlin, J., qualifies this holding to this extent: "But another and more fundamental rule of construction, applying alike to statutes and contracts, is that the writing must in cases of ambiguity be considered valid and efficient to work out the ascertained object of the writer; i. e., in favor of indemnity to the insured rather than useless or nugatory. . . . But this does not mean that clear expressions should be distorted, or that language should not be given its ordinary meaning."

§ 223. **The written controls the printed part of policy.**—Insurance policies are reduced to a printed form, conforming to a prescribed formula, since many, if not most, of the clauses have obtained a settled judicial construction,[17] and because they embrace general provisions applicable not only to one case, but to most cases of a certain class, and these printed forms contain blanks in which may be written such covenants and specific provisions as are agreed upon, which are consistent with the nature of the contract and the principles which govern it, and with such statutory requirements as may exist:[18] these specific written agreements become, therefore, the immediate and chosen language of the parties themselves,[19]

751, 27 Ins. L. J. 193, 195, per Van, J., case modifies 41 N. Y. Supp. 304, 9 App. Div. 339.

[15] Mick v. Royal Exchange Assur. 87 N. J. L. 607, (1914) 52 L.R.A. (N. S.) 1074, 91 Atl. 102. *Citing* Nelson v. Traders Ins. Co. 181 N. Y. 472, 74 N. E. 421.

[16] Rosenthal v. Insurance Co. of North America, 158 Wis. 550, L.R.A. 1915B, 361, 149 N. W. 155.

[17] The greater part of the printed language of policies of assurance, being invariable and uniform, has acquired from use and practice a known and definite meaning. Robertson v. French, 4 East, 136, 14 Eng. Rul. Cas. 1, per Lord Ellenborough.

[18] Harper v. New York City Ins. Co. 22 N. Y. 441, per Selden, J. "In most maritime places they have printed forms of policies of insurance, in the blanks of which are written the special covenants on which the parties choose to agree." Emerigon on Insur. (Meredith's ed. 1850) 32, c. ii. sec. 3; 1 Duer on Insur. (ed. 1845) 64, secs. 6, 7. "The printed words are a general formula, adapted equally to their case and that of all other contracting parties upon similar occasions and subjects." Robertson v. French, 4 East, 136, 14 Eng. Rul. Cas. 1, per Lord Ellenborough.

[19] "The written words are the immediate language and terms selected by the parties themselves for the ex-

and for this reason it is said that they are to be more strictly construed than the printed ones.[20] These written clauses should be construed together with the printed ones, and reconciled with them, if possible, in case of apparent contradiction, so as to give effect to every part of the contract,[1] and if there is no contradiction between the two, the printed clauses will be given the full effect of their terms.[2] But if the printed and written clauses are repugnant to each other, and cannot be reconciled, then inasmuch as the parties have stipulated in writing, this express adoption of a chosen form of words to convey their meaning will control, and upon this point that the written clauses will be given effect over the printed ones, the decisions are unanimous.[3]

pression of their meaning." Robertson v. French, 4 East, 136, 14 Eng. Rul. Cas. 1, per Lord Ellenborough.

[20] 1 Arnould on Ins. (Perkins' ed, 81) sec. 47 rule vi.

[1] Goss v. Citizens' Ins. Co. 18 La. Ann. 97, 101; Howes v. Union Ins. Co. 16 La. Ann. 235; Goicoechea v. Louisiana Ins. Co. 6 Mart. N. S. (La.) 51, 17 Am. Dec. 175; Stokes v. Cox, 1 Hurl. & N. 533; 2 Parsons on Contracts (5th ed) 516.

[2] "But where there is no contradiction between the two (written and printed clauses), the printed clauses must stand and have the full effect of their terms, because they have been adopted by the parties." Emerigon on Ins. (Meredith's ed.) 33, c. ii. sec. 3. See Mumford v. Hallett, 1 Johns (N. Y.) 433.

[3] *United States.*—Thomas v. Taggart, 209 U. S. 385, 52 L. ed. 845, 28 Sup. Ct. 519; Hagan v. Scottish Union & National Ins. Co. 98 Fed. 129, 29 Ins. L. J. 666, rev'd 102 Fed. 919, 920, 43 C. C. A. 55, which is rev'd 186 U. S. 423, 46 L. ed. 1229, 22 Sup. Ct. 862; Canton Ins. Office Ltd. v. Woodside, 90 Fed. 301, 33 C. C. A. 63, 61 U. S. App. 214, 28 Ins. L. J. 269; Gunther v. Liverpool, London & Globe Ins. Co. 34 Fed. 501, aff'd 134 U. S. 110, 33 L. ed. 857, 10 Sup. Ct. 448; Plinskly v. Germania Ins. Co. 32 Fed. 47; Coster v. Phœnix Ins. Co. 2 Wash. (C. C.) 51, Fed. Cas. No. 3,264; Hernandez v. Sun Mut. Ins. Co. 6 Blatchf. (C. C.) 317, Fed. Cas. No. 6,415.

Alabama.—Tubb v. Liverpool & London & Globe Ins. Co. 106 Ala. 651, 17 So. 615.

Arkansas.—Phoenix Ins. Co. v. Fleming, 65 Ark. 54, 39 L.R.A. 789, 44 S. W. 464, 27 Ins. L. J. 584.

California.—Yoch v. Home Mutual Ins. Co. 111 Cal. 503, 34 L.R.A. 857, 44 Pac. 189.

Georgia.—Maril v. Connecticut Fire Ins. Co. 95 Ga. 604, 30 L.R.A. 835, 28 S. E. 463.

Louisiana.—Goicoechea v. Louisiana State Ins. Co. 6 Mart. N. S. (La.) 51, 55, 17 Am. Dec. 175, per Porter.

Maryland.—Fire Ins. Assoc. v. Merchants & Miners Transp. Co. 66 Md. 339, 59 Am. Rep. 332, 7 Atl. 905; Shertzer v. Mutual Fire Ins. Co. 46 Md. 506; Frederick County Mut. Fire Ins. Co. v. Deford, 38 Md. 404.

Massachusetts. — Whitmarsh v. Conway Fire Ins. Co. 16 Gray (82 Mass.) 359, 77 Am. Rep. 414.

Michigan.—Minnock v. Eureka Fire & Marine Ins. Co. 90 Mich. 236, 51 N. W. 367; Niagara Ins. Co. v. DeGraff, 12 Mich. 124. *Compare* Vandervolgen v. Manchester Fire Assur. Co. 123 Mich. 291, 82 N. W. 46, 29 Ins. L. J. 639.

Minnesota.—Russell v. Manufacturers' & Builders Fire Ins. Assn. 50

The rule, however, that written parts control the printed parts, in case of inconsistent stipulations, is subject to the rule that words of exceptions if doubtful are to be construed most strongly against the party for whose benefit they are intended and in favor of indemnity.[4]

§ 224. Same subject: cases.—A special indorsement exempting from liability for partial loss controls,[5] but where the language of the printed form provided that the policy should be controlled by indorsements of special risks, and the written part omitted the word "carriage" contained in the printed part, such omission was held not to limit the policy.[6] Where the terms of limitation and description of the risk are written in, such clauses will control printed clauses which should have been stricken out, but which are left in, according to the usual custom.[7] And the phrase "against actual total loss only," written across the margin of a policy, will control the printed language therein.[8] So a written memorandum as to the manner of settling losses controls.[9] So where the risk as-

Minn. 409, 52 N. W. 906; Phœnix Ins. Co. v. Taylor, 5 Minn. 492.

Missouri.—Archer v. Merchants' & Manufacturers' Ins. Co. 43 Mo. 434; Burnham v. Royal Ins. Co. 79 Mo. App. 394, 1 Mo. App. Rep. 308, 27 Ins. L. J. 928.

New York.—Hall v. Insurance Co. of North America, 58 N. Y. 292, 17 Am. Rep. 255; Reynolds v. Commerce Ins. Co. 47 N. Y. 597; Benedict v. Ocean Fire Ins. Co. 31 N. Y. 389; Harper v. Albany Mut. Fire Ins. Co. 17 N. Y. 194; Bargett v. Orient Mut. Ins. Co. 3 Bosw. (N. Y.) 385; Nielson v. Commercial Ins. Co. 3 Duer (N. Y.) 455.

North Carolina.—Johnston v. Niagara Fire Ins. Co. 118 N. Car. 643, 24 S. E. 424.

Ohio.—Farmers National Bank v. Delaware Ins. Co. 83 Ohio St. 309, 94 N. E. 834, 40 Ins. L. J. 1248, 1254, 56 Ohio Law Bull. 99.

Pennsylvania.—West Branch Lumberman's Exchange v. American Central Ins. Co. 183 Pa. 366, 42 Wkly. N. C. 6, 38 Atl. 1081, 27 Ins. L. J. 305; Haws v. St. Paul Fire & Marine Ins. Co. 130 Pa. 113, 2 L.R.A. 52, 15 Atl. 915, 18 Atl. 621.

Vermont.—Mascott v. First National Fire Ins. Co. 69 Vt. 116, 37 Atl. 255; Mascott v. Granite State Fire Ins. Co. 68 Vt. 253, 35 Atl. 75.

England.—Bell v. Hobson, 16 East, 240; Robertson v. French, 4 East, 130, 14 Eng. Rul. Cas. 1.

"It is permitted to derogate from the printed clauses, and one is judged to derogate from them from the fact alone that the written clauses are repugnant to them." Emerigon on Ins. (Meredith's ed. 1850) 33, c. ii. sec. 3. See 3 Kent's Commentaries (6th ed. 26) 17 Earl of Halsbury's Laws of England, pp. 342, 527, see § 2671 herein.

[4] Canton Insurance Office Ltd. v. Woodside, 90 Fed. 301, 33 C. C. A. 63, 61 U. S. App. 214, 28 Ins. L. J. 269, 275. See § 220 herein.

[5] Chadsey v. Guion, 97 N. Y. 333.

[6] Kratzenstein v. Western Assur. Co. 116 N. Y. 54, 22 N. E. 221, 5 L.R.A. 799, reversing 21 Jones & S. (53 N. Y. Sup. Ct.) 505.

[7] Dudgeon v. Pembrook, 2 L. R. App. C. 284, 14 Eng. Rul. Cas. 105.

[8] Burt v. Brewers' & Malsters' Ins. Co. 9 Hun (16 N. Y. Sup. Ct.) 383.

[9] Hugg v. Augusta Ins. & Banking Co. Taney (C. C.) 159, Fed. Cas. No. 6,838.

sumed by the written agreement is irreconcilable with the printed terms, the former governs.[10] And the written words "port risk in the port of New York" control the printed part, and limit and define the risk.[11] And the insurance will not be limited to the interest of the insured, a carrier, where other and written parts discover a contrary intention.[12] The written portion of a fire insurance policy insuring benzine as part of a stock of merchandise overrides the printed portion of the policy forbidding it to be kept.[13] A written special description of the subject-matter must control the printed clauses whenever they are inconsistent, and if the written portion covers property to be used in a particular business, the keeping of an article necessarily used in such business does not avoid the policy, although it is expressly prohibited in the printed conditions, especially so where the protection of an established and current business, expressly permitted in the written portion of the contract, is really the object of the insurance.[14] A receipt for part payment of the premium on an insurance policy, which is wholly in writing, must control the printed terms of an application which conflict with it, when the delivery of the application and the giving of the receipt are to be regarded as contemporaneous acts.[15] Other cases illustrating this proposition are noted elsewhere.[16]

§ 225. Construction: lex loci contractus.—Although there are conflicting decisions, yet the general rule is that contracts of insurance are governed, in matters of construction affecting their validity and the rights of the parties, by the law and usages of the place where the contract is made,[17] unless it appears that the parties

[10] Nicolet v. Insurance Co. 3 La. 366, 23 Am. Dec. 458.

[11] Nelson v. Sun Mut. Ins. Co. 71 N. Y. 453.

[12] Fire Ins. Assn. v. Merchants' & Miners' Transp. Co. 66 Md. 339, 7 Atl. 905.

[13] Phœnix Ins. Co. v. Flemming, 65 Ark. 54, 67 Am. St. Rep. 900, 39 L.R.A. 789, 44 S. W. 464, 27 Ins. L. J. 584. *Compare* Vandervolgen v. Manchester Fire Assur. Co. 123 Mich. 291, 82 N. W. 46, 29 Ins. L. J. 639.

[14] Faust v. American Fire Ins. Co. 91 Wis. 158, 30 L.R.A. 783, 64 N. W. 883, 51 Am. St. Rep. 876.

[15] Cole v. Union Central Life Ins. Co. 22 Wash. 26, 47 L.R.A. 201, 60 Pac. 68.

[16] See cases under § 223. See chapters 45, 49, 50, 53, 58, herein.

[17] Mutual Life Ins. Co. v. Hill, 193 U. S. 551, 48 L. ed. 788, 24 Sup. Ct. 538, s. c. (mem.) 188 U. S. 742, 47 L. ed. 678, 23 Sup. Ct. 856, s. c. 118 Fed. 708, 55 C. C. A. 536; Mutual Life Ins. Co. v. Cohen, 179 U. S. 262, 45 L. ed. 181, 21 Sup. Ct. 106, s. c. 38 C. C. A. 696. See Mutual Life Ins. Co. v. Hill, 178 U. S. 347, 20 Sup. Ct. 914, 44 L. ed. 1097, rev'g 97 Fed. 263, 28 C. C. A. 159, 49 L.R.A. 127); Mutual Life Ins. Co. v. Phinney, 178 U. S. 327, 44 L. ed. 1088, 20 Sup. Ct. 327; Liverpool & Great Western Steam Co. v. Phenix Ins. Co. 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. 469; Royal Union Mutual Life Ins. Co. v. Wynn (U. S. C. C.)

had the law of another place in contemplation, or had so expressly stipulated,[18] in which case the law of the state agreed upon as governing controls the nature, validity, interpretation, and effect

177 Fed. 289, aff'd (mem.) 185 Fed. 1007, 107 C. C. A. 664; Cudahy Packing Co. v. New Amsterdam Casualty Co. (U. S. C. C.) 132 Fed. 623; Carrollton Furniture Manufacturing Co. v. American Credit Indemnity Co. 115 Fed. 77, aff'd 124 Fed. 25, 59 C. C. A. 575; Lancashire Ins. Co. v. Barnard, 111 Fed. 702, 49 C. C. A. 559; (see Equitable Life Assur. Soc. v. Trimble, 83 Fed. 85, 27 C. C. A. 404).

Arkansas.—Franklin Life Ins. Co. v. Galligan, 71 Ark. 295, 100 Am. St. Rep. 79, 73 S. W. 102.

Connecticut.—Mullen v. Reed, 64 Conn. 240, 24 L.R.A. 664, 42 Am. St. Rep. 174, 29 Atl. 478.

Georgia.—Massachusetts Benefit Life Assoc. v. Robinson, 104 Ga. 256, 42 L.R.A. 261, 30 S. E. 918.

Iowa.—Summitt v. United States Life Ins. Co. 123 Iowa, 681, 99 N. W. 563, 33 Ins. L. J. 620; Belknap v. Johnson, 114 Iowa, 265, 86 N. W. 267.

Kentucky.—Clarey v. Union Central Life Ins. Co. 143 Ky. 540, 33 L.R.A. N. S. 881, 136 S. W. 1014, 40 Ins. L. J. 1403, 1405.

Maine.—Bailey v. Hope Ins. Co. 56 Me. 474.

Missouri.—Thompson v. Traders' Ins. Co. of Chicago, 169 Mo. 12, 68 S. W. 889.

New Hampshire.—Seeley v. Manhattan Life Ins. Co. 72 N. H. 49, 55 Atl. 425, 32 Ins. L. J. 972; Perry v. Dwelling House Ins. Co. 67 N. H. 291, 68 Am. St. Rep. 668, 33 Atl. 731.

New York.—Boston Manufacturers' Mutual Fire Ins. Co. 41 Misc. 479, 85 N. Y. Supp. 44.

Tennessee.—Roberts v. Winton, 100 Tenn. 484, 41 L.R.A. 275, 45 S. W. 673.

Texas.—Fidelity Mutual Life Assoc. v. Harris, 94 Tex. 25, 57 S. W. 635, 86 Am. St. Rep. 813.

But see Griswold v. Union Ins. Co. 3 Blatchf. (C. C.) 231, Fed. Cas. No. 5,840. On where contract of insurance is deemed to have been made, see notes in 63 L.R.A. 834, 52 L.R.A.(N.S.) 279; and 104 Am. St. Rep. 483 et seq.

"Matters bearing upon the execution, the interpretation and the validity of a contract are determined by the law of the place where the contract is made." Scudder v. Union National Bank, 91 U. S. 406, 23 L. ed. 245, *quoted* in Thompson v. Traders' Ins. Co. 169 Mo. 12, 68 S. W. 889, 31 Ins. L. J. 823, 831.

[18] Mutual Life Ins. Co. v. Hill, 193 U. S. 551, 48 L. ed. 788, 24 Sup. Ct. 588, s. c. (mem.) 188 U. S. 742, 47 L. ed. 678, 23 Sup. Ct. 856, s. c. 118 Fed. 708, 55 C. C. A. 536; Nederland Life Ins. Co. Ltd. v. Meinert, 127 Fed. 651, 62 C. C. A. 37, certiorari granted 194 U. S. 633, 48 L. ed. 1159, 24 Sup. Ct. 861, rev'd on another point, 199 U. S. 171, 50 L. ed. 139, 26 Sup. Ct. 15; Liverpool & Great Western Steam Co. v. Phenix Ins. Co. 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. 469; Eagle v. New York Life Ins. Co. 48 Ind. App. 284, 91 N. E. 814; Born v. Home Ins. Co. 120 Iowa, 299, 94 N. W. 849, 32 Ins. L. J. 737 (unless it be shown that it was the intention of the parties that it should be performed at some other place it will ordinarily be governed by the law of the place where it was executed); Belknap v. Johnson, 114 Iowa, 265, 86 N. W. 267; Johnson v. New York Life Ins. Co. 109 Iowa, 708, 50 L.R.A. 99, 78 N. W. 905; Fidelity Mutual Life Assoc. v. Harris, 94 Tex. 25, 86 Am. St. Rep. 813, 57 S.

of the contract.[19] The place where the contract is made is that where the final act is performed which is necessary to its completion and to make it binding upon both parties, for if anything remains to be and is done in another state to give validity to the policy, that state is the place of contract.[20]

Other cases hold, however, that generally the rights of parties are governed by the laws of the place where the contract is to be performed, and not where made, since it will be presumed that the contract was entered into with reference to the laws of the

W. 635; Union Central Life Ins. Co. v. Pollard, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L.R.A. 271.

As to stipulations and illustrative cases, see § 231d herein.

[19] Union Central Life Ins. Co. v. Pollard, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L.R.A. 271.

[20] *United States.*—Equitable Life Assurance Soc. v. Clements, 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. 822; Cox v. United States, 6 Pet. (31 U. S.) 172, 8 L. ed. 359; Globe & Rutgers Fire Ins. Co. of N. Y. v. David Moffat Co. 154 Fed. 13, 83 C. C. A. 91; Northwestern Mut. Life Ins. Co. v. Elliott, 7 Saw. (C. C.) 17, 5 Fed. 225.

Illinois.—Burchard v. Dunbar, 82 Ill. 450, 25 Am. Rep. 334.

Iowa.—Pomeroy v. Manhattan Life Ins. Co. 40 Ill. 398; Born v. Home Ins. Co. 120 Iowa, 299, 94 N. W. 849, 32 Ins. L. J. 737 (the place where the agreement is finally consummated becomes the place of contract).

Kentucky.—Ford v. Buckeye State Ins. Co. 6 Bush (Ky.) 133, 99 Am. Dec. 663.

Massachusetts.—Heebner v. Eagle Ins. Co. 10 Gray (76 Mass.) 131; Kennebec v. Augusta Ins. Co. 6 Gray (72 Mass.) 208.

New Jersey.—Northampton Mutual Live Stock Ins. Co. v. Tuttle, 40 N. J. L. 476.

New York.—Western v. Genesee Mutual Ins. Co. 12 N. Y. (2 Kern.) 258.

Wisconsin.—Galloway v. Standard Fire Ins. Co. 45 W. Va. 237, 31 S. E. 969, 28 Ins. L. J. 125.

See Bliss on Life Ins. (ed. 1872) secs. 370–73; 1 Parsons on Ins. (ed. 1868) 132–35; 1 Duer on Ins. (ed. 1845) 262. "For that which is of the substance of the decision reference must be had, as a general rule, to the laws of the place where the contract was made. Ex consuetudine ejus regionis in qua negotium gestum est:" Emerigon on Ins. (Meredith's ed. 1850) 98: "A foreigner who contracts within the territory of any state is bound as a subject, for the time being, of that state to submit himself to the laws of the country, . . . and reciprocally he is entitled to invoke the laws and privileges of this same country in the matter of any contracts he may have entered into there. It is the same with insurances made in France, for account of a foreigner, for everything connected with the decision of the substantial right of the case depends on the laws of the place of the contract. . . . But for decision of the substance of the cause, recourse must be had to the laws of the place of contract:" Id. 101. See note, 99 Am. Dec. 671; Bacon's Benefit Societies and Life Ins. (ed. 1888) sec. 175; Richards on Ins. (ed. 1892) p. 54, sec. 44; 1 May on Ins. (Parsons' ed.) secs. 66, 66a. "The law of the country where the contract arose must govern the contract:" Male v. Roberts, 3 Esp. 163, per Lord Eldon: "The law of the place where the contract is made is

latter.[1] So it is held in Massachusetts that the place of performance will ordinarily be deemed to be the place of contract unless the parties intend otherwise.[2] Unless there is something "in the circumstances to show that the parties had specially in view the law of the place where the contract is made, this law will govern, although the contract is to be performed elsewhere."[3] In construing contracts, made and to be performed in another state, the law of the state where the contract is made and to be performed controls; but this law, like any other fact, must be proven.[4]

to govern as the nature, validity, and construction of such contract:" Reimsdyk v. Kane, 1 Gall. (U. S. C. C.) 374, Fed. Cas. No. 16,871, per Story, J. "A contract must be governed by the law of the country where it is made:" May on Ins. (Parsons' ed.) 66a.

[1] Hyde v. Goodnow, 3 N. Y. (3 Comst.) 266, per the Court.

Matters connected with the performance of a contract "are regulated by the law prevailing at the place of performance." Scudder v. Union National Bank, 91 U. S. 406, 23 L. ed. 245, *quoted* in Thompson v. Traders' Ins. Co. 169 Mo. 12, 68 S. W. 889, 31 Ins. L. J. 823, 831.

[2] Bottomley v. Metropolitan Life Ins. Co. 170 Mass. 274, 49 N. E. 438, 27 Ins. L. J. 557, *citing* London Assurance v. Companhia De Moagens De Barreiro, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. ed. 113; Coghlan v. South Carolina R. Co. 142 U. S. 101, 12 Sup. Ct. 150, 36 L. ed. 951; Hall v. Cordell, 142 U. S. 116, 12 Sup. Ct. 154, 35 L. ed. 956; Dicey's Conflict of Laws, 568, 572; Story's Conflict of Laws, sec. 280.

"Conceding that the contract of insurance was made in Texas, it is made payable at the home office in the state of Missouri and all premiums are likewise made payable there. It does not provide for any act to be done elsewhere by the company. A tender of the money at the home office would have been valid. Unless there be something in the circumstances which indicate that the parties contracted with reference to the laws of Texas, the legal effect of the contract must be determined according to the law of the state of Missouri." Seiders v. Merchants' Life Assoc. of the U. S. 93 Tex. 194, 54 S. W. 753, '29 Ins. L. J. 97, per Brown, J., rev'g — Tex. Civ. App. —, 51 S. W. 547. See also Metropolitan Life Ins. Co. v. Bradley, — Tex. Civ. App. —, 79 S. W. 367.

[3] Ruse v. Mutual Benefit Life Ins. Co. 26 Barb. (N. Y.) 556, 23 N. Y. 516, 521, 24 N. Y. 653. Same policy was basis of action in Mutual Benefit Life Ins. Co. v. Ruse, 8 Ga. 534.

[4] Clarey v. Union Central Life Ins. Co. 143 Ky. 540, 33 L.R.A.(N.S.) 881, 136 S. W. 1014, 40 Ins. L. J. 1403. The court, per Lassing, J., said: "In Ford v. Buckeye State Ins. Co. 6 Bush (Ky.) 133, 99 Am. Dec. 663, this court held that where a contract, made in Indiana, was not enforceable under the laws of that state it would not be enforced in this state. And in Jameson v. Gregory's Ex'r 4 Metc. (Ky.) 363, it was held that the legality of a contract must be decided by the laws of the state in which it was made. In Archer v. National Ins. Co. 2 Bush (Ky.) 226, it was held that the validity and legality of a contract executed in Indiana must be determined by the laws of that state. In Young v. Harris, 14 B. Mon. (Ky.) 556, 61 Am. Dec. 170, this court, through Chief Justice Marshall, said: 'The general principle determining the law by which a contract is to be construed is that, unless the place appointed for its

It has also been held that the legal construction and effect of a policy of insurance made by a company incorporated in a sister state are governed by the law of that state,[5] and that the law of the place where a mutual benefit association is formed and does business determines the liability of members.[6] So it is held in a mutual benefit association case that the contract is governed by the statutes of the state of the domicil of the corporation.[7] And it is also held that the contracts of a corporation, though made without the state by which it was created, are controlled by the laws of the state in which created.[8]

§ 226. Same subject: cases.—Under a Wisconsin statute [9] a provision that the omission to attach to or indorse upon an insurance policy "a true copy" of the application of the assured shall preclude the insurance company from afterward relying thereon, applies to a foreign corporation insuring property situated in the state, though the contract of insurance is made without the state.[10]

A policy issued within the state by the agent of a foreign insurance company, not naming the place of payment of loss, is payable within the state.[11] The contract is governed also by the laws of the state where the agent having the power to make the contract acts.[12]

payment be different from that in which it is made, it is to be governed by the law of the place where it is made, which is the lex loci contractus.' In Western Union Telegraph Co. v. Eubanks & Russell, 100 Ky. 591, 38 S. W. 1068, 36 L.R.A. 711, 66 Am. St. Rep. 361, 18 Ky. L. Rep. 995, it is said that 'the general rule is that the laws of the place where the contract is to be performed governs, subject, of course, to the rule that a contract which is void by the law of the place where made is void everywhere.' And in Hyatt v. Bank of Kentucky, 8 Bush (Ky.) 193, it was held, where a note was executed in Louisiana, that as between the maker of the note and the payee, its legal effect must be determined by the law of that state."

See also Napier v. Bankers' Life Ins. Co. 100 N. Y. Supp. 1072, 51 Misc. 283; Peckham, In re, 29 R. I. 250, 132 Am. St. Rep. 813, 69 Atl. 1002; National Trust Co. v. Hughes, 14 Manitoba R. 41.

[5] St. John v. American Mut. Life Ins. Co. 2 Duer (N. Y.) 419, 13 N. Y. 31, 64 Am. Dec. 529. See note 104 Am. St. Rep. 483–484.

[6] Cutler v. Thomas, 25 Vt. 73. See Knights of Honor v. Nairn, 60 Mich. 44, 26 N. W. 826.

[7] In re Globe Mut. Benefit Assn. 63 Hun (N. Y.) 264, 43 N. Y. 756, 17 N. Y. Supp. 852.

[8] Fidelity Mut. Life Assn. v. Ficklin, 74 Md. 172, 20 Ins. L. J. 534, 21 Atl. 680.

On conflict of laws as to contracts of insurance, see notes in 63 L.R.A. 833; 23 L.R.A.(N.S.) 968; and 52 L.R.A.(N.S.) 279. On laws or judgments of courts of state in which insurance company is incorporated as binding in other states, see note in L.R.A.1916A, 770.

[9] Wis. Rev. Stat. sec. 1945a.

[10] Stanhilber v. Mut. Mill Ins. Co. 76 Wis. 285, 45 N. W. 221.

[11] Moshassuck Felt Mill v. Blanding, 17 R. I. 95, 20 Ins. L. J. 475, 21 Atl. 538.

[12] Albion Life Ins. Co. v. Mills (App. Cas.), 3 Wils. & S. 218, 233.

So where an insurance company, organized under the laws of Vermont, was transacting business in the state of New York, and had a general agent in the city of New York, to whom a person acting as agent for a resident of New Jersey made application for insurance, and a policy was issued in pursuance of such application by the general agent in New York, it was held that the contract was executed in New York and subject to the laws of that state as to forfeiture for nonpayment of premiums.[13] The law of the place where the premium note is made and given to the agent governs its construction.[14] But it is not necessary that a foreign insurance company issuing policies, duly signed by their president and secretary and accepted by the insured in the state of Massachusetts, where the premium note is given, should have a general agent within that state, in compliance with its general statutes, in order to have the policy interpreted according to the laws of that state,[15] and it is held that where a state law requires an agent to be appointed therein on whom process can be served, the contracts made by the agent are to be governed by the law of the state where the agent acts.[16]

The Massachusetts statute relating to the forfeiture of life policies applies to foreign insurance companies doing business in Massachusetts, without regard to the question whether the contract of insurance is made there or in the state where the company is incorporated.[17] It is decided in a Michigan case that the "circumstance that the liability to pay is made to depend" upon a risk upon real property there does not make the contract a Michigan contract, or in any legal sense make that "state the place of performance by the insurance company, and the further circumstances that the contractee was a Michigan corporation did not impress upon the contract the quality of locality so as to cause" the laws of Michigan, as to business done there by agents of foreign companies, to affect it in point of law.[18] An open policy of insurance containing all the conditions governing the shipment of such goods as are specially insured under the policy, and reserving to the insurer the right of accepting or rejecting each special subject of insurance, will, it is held, be considered as a contract made at the domicil of the com-

[13] Hicks v. National Life Ins. Co. 60 Fed. 690, 9 C. C. A. 215.

[14] Thornton v. Western Reserve Farmers' Ins. Co. 31 Pa. St. 529.

[15] Thwing v. Great Western Ins. Co. 111 Mass. 93.

[16] Manhattan Life Ins. Co. v. Warwick, 20 Gratt. (Va.) 614.

[17] Holmes v. Charter Oak Life Ins. Co. 131 Mass. 64.

[18] Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co. 31 Mich. 346.

Lex loci; situation of insured property. See § 231a herein.

pany.[19] And where business is transacted in a state by a foreign insurance company without any provision in its policies that the laws of the state of its incorporation shall govern, the contract is not subject to the provisions of the foreign state statute.[20]

Where the policy was issued and dated in Maine, the laws of that state were held to govern its construction, though the policy was sent to another state.[1] And where an application was made in Minnesota, forwarded to New York, issued and delivered in the former state, and insured died in Iowa it was held that it should be construed and enforced as a Minnesota contract.[2] Where an accident policy sued on was applied for by insured in Ohio and issued by an Illinois company and insured sustained an accident in Kentucky, it was held that the contract sued on, not being a Kentucky contract, was not affected by the provisions of its statutes.[3] Policies executed in Ontario are Ontario contracts.[4] In another case where the contract was held to have been made in Glasgow, the agent there accepted the risk, and delivered the insured a memorandum stating the sum and the property insured, and promised that the policy would be made out in London and delivered to the insured or to his order.[5]

A policy issued in a state by a foreign corporation is governed by the law of that state.[6]

Where the contract was to be performed in New Jersey, it was held that the statute of limitations operating as a bar there would control in another state.[7] A marine insurance policy is held to be governed by the law of the place of performance, and if such a contract is made payable at a certain place, it is governed by the law of that place.[8] And although the application for life insurance was made in person by a citizen of Massachusetts to the insurer at its home office in New York, yet where the company forwarded its bond policies to the applicant in Massachusetts for his approval

[19] State v. Williams, 46 La. Ann. 922, 15 So. 290, 23 Ins. L. J. 508.

[20] Rye v. New York Life Ins. Co. 88 Neb. 707, 130 N. W. 434, 40 Ins. L. J. 910.

[1] Bailey v. Hope Ins. Co. 56 Me. 474.

[2] Rauen v. Prudential Ins. Co. of America, 129 Iowa, 725, 106 N. W. 198, 35 Ins. L. J. 288.

[3] Pritchett v. Continental Casualty Co. 117 Ky. 923, 25 Ky. L. Rep. 2064, 80 S. W. 181.

[4] Clarke v. Union Fire Ins. Co. 6 Ont. Rep. 223.

[5] Pattison v. Mills, 2 Bligh, N. S. 519, 1 Dow. & C. 342.

[6] Whittaker v. Mutual Life Ins Co. 133 Mo. App. 664, 114 S. W. 53; Roberts v. Winton, 100 Tenn. 484, 41 L.R.A. 275, 45 S. W. 673.

[7] Spratley v. Mutual Benefit Life Ins. Co. 11 Bush (Ky.) 443, 7 Chi. Leg. News, 51.

[8] Progresso Steamship Co. v. St. Paul Fire & Marine Ins. Co. 146 Cal. 279, 79 Pac. 967.

and acceptance leaving the final acts of approval, acceptance and payment to be performed in Massachusetts the contract was completed in and was a Massachusetts contract.[9] Under an Arkansas decision a policy of life insurance, by its terms to be performed in another state, is governed by the statute of that state providing that no misrepresentation made in obtaining or securing a policy of life insurance shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable.[10] Under the statutes of Massachusetts a provision that no misrepresentation made in the negotiation of a contract of insurance, by the insured, shall be deemed material or defeat the policy, unless made with the actual intent to deceive, or unless the matter represented or warranted increased the risk, applies to a policy written in Massachusetts by a Massachusetts company and sued upon in the courts of Rhode Island.[11] Where the insurer was created by the laws of Pennsylvania it was held that its contracts were to be construed by the laws of that state which governed its enforcement, the contract having been there signed by the company's officers and the promise being to pay after acceptance of due and satisfactory proof of loss at its office there.[12] And where a certificate is executed, issued and payable at the home office of the association that is the place of contract even though issued to a resident of another state who continued to reside there until his death.[13]

If a policy insuring mail packages during their transportation through specified countries is issued to a bank located in a country not specified in the policy, but the transportation by mail is initiated in one of such countries, the portion of the contract prescribing the manner of packing and sealing the property is governed by the law of the country where the bank is located. The application for the policy was mailed from such foreign country to which the executed policy was mailed, said bank being there located and the policy was construed as contemplating such place of business as the place of the preparation of the mail packages.[14]

[9] Provident Savings Life Assur. Soc. of N. Y. v. Hadley, 102 Fed. 856, 43 C. C. A. 25, 29 Ins. L. J. 998, certiorari denied 179 U. S. 686, 45 L. ed. 386, 21 Sup. Ct. 919.

[10] Franklin Life Ins. Co. v. Galligan, 71 Ark. 295, 100 Am. Dec. 73, 73 S. W. 102.

[11] Leonard v. State Mutual Life Assur. Co. 27 R. I. 121, 114 Am. St. Rep. 30, 61 Atl. 52.

[12] Fidelity Mutual Life Ins. Co. v. McDaniel, 25 Ind. App. 608, 57 N. E. 645.

[13] Burns v. Burns, 95 N. Y. Supp. 797, 109 App. Div. 98.

[14] Banco de Sonora v. Bankers Mutual Casualty Co. 124 Iowa, 576, 104 Am. St. Rep. 367, 95 N. W. 232.

§ 227. **Same subject: exceptions to the rule.**—An exception to the rule that the contract of insurance is governed by the law of the place where made exists in case the usage of trade in one state affects the construction of a policy made in another.[15] So the question of seaworthiness is determined by the usage or custom of port where the vessel belongs, rather than that of the place where the contract is made,[16] and if the usages of such port are adopted by the policy, they control its construction;[17] but rights of parties under a contract of affreightment are governed by the law of the place where the contract is made, and not by that of the place of the ship's flag.[18]

§ 228. **Same subject: mutual benefit, etc., societies.**—In case of mutual benefit societies it is held that the right to designate a beneficiary is governed by the law of the place of contract giving such power,[19] and in another case the application was made in Michigan, and the by-laws provided that it must be approved in Indiana, and that the membership fee should be paid before the contract became binding, and the certificate also provided that the contract should be considered made in Indiana, and should be governed by its laws, and it was held that the laws of that state controlled.[20] So the state where the certificate is accepted by the insured, where such acceptance is dated, and where insured resides is the place of contract, even though the certificate is signed by the association's officers in another state.[1] And a certificate is to be governed by the law of the place where the contract is consummated, as where it is issued in one state to a resident of another state and is not to be binding until acceptance by insured and the acceptance is executed in the state of residence of the insured.[2] And a contract of insurance in a benefit association should be construed and interpreted according to the laws of the state where the contract was made and was to be performed.[3] So where a policy of insurance, issued by a bene-

[15] See 1 Duer on Ins. (ed. 1845) 262, 263.

[16] The Titania, 19 Fed. 101; Tidmarsh v. Washington Fire & Marine Ins. Co. 4 Mason (C. C.) 439, 442 Fed. Cas. No. 14,024.

[17] Union Bank v. Union Ins. Co. Dud. (S. C.) 171.

[18] China Mut. Ins. Co. v. Force, 142 N. Y. 90, 58 N. Y. St. R. 400, 40 Am. St. Rep. 570, *citing* Dyke v. Erie R. R. Co. 45 N. Y. 113; Faulkner v. Hart, 82 N. Y. 413.

[19] American Legion of Honor v. Perry, 140 Mass. 580, 5 N. E. 634; Supreme Knights of Honor v. Nairn, 60 Mich. 44, 26 N. W. 826.

[20] Voorhees v. People's Mut. Benefit Soc. 91 Mich. 469, 51 N. W. 1109.

[1] Meyer v. Supreme Lodge Knights of Pythias, 178 N. Y. 63, 64 L.R.A. 839, 70 N. E. 111.

[2] Meyer v. Supreme Lodge Knights of Pythias, 178 N. Y. 63, 64 L.R.A. 840, 70 N. E. 111, 33 Ins. L. J. 446, aff'd Supreme Lodge Knights of Pythias, 198 U. S. 508, 49 L. ed. 1146, 25 Sup. Ct. 754.

[3] Mullen v. Reed, 64 Conn. 240, 42 Am. St. Rep. 174, 24 L.R.A. 664, 29

fit society chartered in one state, is delivered to the insured by the society's agent in another state, and the assessments and dues are to be paid to it, and the claim of the beneficiary is to be paid by such agent, the contract is made and to be performed in the latter state, and the rights of the parties are to be determined by the law of such state.[4] If at the time of making the application and the issuance and delivery of the certificate the association and insured were both residents of the same state that state's laws govern the contract.[5] So the laws of the state where the certificate was executed and which was the then place of residence of insured and the domicil of insurer govern the contract.[6] And if the contract is made, is to be performed, and is actually performed in a certain state the laws of that state govern.[7] Although a benefit association is organized under the laws of a certain state still if the subordinate lodge of another state accepts a member there, and all the formalities of an application, examination, payment of dues and assessments are there performed, the contract is governed by the laws of such state.[8] It is decided that the laws of the home state of a foreign fraternal benefit association may be looked to to determine the effect of its contracts.[9] And a stipulation making the insurer's home office its place of contract is obligatory unless the agreement conflicts with the law of the state where made or impairs the obligations of a contract.[10] If an association is transacting business, within the intent of a statute, in a state, and solicits members and issues policies therein its laws govern contracts so made whether or not it has applied for the privilege of doing business there as required by statute.[11]

§ 229. When place where policy is countersigned is place of contract.—Where the policy is not to be valid till countersigned by the agent, it will be construed according to the law of the place where

Atl. 478. See also McCue v. Northwestern Mutual Life Ins. Co. 167 Fed. 435, 92 C. C. A. 71, s. c. 181 Fed. 1022; Expressman's Mutual Benefit Assoc. v. Hurlock, 91 Md. 585, 80 Am. St. Rep. 470, 46 Atl. 937, 29 Ins. L. J. 934; see Green v. Supreme Council of Royal Arcanum, 124 N. Y. Supp. 398, rev'd 129 N. Y. Supp. 791, 144 App. Div. 76.

[4] Expressman's Mut. Ben. Assn. v. Hurlock, 91 Md. 585, 80 Am. St. Rep. 470, 46 Atl. 957.

[5] Roberts v. Modern Woodmen of America, 133 Mo. App. 207, 113 S. W. 726.

[6] Franklin Life Ins. Co. v. Morrell, 84 Ark. 511, 106 S. W. 680.

[7] Kavanaugh v. Supreme Council of Royal League, 158 Mo. App. 234, 138 S. W. 359.

[8] Coverdale v. Royal Arcanum, 193 Ill. 91, 61 N. E. 915.

[9] Valleroy v. Knights of Columbus, 135 Mo. App. 574, 116 S. W. 1130.

[10] Polk v. Mutual Reserve Fund Life Asso. 137 Fed. 273, s. c. 165 Fed. 1006.

[11] Corley v. Travelers' Protective Assoc. 105 Fed. 854, 46 C. C. A. 278.

such act is performed and the policy delivered,[12] although the policy is dated in another state and signed by the president and secretary there.[13] A Canadian insurance company with a branch office at Baltimore insured a resident of Washington, D. C. The policy provided that it was not to be valid until countersigned by the authorized agent at Washington, D. C. The agent there countersigned and delivered the policy, and it was signed by the agent at Baltimore, at which place it also purported to be dated and to be signed by two directors of the company and by the attorney, and to bear the company's seal. It was held that this was not a Maryland contract.[14]

§ 230. When place of delivery is place of contract.—Although the contract is made and dated in one state, but is to be binding only on delivery, the laws of the state where the insured is a resident and where it is delivered to him, govern the contract.[15] And, as a general rule, the delivery of the policy to the insured in the state in which he resides, and the payment by him of his first premium in that state, renders the contract subject to the laws of such state.[16]

[12] *United States.*—Northwestern Mutual Life Ins. Co. v. Elliott, 9 Saw. (C. C.) 17, 23 Fed. 462. See Smith v. Mutual Life Ins. Co. 5 Fed. 582.

California.—Curtiss v. Ætna Life Ins. Co. 90 Cal. 245, 25 Am. St. Rep. 114, 27 Pac. 211.

Illinois.—Pomeroy v. Manhattan Life Ins. Co 40 Ill 398; Moore v. Charter Oak Life Ins. Co. 8 Ins. L. J. 78.

Kentucky.—St. Louis Mutual Life Ins. Co. v. Kennedy, 6 Bush (Ky.) 450.

Louisiana.—Hardie v. St. Louis Mutual Life Ins. Co. 26 La. Ann. 242.

Nebraska.—See Antes v. State Ins. Co. 61 Neb. 55, 84 N. W. 412.

Pennsylvania.—Hardiman v. Fire Association of Phila. 212 Pa. 383, 61 Atl. 990.

South Carolina.—Curnow v. Phœnix Ins. Co. 37 S. C. 406, 34 Am. St. Rep. 766, 16 S. E. 132.

West Virginia.—S. M. Smith Ins. Agency v. Hamilton Fire Ins. Co. 69 W. Va. 129, 71 S. E. 194; Galloway v. Standard Fire Ins. Co. 45 W. Va. 237, 31 S. E. 969, 28 Ins. L. J. 126.

Wisconsin.—In re Breitung's Estate, 78 Wis. 33, 46 N. W. 891.

[13] Daniels v. Hudson River Fire Ins. Co. 12 Cush. (66 Mass.) 422, 59 Am. Dec. 192; Heebner v. Eagle Ins. Co. 10 Gray (76 Mass.) 131, 69 Am. Dec. 308. See Friedland v. Commonwealth Fire Ins. Co. 143 App. Div. 570, 128 N. Y. Supp. 705.

[14] Cromwell v. Royal Canadian Ins. Co. 49 Md. 366, 33 Am. Rep. 258.

[15] Knights Templars' & Masons' Life Indemnity Co. v. Berry, 50 Fed. 511, 1 C. C. A. 561, 4 U. S. App. 353; Wall v. Equitable Assurance Soc. 32 Fed. 273, aff'd 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. 822; Meagher v. Ætna Ins. Co. 20 U. C. Q. B. 607; Hyde v. Goodnow, 3 Comst. (N. Y.) 266. See Watt v. Gideon, 8 Pa. Dist. Ct. Rep. 395.

As to contract stipulations varying rule as to place of delivery being place of contract, see § 231d herein.

[16] Equitable Life Assur. Soc. v. Winning, 7 C. C. App. (U. S.) 359, 58 Fed. 541, 23 Ins. L. J. 81; Reliance Mut. Ins. Co. v. Sawyer, 160 Mass. 414, 36 N. E. 59. See also Fidelity

So a policy which is not to take effect until it is delivered, after payment of the first premium, is a contract of the state where delivery takes place, and to be governed by its laws; and it is immaterial that premiums are to be paid and the policy liquidated at the office of the insurer in another state.[17] And the rule applies where it is sent to the agent in another state to be there delivered on receipt of the premium.[18] So where an application for insurance is made in one state to an agent therein, and forwarded by him to the insurer in another state, where the policy is executed, and sent to such agent and by him delivered to the insured in the former state, the contract must be regarded as made in the state where delivered, and as subject to its laws.[19] Where by the express terms of the charter of an insurance company a contract of life insurance does not become binding until delivery to assured, and the application is made and the policy delivered to the resident agent of the company in Missouri, it is incepted and completed in that state, and is to be construed by the laws thereof, even though issued by a corporation in Illinois.[20] If an application for a life insurance policy in favor of a named beneficiary is made in one state to the duly authorized agent of the company located there, who forwards it to the home office in another state, where it is accepted, but the policy returned contains additional beneficiaries, and was not to be delivered until the first premium was paid, the contract of insurance was not made until the policy as changed was delivered to the applicant and the premiums paid, and it is deemed a contract made in the former state, and the rights of the parties are to be determined by the law of such state.[1] So the state where the application and medical examination are made, the premium paid and policy de-

Mutual Life Ins. Co. v. Jefferds, 53 L.R.A. 193, 107 Fed. 402, 46 C. C. A. 377; Harrington v. Home Life Ins. Co. 128 Cal. 531, 58 Pac. 180; Mutual Life Ins. Co. v. Mullen, 107 Md. 457, 69 Atl. 385; Horton v. New York Life Ins. Co. 151 Mo. 607, 52 S. W. 356, 28 Ins. L. J. 816.

[17] Metropolitan Life Ins. Co. v. Bradley, 98 Tex. 230, 68 L.R.A. 509, 82 S. W. 1031.

[18] McElroy v. Metropolitan Life Ins. Co. 84 Neb. 866, 23 L.R.A. (N.S.) 968, 122 N. W. 27; Antes v. State Ins. Co. 61 Neb. 55, 84 N. W. 412; Ford v. Buckeye State Ins. Co. 6 Bush (Ky.) 133, 99 Am. Dec. 663; Thwing v. Great Western Ins. Co. 111 Mass. 93; In re Breitung's Estate, 78 Wis. 33, 46 N. W. 891. See also Grevenig v. Washington Life Ins. Co. 112 La. 879, 104 Am. St. Rep. 474, 36 So. 790.

[19] Perry v. Dwelling House Ins. Co. 67 N. H. 291, 68 Am. St. Rep. 668, 33 Atl. 731.

[20] Knights Templars & Masons' Life Indemnity Co. v. Berry, 50 Fed. 511, 1 C. C. A. 561, 4 U. S. App. 353, affirming 46 Fed. 439; Mutual Benefit Life Ins. Co. v. Robison, 54 Fed. 580, 584; Hicks v. National Life Ins. Co. 60 Fed. 690, 9 C. C. A. (U. S.) 215.

[1] Millard v. Brayton, 177 Mass. 533, 83 Am. St. Rep. 294, 52 L.R.A. 117, 59 N. E. 436.

livered is the place of contract.[2] If, however, the first payment of premium is forwarded with the application for insurance, a provision in the policy that it "shall not be binding until delivery during the lifetime and good health of the applicant, and until the first payment due thereon has been paid," does not suspend the contract until delivered to the insured and make the place of delivery that of the contract, especially when the policy is forwarded to the agent for unconditional delivery.[3] But delivery does not necessarily determine the place of contract since a claim thereunder, under a policy of indemnity insurance, may be governed by the law of another state where the policy is signed and is payable.[4] And where the policy is issued in a certain state and the premiums and the amount to be paid under the policy are there payable it is a contract of that state even though the delivery is made in another state.[5] Again, where the agent in Edinburgh received a policy and delivered it there, and received the premium, the policy being executed in London, it was held that the laws of England governed.[6] So in another case the agent in Canada of an insurance company, incorporated in New York, received and forwarded to the secretary of the company in New York a proposal for insurance upon property in Canada, the proposal was accepted, and the deposit and premium note left with the secretary, who issued the policy and sent it to the agent in Canada, by whom it was delivered to the insured, and it was decided that it was a New York contract.[7]

§ 231. When place of acceptance and mailing is place of contract. —The place of acceptance of the proposal for insurance may become the place of contract, by mailing from there such acceptance, and the law of that place will then govern the contract.[8] If an

[2] Kelley v. Mutual Life Ins. Co. 109 Fed. 56, 30 Ins. L. J. 904, rev'd 114 Fed. 268, 52 C. C. A. 154, 31 Ins. L. J. 497 (s. c. 114 Fed. 276), but on other points as the Iowa statute, which state was the place of contract, was the basis of the decision.

[3] Fidelity Mutual Life Assn. v. Harris, 94 Tex. 25, 86 Am. St. Rep. 813, 57 S. W. 635.

[4] Cudahy Packing Co. v. New Amsterdam Packing Co. (U. S. C. C.) 132 Fed. 623.

[5] Equitable Life Assur. Soc. v. Frommhold, 75 Ill. App. 43.

[6] Parken v. Royal Exch. Assur. Co. 18 Scot. Jur. 147.

[7] Western v. Genesee Mut. Ins. Co. 12 N. Y. (2 Kern.) 258.

[8] *United States.*—Giddings v. Northwestern Mutual Life Ins. Co. 102 U. S. 108, 26 L. ed. 92.

Indiana.—Swing v. Marion Pulp Co. 47 Ind. App. 199, 93 N. E. 1004, 10 Ins. L. J. 807; Equitable Life Assur. Soc. of U. S. v. Perkins, 41 Ind. App. 183, 80 N. E. 682.

Iowa.—Tuttle v. Iowa State Traveling Men's Assoc. 132 Iowa, 652, 7 L.R.A.(N.S.) 223, 104 N. W. 1131.

Kentucky.—Ford v. Buckeye State Ins. Co. 6 Bush. (Ky.) 133, 139, 99 Am. Dec. 663.

Maine.—Bailey v. Hope Ins. Co. 56 Me. 474.

Massachusetts. — Commonwealth Mutual Fire Ins. Co. v. Fairbank

application is made out by an insurer in Pennsylvania and sent by mail to an applicant in Wisconsin, who, in that state, fills out and signs the application and forwards it to the insurer's office in Pennsylvania, and directs a policy to issue, and the insurer thereupon issues its policy in the latter state and mails it to the insured in the former, who then signs the note, reciting that it is for the balance of the first premium and is payable in Pennsylvania, the contract of insurance is a Pennsylvania contract.[9] It is held, however, that where the application was accepted in New York and mailed to Missouri, the law of Missouri governed the contract.[10] But in another case it was held that a policy of insurance executed in New York by a New York corporation doing business in Missouri, upon an application signed in Missouri by a resident of Missouri, the application being made part of the contract, which declared that it should not take effect until the first premium should have been actually paid, etc., and which was delivered and the first premium paid in Missouri, was, in the absence of evidence of the company's acceptance of the application in New York, or of its transmission directly by mail to the insured, a Missouri contract, and governed by the laws of that state.[11]

§ 231a. Lex loci: situation of insured property.—If a contract with a foreign insurance company is made in another state in which it is valid, but in direct violation of the laws of the state in which the property is situated and in which the insured resides, it will not be enforced in the latter state.[12] In South Carolina it is decided that when an insurance company having its home office in one state issues a policy upon property situated in another state to a resident thereof, and through its authorized agent therein, as provided by the policy, the contract of insurance is deemed to have

Canning Co. 173 Mass. 161, 53 N. E. 373; Commonwealth Mutual Fire Ins. Co. v. Wm. Knabe & Co. Mfg. Co. 171 Mass. 265, 50 N. E. 516.

New Jersey.—Northampton Mutual Life Ins. Co. v. Tuttle, 40 N. J. L. 476; Commercial Ins. Co. v. Hallock, 27 N. J. L. (3 Dutch.) 645, 72 Am. Dec. 379.

New York.—Stone v. Penn Yan, Keuka Park & Branchport Ry. 197 N. Y. 279, 90 N. E. 843, 134 Am. St. Rep. 879, 39 Ins. L. J. 527, aff'g 109 N. Y. Supp. 374, 125 App. Div. 94; Hyde v. Goodnow, 3 N. Y. 269; Hammond v. International Ry. Co. 116 N. Y. Supp. 854, 63 Misc. 437, aff'd (Mem.) 134 App. Div. 995, 119 N. Y. Supp. 1127.

West Virginia. — Galloway v. Standard Fire Ins. Co. 45 W. Va. 237, 31 S. E. 969, 28 Ins. L. J. 125.

[9] Presbyterian Ministers' Fund v. Thomas, 126 Wis. 281, 110 Am. St. Rep. 919, 105 N. W. 801.

[10] Wall v. Equitable Life Assur. Co. 32 Fed. 273, aff'd 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. 822.

[11] Equitable Life Ins. Soc. v. Clements, 140 U. S. 226, 11 Sup. Ct. 822, 38 L. ed. 497.

[12] Swing v. Munson, 191 Pa. 582, 71 Am. St. Rep. 772, 58 L.R.A. 223, 43 Atl. 342.

been made in the state where the property is situated; and after loss thereunder, and proof of such loss, coupled with a refusal to pay, the insured or his assignee may bring an action to recover on the policy in the latter state.[13] Under an Iowa decision if an insurance corporation organized and doing business in that state solicits insurance in another, and there receives an application, and a premium note which is dated at its home office in the former state, to which the note and the application are sent, and from which a policy issues, the contract is deemed to be made there, and is controlled by the laws of said state, and not by the laws of the state in which the property insured is situated.[14] It is also held in that state that where a policy of insurance is issued on property in one state by a company in another state, and it does not appear where it was delivered or payable, or where the contract was made or the premium paid, it may be inferred that the contract was made in either state, as readily as in the other.[15] Under a Missouri decision the local law governs a policy of insurance on real property delivered to the owner in the state where the property is situated, although the policy was issued by a foreign corporation.[16] But it is also held in that state that a statute imposing a penalty for vexatious delay in paying a loss does not relate to the remedy, but is a matter connected with the performance of a contract and has no application to an action on a policy brought in Missouri, where the property insured was located and destroyed in Kansas where the contract was made and was to be performed, and the cause of action accrued and became complete there.[17] It is decided in Wisconsin that its statutory provision conclusively establishing the value of insured real property, when wholly destroyed, at the amount of insurance written in the policy, applies to contracts made in other states as well as in Wisconsin, where the real property is situated in that state.[18]

§ 231b. Lex loci: fidelity or guaranty insurance.—A policy insuring against fraud or dishonesty of an agent amounting to embezzlement or larceny is a contract of the state where it was made and delivered to insured, a resident thereof, and is governed by its laws

[13] Curnow v. Phœnix Ins. Co. 37 S. C. 406, 34 Am. St. Rep. 766, 16 S. E. 132.

[14] Marden v. Hotel Owners' Ins. Co. 85 Iowa, 584, 39 Am. St. Rep. 316, 52 N. W. 509.

[15] Pennypacker v. Capital Ins. Co. 80 Iowa, 56, 20 Am. St. Rep. 395, 8 L.R.A. 236, 45 N. W. 408.

[16] Daggs v. Orient Ins. Co. 136 Mo. 382, 35 L.R.A. 227, 58 Am. St. Rep. 638, 38 S. W. 85, aff'd Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. 287.

[17] Thompson v. Traders' Ins. Co. 169 Mo. 12, 68 S. W. 889, 31 Ins. L. J. 823.

[18] Seyk v. Millers' National Ins. Co. 74 Wis. 67, 3 L.R.A. 523, 41 N. W. 443; Wis. Rev. Stat. sec. 1943.

and not by the laws of another state where the larceny was committed.[19]

§ 231c. Lex loci: contracts by unauthorized companies or agents. —Where the secretary of an insurance company solicited and obtained the application of a resident of Nebraska, in which place the company was not authorized to transact business, and the application and the premium note were signed, the latter made payable at the home office, in Iowa, whence the policy issued, the contract was held to be governed by Iowa laws.[20] Under a Texas decision contracts of insurance upon applications taken in one state by an agent without authority to conclude the contract or bind the company, and forwarded to the domicil of the company, and there accepted and the policy issued, are ordinarily to be treated as having been made at such domicil and to be performed there;[1] and such contracts are not invalid by reason of the unauthorized acts of the agent in obtaining the insurance.[2] It is held in Arkansas that an application for insurance sent by mail to another state, where they are passed upon and accepted, and in which policies are dated and signed and then mailed to the insured, are governed by the laws of that state, so as to be unaffected by statutes at the residence of the insured prohibiting insurance by unauthorized foreign companies.[3] In a Vermont case a receiver of a mutual fire insurance company of Massachusetts sought to recover an assessment. The company was not authorized to do business in Vermont. The agent had so informed the assured and stated that he should have to act as insured's agent in the matter. The application was mailed to the company, accepted by it, and the policy mailed to the agent with a request to collect the premium and the policy was delivered. It was held that the contract was a Massachusetts one and enforceable under Vermont laws permitting residents to insure at unauthorized companies' home offices.[4] It is decided in Wisconsin that the office of the insurer is the place of contract, where it, in response to the request of a broker not its agent, mails a policy, blank appli-

[19] Matthews & Co. v. Employers' Liability Assurance Corp. Ltd. 111 N. Y. Supp. 76, 127 App. Div. 195, aff'd (Mem.) 195 N. Y. 593.

[20] Marden v. Hotel-Owners' Ins. Co. 85 Iowa, 584, 39 Am. St. Rep. 316, 52 N. W. 509. See also Eureka Ins. Co. v. Parks, 1 Cin. S. C. R. 574; Hyde v. Goodnow, 3 N. Y. 266.

[1] Fidelity Mut. Life Assn. v. Harris, 94 Tex. 25, 86 Am. St. Rep. 813, 57 S. W. 635; Commonwealth Mutual Fire Ins. Co. v. Fairbank Canning Co. 173 Mass. 161, 53 N. E. 373.

[2] Commonwealth Mutual Fire Ins. Co. v. Fairbanks Canning Co. 173 Mass. 161, 53 N. E. 373.

[3] State Mutual Fire Ins. Co. v. Brinkley Stave & Heading Co. 61 Ark. 1, 54 Am. St. Rep. 191, 29 L.R.A. 712, 31 S. W. 157.

[4] Baker v. Spaulding, 71 Vt. 169, 42 Atl. 982.

cation, and premium note to the property owner in another state, for him to fill the blanks and return the application and note for the approval of the insurer.[5] Under an Indiana decision a contract made by an agent of a foreign company, not authorized to do business in that state, with a resident thereof was an Indiana contract and governed by its laws but the corporation had been dissolved and ousted from doing any further business as a corporation in its home state, although the court said that if it were a going concern its action for assessments would have been suspended until compliance by it with the Indiana statute governing the right of such companies to do business.[6]

§ 231d. **Lex loci: contract stipulations.**—If a policy provides that the place of contract shall be that of the state wherein it is made it will be construed in accordance with the laws of that state.[7] And where it is stipulated that the policy shall be construed and governed by the laws of a foreign state such statutes as are applicable will be deemed a part of the written contract, nor can such statutory provisions be waived.[8] So, an insurance policy which was signed in New York and by which it is agreed that all premiums and losses shall be paid in that state, and that it shall be construed as having been made therein, is a contract thereof, though the assured to whom it was issued resides in another state.[9] And a statute for the regulation of insurance contracts, providing that no answer in an application shall bar a recovery unless wilfully false, fraudulently made, material, and one which induced the company to issue the policy, will govern a policy issued by a corporation of that state on property in another state when it is expressly made subject to the laws of the former state.[10] And the rights of citizens will be protected under the laws of the state stipulated as the place of contract.[11] Again, if insurance is solicited in another

[5] Seamans v. Knapp Stout & Co. 89 Wis. 171, 46 Am. St. Rep. 825, 27 L.R.A. 362, 61 N. W. 757.

[6] Swing v. Wellington, 44 Ind. App. 455, 89 N. E. 514, 38 Ins. L. J. 1237.

[7] Russell v. Grigsby, 168 Fed. 577, 94 C. C. A. 61, case rev'd upon question of insurable interest in Grigsby v. Russell, 222 U. S. 149, 56 L. ed. 133, 32 Sup. Ct. 58, 41 Ins. L. J. 301, 36 L.R.A.(N.S.) 642.

[8] New York Life Ins. Co. v. Orlopp, 25 Tex. Civ. App. 284, 61 S. W. 336.

[9] Goodwin v. Provident Savings Life Assn. 97 Iowa, 226, 59 Am. St. Rep. 411, 32 L.R.A. 473, 66 N. W. 157. See Mutual Life Ins. Co. v. Dingley, 100 Fed. 408, 40 C. C. A. 459, 49 L.R.A. 132, rev'd 184 U. S. 695, 46 L. ed. 763, 22 Sup. Ct. 937.

[10] Union Central Life Ins. Co. v. Pollard, 94 Va. 146, 54 Am. St. Rep. 715, 36 L.R.A. 271, 26 S. E. 421.

[11] Missouri State Life Ins. Co. v. Lovejace, 1 Ga. App. 446, 58 S. E. 93.

state by a broker, and the property owner there consents to take insurance in companies acceptable to such broker, who thereupon requests an insurance corporation of Wisconsin to write such insurance, and it, at its office in Wisconsin fills out an application for the insurance, and prepares a premium note to be signed by the property owner, and transmits the note and application to him, and at the same time fills out a policy of insurance, all these papers being dated at the home office, and stipulating that the contract of insurance shall be governed by the laws of Wisconsin, and the papers are then sent to the brokers, and by them mailed to the property owner, who, on his part, then answers the questions contained in the contract, signs the premium note, accepts the policy, transmits the application and note and a cash premium to the brokers, who in turn send them to the insurer in Wisconsin the contract of insurance is not completed until the note and application are accepted by the insurer, and hence must be deemed to have been made in Wisconsin.[12] But even though it is stipulated that the contract shall be construed according to the laws of a certain state, the court will not take judicial knowledge of them but they must be proved.[13] If, however, parties agree that a policy shall be construed by the laws of a certain state it will be presumed that they know the law of that state.[14] But under a Massachusetts decision, if a foreign company through its resident agent issues a policy to a resident of Massachusetts stipulating by an indorsement on the back of the policy that it shall be construed by the laws of another state, it is a Massachusetts contract and within a statutory provision of that state.[15] And in Missouri an insurance policy is governed by the law of the state in which it is actually delivered to the insured and the premium paid by him to the insurer's agent, although it was issued by a foreign corporation in another state, and expressly provides that it shall be construed according to the laws of that state, where it also provides that it shall not be in force until actual payment of the premium.[16]

[12] Seamans v. Knapp-Stout & Co. 89 Wis. 171, 46 Am. St. Rep. 825, 27 L.R.A. 362, 61 N. W. 757.

[13] New York Life Ins. Co. v. Smith, 139 Ala. 303, 35 So. 1004.

[14] Mutual Life Ins. Co. v. Phinney, 178 U. S. 327, 44 L. ed. 1088, 20 Sup. Ct. 906, 29 Ins. L. J. 910, s. c. 76 Fed. 617, 22 C. C. A. 425.

[15] Dolan v. Mutual Reserve Fund Life Assoc. 173 Mass. 197, 53 N. E. 398, Rev. Stat. 1894, c. 522, sec. 73.

[16] Cravens v. New York Life Ins. Co. 148 Mo. 583, 71 Am. St. Rep. 628, 53 L.R.A. 305, 50 S. W. 519, aff'd New York Life Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. 762. See Horton v. New York Life Ins. Co. 151 Mo. 604, 52 S. W. 356, 28 Ins. L. J. 816; Pietri v. Seguenot, 96 Mo. App. 258, 69 S. W. 1055; Sumner v. Fidelity Mutual Aid Assoc. 84 Mo. App. 605.

It is held that even though the application provides that the policy is to be construed by the laws of a certain state, still a statute of such state, not specially referred to in the contract, may be limited by an express stipulation in the policy.[17] Under a North Carolina decision a provision that "this contract shall be governed by, subject to and construed only according to the laws of the State of New York, the place of this contract being expressly agreed to be the home office of said association in the city of New York" is void so far as its enforcement in the courts of another state is concerned.[18]

If there is no contract stipulation as to the place of contract or as to the law by which the policy is to be construed then the question is one of general and not of local law.[19]

§ 231e. Lex loci: statutory provisions.—A state statute which provides that contracts for insurance shall be deemed to have been made in the state and subject to its laws where the application for the policy is taken within the state is constitutional and does not abridge the privileges or immunities of citizens.[20] Under a North Carolina decision a statute, which makes insurance contracts, the application for which is taken there, a contract of that state, applies to a foreign company where the application for insurance is there taken, no matter what the form of the contract may be.[1] In Mississippi a statute that "all contracts of insurance on property, lives or interests in this state shall be deemed to be made therein" is the law of that state, and no contract of the parties can change it. Hence a contract of life insurance entered into between a resident of Mississippi and a corporation of another state is to be construed under the laws of the former commonwealth.[2] Although one section of a statute provides that all life insurance contracts in the state shall be

[17] Mutual Life Ins. Co. v. Hill, 193 U. S. 551, 24 Sup. Ct. 538, 48 L. ed. 788, s. c. 55 C. C. A. 536, 118 Fed. 708. See Mutual Life Ins. Co. v. Cohen, 179 U. S. 262, 45 L. ed. 181, 21 Sup. Ct. 106, s. c. 97 Fed. 985, 38 C. C. A. 696. See §§ 194, 194a, 1324 herein.

[18] Blackwell v. Mutual Reserve Fund Life Assoc. 141 N. Car. 117, 5 L.R.A.(N.S.) 771n, 115 Am. St. Rep. 677, 53 S. E. 833.

[19] Russell v. Grigsby, 168 Fed. 577, 94 C. C. A. 61, case rev'd upon question of insurable interest in Grigsby v. Russell, 222 U. S. 149, 56 L. ed. 133, 32 Sup. Ct. 58, 36 L.R.A.(N.S.) 642, 41 Ins. L. J. 301.

[20] State Life Ins. Co. of Indianapolis v. Westcott, 166 Ala. 192, 52 So. 344, Ala. Code 1907, sec. 4583.

[1] Commonwealth Mutual Fire Ins. Co. v. Edwards, 124 N. Car. 116, 32 S. E. 404; Horton v. Home Ins. Co. 122 N. Car. 498, 65 Am. St. Rep. 717, 29 S. E. 944. See Albert v. Mutual Life Ins. Co. 122 N. Car. 92, 30 S. E. 327, 27 Ins. L. J. 723.

[2] Fidelity Mutual Life Ins. Co. v. Miazza, 93 Miss. 18, 136 Am. St. Rep. 534, 46 So. 817; Miss. Laws 1902, p. 66, c. 59, sec. 14. See §§ 194, 194a herein.

deemed to be made therein it should be construed with other sections as to policies "issued in" the state and does not apply to a contract made in a foreign state between a company therein and a person residing in the first state.[3]

§ 231f. Lex loci: public policy: comity.—In a Federal supreme court case it appeared that a New York mutual life insurance company issued and delivered in Missouri to a resident of that state a nonforfeiting limited tontine policy providing for a specified paid up policy in case of lapse for nonpayment of premium. It was also stipulated that the policy should be construed according to New York laws and that that state should be the place of contract. The Missouri statute provided against forfeiture for nonpayment of premium, but subject to specified rules of commutation. It was contended that a policy of mutual life insurance was an interstate contract, and the parties might choose its "applicatory law," also that contracting for New York law to the exclusion of Missouri law was in no wise prejudicial to the interests of the state of Missouri, or violative of its public policy. The court, per Mr. Justice McKenna, said: "But the interests of the state must be deemed to be expressed in its laws. The public policy of the state must be deemed to be authoritatively declared by its courts. Their evidence we cannot oppose by speculations or views of our own. Nor can such interests and policy be changed by the contract of parties. Against them no intention will be inferred or be permitted to be enforced." The contract was held to be subject to Missouri laws.[4] And where a contract was made in Massachusetts between a foreign corporation admitted to do business therein, and a resident of that state with a delivery of the policy and a payment of premium all taking place therein, it is governed by the statutes of that state from motives of public policy, notwithstanding a policy provision that the contract should be governed by the law of a foreign state, for, although, as a general principle, parties may agree to the law of a state or country foreign to the place of contract, still this has no application where the result would be to accomplish some evasion of statutory provisions declaring a rule of public policy with reference to contracts made within the jurisdiction where the legislation is enacted, although there are some exceptions to the rule.[5]

[3] Johnson v. Mutual Life Ins. Co. of N. Y. 180 Mass. 407, 63 L.R.A. 838, 62 N. E. 733.

[4] New York Life Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. 762, 29 Ins. L. J. 876, aff'g Cravens v. New York Life Ins. Co. 148 Mo. 583, 71 Am. St. Rep. 628, 53 L.R.A. 505, 50 S. W. 519. *Considered* with approval in National Mutual Building & Loan Assoc. v. Brahan, 193 U. S. 635, 647–649, 48 L. ed. 829, 24 Sup. Ct. 532.

[5] Albro v. Manhattan Life Ins. Co. 119 Fed. 629, aff'd 127 Fed. 281, 62 C. C. A. 213, certiorari denied, 194

But in another case the policy was issued by an Ohio corporation and delivered in Wisconsin to a then resident of the latter state upon an application forwarded therefrom. Insured resided in Kentucky at the time of his death. It was decided that it was wholly immaterial whether the contract was to be construed and governed by the laws of Wisconsin where it was made or by the laws of Ohio where it was to be performed, that it must be construed by the laws of one of those states, and that a condition barring recovery being valid in both states it would be recognized as valid in Kentucky, even though contrary to its public policy.[6] When a contract of life insurance is made by a Pennsylvania corporation with a resident of Wisconsin which is forbidden by the laws of the latter state, its courts will not enforce such a contract on the ground of comity. Hence, an action cannot be maintained in those courts on a note given for the first premium of such insurance.[7]

§ 231g. Lex loci: rights of beneficiaries or claimants.—In a Connecticut case the words, "heirs at law," in a benefit certificate made in Massachusetts by inhabitants of that state, must be construed in another state as they would be in Massachusetts.[8] Under a Massachusetts decision the rights of claimants under a life insurance policy are to be determined by the law of the state in which the applicant resided, made his application, and received the policy, although the application was sent by an agent to the home office of the company in another state, where it was accepted and the policy returned to the agent, and there was a stipulation that the premiums and the sum insured were to be paid in that state.[9] In Tennessee the law of a state in which a contract of life insurance is made by a resident thereof will control as to the rights of his creditors and beneficiaries, instead of the law of another state in which the beneficiaries reside, or of another state in which the insurance company is located and the policy payable.[10] Under a New York decision the contract contained in a mutual benefit certificate, which requires the beneficiary to sign an acceptance of its provisions, is

U. S. 633, 48 L. ed. 1159, 24 Sup. Ct. 857, 32 Ins. L. J. 400.

[6] Clarey v. Union Central Life Ins. Co. 143 Ky. 540, 33 L.R.A.(N. S.) 881, 136 S. W. 1014, 40 Ins. L. J. 1403.

[7] Presbyterian Ministers Fund v. Thomas, 126 Wis. 281, 110 Am. St. Rep. 919, 105 N. W. 801.

[8] Mullen v. Reed, 64 Conn. 240, 42 Am. St. Rep. 174, 24 L.R.A. 664, 29 Atl. 478. See §§ 783–786, 789 861 herein.

[9] Millard v. Brayton, 177 Mass. 533, 83 Am. St. Rep. 294, 52 L.R.A. 117, 59 N. E. 436.

[10] Roberts v. Winton, 100 Tenn. 484, 41 L.R.A. 275, 45 S. W. 673.

As to creditor's rights, see §§ 858–861 herein.

made where the contract is consummated by such acceptance, and subject to the laws there in force.[11]

§ 231h. Lex loci: adjustment of claim on forfeited policy.—The right to contract for the adjustment of a claim on an insurance policy forfeited for nonpayment of premiums, according to the laws of the insurer's domicil, although the insurance is upon the life of a person residing in another state where the contract is made, is accorded by a statute of the latter state providing for such adjustment but making its provisions inapplicable to policies issued by foreign companies authorized to do business in the state where the laws of their domicil provide for continued insurance upon such forfeiture. And leaving it optional with insured as to the kind of policy he will take in the adjustment of a claim upon a policy forfeited for nonpayment of premium does not prevent the application of a proviso of the local statute making inapplicable its provisions as to such adjustment, where the laws of the state of the insurer's domicil, in respect to which the parties have agreed the contract shall be construed, provide for the methods of adjustment which the local statute requires to make its provisions inapplicable.[12]

§ 231i. Lex loci: reinstatement, extension or revival of policy.—Executing in one state a reinstatement of a policy made in another state will not destroy the character of the policy as a contract of the state where it was originally executed.[13] Under a Missouri decision life policies issued by foreign companies, which do not take effect until they are delivered to the insured and the premium collected from him in the state, are subject to the statute of that state, providing for extension of the policy for the full sum for such time as three fourths of the net revenue will pay for, in case of default after two full annual premiums have been paid, notwithstanding provisions for forfeitures in the policies.[14]

§ 231j. Lex loci: policy pledged for loan: collateral note: capital stock note.—Although a policy is a contract of one state, yet where the policy is pledged as collateral security for a loan and the application therefor was submitted to the home office of the insurer in another state, the collateral note signed in the first state, but was

[11] Meyer v. Supreme Lodge Knights of Pythias, 178 N. Y. 63, 64 L.R.A. 839, 70 N. E. 111.

[12] Nichols v. Mutual Life Ins. Co. 176 Mo. 355, 62 L.R.A. 657, 75 S. W. 664.

[13] Goodwin v. Provident Savings Life Assur. Soc. 97 Iowa, 226, 59 Am. St. Rep. 411, 32 L.R.A. 473, 66 N. W. 157.

As to reinstatement extension or revival of policy, see §§ 1121, 1276, 1277, 1472 herein.

[14] Cravens v. New York Life Ins. Co. 148 Mo. 583, 71 Am. St. Rep. 628, 53 L.R.A. 305, 50 S. W. 519. Mo. Rev. Stat. 1879, secs. 5983, 5985.

dated in the latter state and made payable there and the loan was incomplete until approved and accepted by insurer at its home office, the collateral note is a contract of the state where it was accepted and approved, and the parties rights are to be determined by reference thereto where the law of the foreign state in such matters is before the court, although in the absence of proof it will be presumed to be the same as the law of the former.[15] Where a note secured by a policy on the life of its maker was signed in one state but was sent together with the policy to the maker's wife in another state to be endorsed by her, which was done and the papers returned by mail, and no place of payment was fixed in the note and the wife had no personal transactions with the payee, it was decided that the wife's contract was that of the latter state.[16] The validity of a capital stock note, given to a mutual fire insurance company, is determined by the laws of the state wherein it is executed and made payable.[17]

§ 232. Lex loci: assignment.—It is held that the validity of an assignment of a policy of insurance is governed by the law of the place of contract.[18] In this connection it may be stated that the contract between assured and the insurer, and an assignment thereof constitute separate distinct contracts.[19] It is also held that even though it is stipulated that a certain state shall be the place of contract, still the validity of an assignment made in another state is governed by the laws of the latter state.[20] But it is decided that where a policy was issued under the laws of New York relating to insurances on lives for the benefit of married women, the contract being made in that state and assigned by the wife to secure her husband's debt, and the assignment was executed in New York and sent by mail to Maryland, to a creditor there, the validity of the assignment must be determined by the laws of New York, the

[15] Tennent v. Union Central Life Ins. Co. 133 Mo. App. 345, 112 S. W. 754.

[16] Troendle v. Higleyman (1908) — Ky. —, 113 S. W. 812.

[17] Equitable Mutual Fire Ins. Corp's Receiver v. Murray, 131 Ky. 740, 115 S. W. 816.

[18] Pratt v. Globe Mut. Life Ins. Co. 3 Tenn. Cas. 174, 17 S. W. 352; Succession of Miller v. Manhattan Life Ins. Co. 110 La. 652, 34 So. 723, 32 Ins. L. J. 865; Manhattan Life Ins. Co. v. Cohen (1911) — Tex. Civ. App. —, 139 S. W. 51, 40 Ins. L. J. 1685. See notes in 63 L.R.A. 858; 23 L.R.A.(N.S.) 978; and 52 L.R.A.(N.S.) 281, on conflict of laws as to assignment of policy.

[19] Succession of Miller v. Manhattan Life Ins. Co. 110 La. 652, 34 So. 723, 32 Ins. L. J. 865; Manhattan Life Ins. Co. v. Cohen (1911) — Tex. Civ. App. —, 139 S. W. 51, 40 Ins. L. J. 1685. See §§ 2304, 2308 herein.

[20] Russell v. Grigsby, 168 Fed. 577, 94 C. C. A. 61, case rev'd Grigsby v. Russell, 222 U. S. 149, 56 L. ed. 133, 32 Sup. Ct. 58, 36 L.R.A.(N.S.) 642, 41 Ins. L. 301, upon point of insurable interest.

action being brought there.[1] The laws of Maryland govern the rights of parties in that state under an assignment of a life policy issued by a New York corporation to a citizen of Maryland on an application made to an agent of the company in Baltimore. So where a policy of insurance was applied for in Maryland by a resident thereof, and the corporation issuing the policy was a resident of another state, and an assignment was subsequently made by a citizen of the first-named state, any controversy afterward arising between the assignee and the heirs or personal representatives of the assignor will be controlled by the laws of the state in which the policy was applied for, and which the assignee and the representatives of the assignor are residents, rather than by the laws of the state whose corporation issued the policy.[2]

§ 232a. Lex loci: substituted policy.—If a substituted policy is issued by a society of one state to a citizen of another and the change is made at the home office of the society, the contract is governed by the laws of the state where such change is made, and is not affected by the laws of the foreign state subsequently enacted even though the insurer has become amenable thereto.[3]

[1] Barry v. Equitable Life Assur. Soc. 59 N. Y. 587.

Assignment by wife in State foreign to that in which insurer was organized and conducted business. See Mutual Reserve Fund Life Assoc. v. Cleveland Woolen Mills, 82 Fed. 508, 27 C. C. A. 212, 54 U. S. App. 290.

[2] Robinson v. Hurst, 78 Md. 59, 20 L.R.A. 761, 44 Am. St. Rep. 266, 26 Atl. 956.

[3] Belknap v. Johnson, 114 Iowa, 265, 86 N. W. 267.

CHAPTER IX.

CONSTRUCTION—USAGE.

§ 237. Usage generally.
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§ 239. Presumption as to knowledge of usage.
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§ 256. Evidence of usage: liberal construction.
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§ 259. Evidence of usage, when inadmissible: cases.

§ 237. Usage generally.—Evidence of general usage was formerly admitted to determine the construction of policies of insurance for the reason that they were so loosely drawn, and because the contract depended so greatly upon commercial usage, and there were so few adjudications or rules of positive law to aid in its interpretation. So Lord Mansfield had recourse in a large measure to the usage of merchants and commercial law in ascertaining those principles which underlie his decisions in cases of insurance, and which have now to so large an extent become of controlling force

in the construction of insurance contracts.[4] Buller, J., in Brough v. Whitmore,[5] says that insurance "is founded on usage, and must be governed and construed by usage," and Mr. Duer[6] asserts that the true purpose of a usage is "to discover in order to effectuate the intentions of the parties," and usage is received to ascertain the sense of the parties with reference to such usage.[7]

§ 238. Usage part of the common law.—In England, where so few positive laws have been enacted, and where the first act concerning insurances was not passed until 1601,[8] the practice of insuring was dependent upon the common law, of which the law of merchants was considered a branch, and also upon the general principles and usages of trade.[9] It is declared in an English case[10] that "the custom of merchants or law of merchants is the law of the kingdom, and is part of the common law." These customs acquire the force of law, because as they must be ancient, uniform, and reasonable, they must have been generally received, known, and approved.[11]

[4] See § I., preliminary chapter. Remarks of Lord Kenyon in Brough v. Whitmore, 4 Term Rep. 208, that Lombard St. had given a construction to policies of insurance, and that the practice of merchants and underwriters had rendered them intelligible.

[5] 4 Term Rep. 210.

[6] 1 Duer on Ins. (ed. 1845) 253.

[7] Renner v. Bank of Columbia, 9 Wheat. (22 U. S.) 581, 6 L. ed. 166, per the court. See Destrehan v. Louisiana Cypress Lumber Co. 45 La. Ann. 920, 13 So. 230, 40 Am. St. Rep. 265.

When custom or usage is presumed to enter into intention of parties. See London Assur. Corp. v. Thompson, 170 N. Y. 94, 62 N. E. 1066, 31 Ins. L. J. 351, 354.

Usage as part of contract. See Union Ins. Co. v. American Fire Ins. Co. 107 Cal. 327, 48 Am. St. Rep. 140, 40 Pac. 431, 28 L.R.A. 692; Connelly v. Masonic Mutual Benefit Assoc. 58 Conn. 552, 9 L.R.A. 428, 20 Atl. 671, 18 Am. St. Rep. 296n; Savage v. Salem Mills Co. 48 Oreg. 1, 10 Am. & Eng. Ann. Cas. 1065, 85 Pac. 69; MacCulsky v. Klosterman, 20 Oreg. 108, 10 L.R.A. 785, 25 Pac. 366.

Distinction between custom and usage, see Byrd v. Beall, 150 Ala. 122, 124 Am. St. Rep. 60, 43 So. 749; Wilmington City Ry. Co. v. White, 6 Pen. (Del.) 363, 66 Atl. 1009. *Examine* Kent v. Town of Patterson, 141 N. Y. Supp. 932, 80 Misc. 560.

[8] 43 Eliz. c. 12.

[9] See § I., preliminary chapter; 1 Marshall on Ins. (ed. 1810) 21.

[10] Edie v. East India Co. 2 Burr. 1226, 4 Eng. Rul. Cas. 344.

[11] McGregor v. Insurance Co. of Pa. 1 Wash. (U. S. C. C.) 39, Fed. Cas. No. 8811, per Washington, J. See § 1 herein. "The whole business of insurance and all the instruments by which it is carried on, and all their language and provisions, rest on the usage of merchants; and nearly all the law of insurance is but the usage of merchants, adopted and sanctioned by courts." 1 Parsons on Marine Ins. (ed. 1868) 82. "With respect to usage, it is a sort of natural law formed out of our habits, our interests, and the universal consent of all mankind. In all maritime matters it is regarded as the surest in-

§ 239. Presumption as to knowledge of usage.—Underwriters are bound to inform themselves and to know the general usages of the trade in which they insure,[12] for it is presumed that the custom of merchants is known to them,[13] and the insurer and insured must be supposed to be fully apprised and conusant of a notorious usage, as to a course of a voyage, and to know the nature and peculiar circumstances of that branch of trade to which the policy relates, and that whether it is recently established or not.[14] The insurers are also presumed to know the customs of the place where they do business, and are assumed in law to know them.[15] It is also presumed that a person dealing in a particular market has knowledge of its customs in relation to his transactions therein.[16] So they are presumed to be acquainted with the nature and peculiar circumstances of the branch of trade to which the risk relates.[17] So in a policy

terpreter of the law. . . . In questions of insurance established usages must in all cases be adhered to, and in doubtful cases they are the safest guide one can follow." 1 Marshall on Ins. (ed. 1810) 707a.

[12] Noble v. Kennoway, 2 Doug. pt. 2, 3d ed. 513, per Lord Mansfield.

See also the following cases:

Maryland.—Maryland & Phœnix Ins. Co. v. Bathhurst, 5 Gill & J. (Md.) 159.

New York.—London Assur. Corp. v. Thompson, 170 N. Y. 94, 62 N. E. 1066, 31 Ins. L. J. 351, 354; Wall v. Howard Ins. Co. 14 Barb. (N. Y.) 383; Cook v. Loew, 69 N. Y. Supp. 614, 34 Misc. 276.

Pennsylvania.—Norris v. Insurance Co. of North America, 3 Yeates (Pa.) 84, 2 Am. Dec. 360.

South Carolina.—Cox, Maitland & Co. v. Charleston Fire & Marine Ins. Co. 3 Rich. (S. C.) 331, 45 Am. Dec. 771.

England.—Salvador v. Hopkins, 3 Burr, 1707, 1712, 1714; Vallance v. Dewar, 1 Camp. 503.

See 1 Duer on Ins. (ed. 1845) 196.

As to general rule, see also:

United States.—New Roads Oil-mill & Manufacturing Co. v. Kline, Wilson & Co. 154 Fed. 296, 83 C. C. A. 1.

Georgia.—Horan v. Strachan, 86 Ga. 408, 12 S. E. 678, 22 Am. St. Rep. 471.

Illinois.—Union Stock Yards & Transit Co. v. Mallory, Son & Zimmerman Co. 157 Ill. 554, 48 Am. St. Rep. 341, 41 N. E. 888; First National Bank v. Fiske, 133 Pa. St. 241, 7 L.R.A. 209, 19 Am. St. Rep. 635, 19 Atl. 554.

Minnesota.—Baxter v. Sherman, 73 Minn. 434, 72 Am. St. Rep. 631, 76 N. W. 211.

Virginia.—Bowles v. Rice, 107 Va. 51, 57 S. E. 575.

[13] McGregor v. Insurance Co. 1 Wash. (C. C.) 39, Fed. Cas. No. 8811, per Washington, J. See, generally, Austrian v. Springer, 34 Mich. 343, 34 Am. St. Rep. 350.

[14] Salvador v. Hopkins, 3 Burr. 1707, 1714; Wadsworth v. Pacific Ins. Co. 4 Wend. (N. Y.) 33.

[15] Hartshorne v. Union Mutual Ins. Co. 36 N. Y. 172.

[16] William R. Smith & Son v. Bloom, 159 Iowa, 592, 141 N. W. 32, *citing* Cotham v. Ellis, 107 Ill. 413; Bailey v. Bensley, 87 Ill. 556; Long v. Armsley Co. 43 Mo. App. 25, Jones on Ev. (pocket ed.) sec. 57.

[17] Grant v. Lexington Fire Life & Marine Ins. Co. 5 Ind. 23, 61 Am. Dec. 74. See also Capital Fire Ins. Co. v. Kaufman, 91 Ark. 310, 121 S. W. 289, 38 Ins. L. J. 1058.

on a foreign vessel the underwriter must be taken to have knowledge of the common usages of trade in such country as to equipments of vessels of that class for the voyage on which she was destined.[18] Mr. Marshall [19] asserts that British underwriters cannot be presumed to be conusant of the usages of the particular trade undertaken by ships of foreign nations in foreign trade, but that the usage must have been made known to them to be binding.[20] Mr. Duer, however,[1] criticises this assertion as impolitic and unsupported, but it is said by McLean, J., in Hazard's Administrator v. New England Marine Insurance Company,[2] that "the underwriters are presumed to know the usages of foreign ports to which insured vessels are destined, also the usages of trade and the political conditions of foreign nations." Where the usage is of such a character that the presumption exists that the insurer has knowledge thereof, the applicant is not bound to communicate such usage to him.[3] But usage in a particular place or of a particular class of persons cannot be binding on other persons unless they are acquainted with that usage and adopt it.[4] Under an Alabama decision, there is no

[18] Tidmarsh v. Washington Fire & Marine Ins. Co. 4 Mason (U. S. C. C.) 439, 442, Fed. Cas. No. 14,024, per Story, J.

Implied obligations varied by agreement or usage, see marine ins. act 1906 (6 Edw. VII. c. 41) sec. 87; Butterworth's Twentieth Cent. Stats. (1900–1909) p. 423; Chitty's Stats. Eng. (1902–1907) p. 905.

[19] 1 Marshall on Ins. (ed. 1810) 275.

[20] *Citing* Larabie v. Wilson, Doug. 271; digested, Id. 192, et seq.; also in 1 Duer on Ins. (ed. 1845) 243, et seq.

[1] 1 Duer on Ins. (ed. 1845) 199.

[2] 8 Pet. (33 U. S.) 557, 582, 8 L. ed. 1043.

[3] Cox, Maitland & Co. v. Charleston Fire & Marine Ins. Co. 3 Rich. (S. C.) 331, 45 Am. Dec. 771; Daniels v. Hudson River Fire Ins. Co. 12 Cush. (66 Mass.) 416, 59 Am. Dec. 192; Planche v. Fletcher, 1 Doug. 251; Kingston v. Knibbs, 1 Camp. 508n, per Lord Ellenborough.

[4] Bartlett v. Pentland, 10 Barn. & C. 760, 770, per Lord Tenterden.

See also the following cases:

United States.—Adams v. Otterback, 15 How. (56 U. S.) 539, 14 L. ed. 805; Trott v. Wood, 1 Gall. (U. S. C. C.) 443, Fed. Cas. No. 14,190; Rogers v. Mechanics' Ins. Co. 1 Story (U. S. C. C.) 603, Fed. Cas. No. 12,016.

Connecticut.—Crosby v. Fitch, 12 Conn. 422, 31 Am. Dec. 745.

Iowa.—Sherwood v. Home Savings Bank, 131 Iowa, 528, 109 N. W. 9.

Louisiana.—Herman v. Western Marine & Fire Ins. Co. 7 La. (13 La. O. S. 516) 325.

Maine.—Leach v. Perkins, 17 Me. 462, 35 Am. Dec. 268.

Maryland.—Mason v. Franklin Ins. Co. 12 Gill & J. (Md.) 468.

Massachusetts.—Howard v. Great Western Ins. Co. 109 Mass. 384; Lee v. Dorchester Mut. Fire Ins. Co. 105 Mass. 298; Taylor v. Ætna Life Ins. Co. 13 Gray (79 Mass.) 434.

New York.—Wells v. Bailey, 49 N. Y. 464; Cook v. Loew, 34 Misc. 276, 69 N. Y. Supp. 614.

Ohio.—Hartford Prot. Ins. Co. v. Harmer, 2 Ohio St. 452, 59 Am. Dec. 684.

Pennsylvania.—Eyre v. Marine Ins. Co. 5 Watts & S. (Pa.) 116.

presumption of knowledge on the part of an insurer doing a general business throughout the United States of a custom or usage which is peculiar to a city in a state foreign to its domicil, so as to make the custom an element of its contracts relating to property in such city without proof that it had such knowledge.[5]

§ 240. Usage must be general.—In order that a usage should be admitted in evidence in the construction of the terms of a policy, it must possess certain necessary properties or essentials, one of which is, that it should be general,[6] that is, general to the whole mercantile world,[7] or in regard to the trade to which it has refer-

England.—Stewart v. Aberdeen, 4 Mees & W. 211; Gabay v. Lloyd, 3 Barn. & C. 793; Scott v. Irving, 1 Barn. & Adol. 605.

In general, if a custom is local, a person who resides in a foreign land, and has never been to the particular locality before, is not bound unless he has knowledge of the custom: Horan v. Strachan, 86 Ga. 408, 22 Am. St. Rep. 471, 12 S. E. 678.

[5] German American Ins. Co. v. Commercial Fire Ins. Co. 95 Ala. 469, 16 L.R.A. 291, 11 So. 117. *Examine* National Fire Ins. Co. v. Hanberg, 215 Ill. 378, 74 N. E. 377; Traders Ins. Co. v. Dobbins & Ewing, 114 Tenn. 227, 86 S. W. 323. *Compare* Capital Fire Ins. Co. v. Kaufman, 91 Ark. 310, 121 S. W. 389, 38 Ins. L. J. 1058.

[6] See Trott v. Wood, 1 Gall. (U. S. C. C.) 443, Fed. Cas. No. 14,190, per Story, J.; Sturges v. Buckley, 32 Conn. 20; Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745, 750, per Church, J.; Leach v. Perkins, 17 Me. 462, 35 Am. Dec. 268; Lockney v. Police Beneficiary Assoc. 217 Pa. 568, 66 Atl. 844; Missouri Pacific R. R. Co. v. Fagan, 72 Tex. 127, 2 L.R.A. 75, 13 Am. St. Rep. 776; Gabay v. Lloyd, 3 Barn. & C. 793; and see cases cited in last note. See also generally:

Alabama.—Byrd v. Beall, 150 Ala. 122, 124 Am. St. Rep. 60, 43 So. 749.

Arkansas.—City Electric Street Rd. Co. v. First National Exchange Bank, 62 Ark. 33, 31 L.R.A. 535, 34 S. W. 89, 54 Am. St. Rep. 282.

Illinois.—Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Jenkins, 174 Ill. 398, 62 L.R.A. 922, 51 N. E. 811, 66 Am. Rep. 296; Whipple v. Tucker, 123 Ill. App. 223.

Kentucky.—Shaw v. Ingraham-Day Lumber Co. 152 Ky. 329, L.R.A.1915D, 145, 153 S. W. 231.

New York.—Hatch v. Luckman, 140 N. Y. Supp. 1123, 155 App. Div. 765, aff'g 118 N. Y. Supp. 689, 64 Misc. 508.

[7] 1 Arnould on Marine Ins. (Perkins' ed. 1850) 71. See Id. (9th ed. Hart & Simey) secs. 55 et seq., pp. 74 et seq., sec. 505, p. 666; sec. 507, p. 668; sec. 1273, p. 1591. See generally on this point, Southwestern Freight & Cotton Press Co. v. Stanard, 44 Mo. 71, 100 Am. Dec. 255; Columbus Coal Ins. Co. v. Tucker, 48 Ohio St. 41, 12 L.R.A. 577, 29 Am. St. Rep. 534, per Spear, J.

In examining for the the first time any question under a policy of insurance, the practical construction of the contract by merchants and underwriters, not through any partial or local usages, but by the general consent of the mercantile world, is of great weight, though not necessarily decisive. General Mutual Ins. Co. v. Sherwood, 14 How. (55 U. S.) 351, 14 L. ed. 452. *Cited* in Ocean Steamship Co. v. Ætna Ins. Co. 121 Fed. 884; Anderson v. Munson, 104 Fed. 917; Barnstable, The, 84 Fed. 900; Moores v. Louisville Underwriters, 14 Fed. 232; Pride v. Providence-Washington Ins. Co. 6 Pa. Dist. R. 231.

ence. Thus, a universal custom of a particular trade, which has been invariably or uniformly followed for many years, is admissible in evidence to determine the actual contract.[8] A usage cannot be said to be general which has obtained only in a few instances, for such a usage cannot be regarded,[9] nor can a usage be general which is known only to a few, for such limited knowledge does not establish a usage.[10] Mr. Duer [11] gives much consideration to the meaning of the word "general" in this connection,[12] and limits its application to those cases in which the knowledge of the parties and their intention to adopt the usage are inferred merely from the fact of its existence, but says that when their knowledge or intentions depend upon other direct or circumstantial evidence, their contract may be governed by usage, local or partial, as in case of usage between the parties or a local usage of trade practised by the insurers.[13] It is said by Story, J., in Rogers v. Mechanics' Insurance Company [14] that "the usage or custom of a particular port in a particular trade is not such a custom as the law contemplates to limit or control or qualify the language of contracts of insurance. It must be some known general usage or custom in the trade, applicable and applied to all the ports of the state where it exists, and from its character and extent so notorious that all such contracts of insurance in that trade must be presumed to be entered into by the parties in reference to it as a part of the policy." But a local or particular custom may be general in the sense that an insurance company, by a long-continued and invariable and known course of dealing, have established a binding usage.[15] So a usage at Lloyds

[8] Renner v. Bank of Columbia, 9 Wheat. (22 U. S.) 581, 6 L. ed. 166; see Leach v. Perkins, 17 Me. 462, 35 Am. Dec. 268; Goodenow v. Tyler, 7 Mass. 336, 5 Am. Dec. 22; Coggeshall v. American Ins. Co. 3 Wend. (N. Y.) 283. In general, knowledge of a usage need not be shown by direct evidence, but may be inferred from circumstances or implied from its notoriety. Barry v. Hannibal & St. Joseph's Ry. Co. 98 Mo. 62, 14 Am. St. Rep. 610, 11 S. W. 308.

[9] Cutter v. Powell, 6 Term Rep. 324, 6 Eng. Rul. Cas. 627; Crosby v. Fitch, 12 Conn. 422, 31 Am. Dec. 745, 749; Kocher v. Supreme Council Catholic Benevolent Legion, 65 N. J. L. 649, 52 L.R.A. 861, 86 Am. St. Rep. 687, 48 Atl. 544.

[10] Collings v. Hope, 3 Wash. (C. C.) 149, 150, Fed. Cas. 3003, per Washington, J.

[11] 1 Duer on Ins. (ed. 1845) 258, et seq.

[12] "The word 'general,'" he says, "is used in various senses. It is used in reference to places as well as persons. In the first sense it is opposed to 'local,' in the second to 'partial.' In another sense it embraces the whole of the subjects to which it relates, and is opposed to 'special' or 'particular,'" etc. 1 Duer on Ins. (ed. 1845) 259, sec. 55.

[13] 1 Duer on Ins. (ed. 1845) 263, sec. 55.

[14] 1 Story (U. S. C. C.) 607, Fed. Cas. No. 12,016.

[15] Baxter v. Massasoit Ins. Co. 13 Allen (95 Mass.) 320; DeForest v. Fulton Fire Ins. Co. 1 Hall (N. Y.)

may be general and binding upon those in the habit of underwriting there.[16]

§ 241. Usage must be well established and notorious.—The usage should be well established; that is, so well settled that persons engaged in a trade must be considered as contracting in reference thereto,[17] and it must be so well known in general among those engaged in the business or trade to which it belongs as to be received as a matter of course.[18] If it be a particular usage, it must be "of universal notoriety in the trade in which, and of the place at which, the insurance is effected." [19]

84; Union Cent. Life Ins. Co. v. Pottker, 33 Ohio St. 459, 31 Am. Rep. 555; Helme v. Philadelphia Life Ins. Co. 61 Pa. St. 107, 100 Am. Dec. 621.

[16] Gabay v. Lloyd, 3 Barn. & C. 793.

[17] *United States.*—Trott v. Wood, 1 Gall. (C. C.) 443, Fed. Cas. No. 14,190 per Story, J.

Alabama.—Mobile J. & K. R. Co. v. Bay Shore Lumber Co. 165 Ala. 610, 138 Am. St. Rep. 84, 51 So. 956; Byrd v. Beall, 150 Ala. 122, 124 Am. St. Rep. 60, 43 So. 749.

Arkansas.—City Electric Street R. Co. v. First National Exchange Bank, 62 Ark. 33, 31 L.R.A. 535, 34 S. W. 89, 54 Am. St. Rep. 282.

Illinois.—Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Jenkins, 174 Ill. 398, 62 L.R.A. 922, 51 N. E. 811, 66 Am. St. Rep. 296.

Kentucky.—Rochester German Ins. Co. v. Peaslee Gaulbert Co. 27 Ky. L. Rep. 756, 87 S. W. 1115.

Maine.—Cobb v. Lime Rock Fire & Marine Ins. Co. 58 Me. 328, per Appleton, C. J.

Maryland.—Baltimore Base Ball & Exhibition Co. v. Pickett, 78 Md. 375, 22 L.R.A. 690, 28 Atl. 279, 44 Am. St. Rep. 304; Blake v. Stump, 73 Md. 160, 10 L.R.A. 103, 20 Atl. 788.

Missouri.—Southwestern Freight & Cotton Press Co. v. Stanard, 44 Mo. 71, 100 Am. Dec. 255.

Ohio.—Columbus Coal Ins. Co. v. Tucker, 48 Ohio St. 41, 12 L.R.A. 577, 29 Am. St. Rep. 534, per Spear, J.

Pennsylvania.—Lockney v. Police Beneficiary Assoc. 217 Pa. 568, 66 Atl. 844; Dempsey v. Dobson, 184 Pa. St. 588, 40 L.R.A. 550, 63 Am. St. Rep. 809.

Texas.—Missouri Pacific R. Co. v. Fagan, 72 Tex. 127, 2 L.R.A. 75, 13 Am. St. Rep. 776.

Wisconsin.—Lemke v. Hage, 142 Wis. 178, 135 Am. St. Rep. 1066, 125 N. W. 440.

[18] Rogers v. Mechanics' Ins. Co. 1 Story (C. C.) 603, 607, 608, Fed. Cas. No. 12,016, per Story, J.; Collings v. Hope, 3 Wash. (C. C.) 149, 150, Fed. Cas. No. 3003, per Washington, J.; McGregor v. Insurance Co. of Pa. 1 Wash. (C. C.) 39, Fed. Cas. No. 8811, per Washington, J.; Donnell v. Columbian Ins. Co. 2 Sum. (U. S. C. C.) 377, 378, Fed. Cas. No. 3987, per Story, J.; Steele v. McTyer's Admr. 31 Ala. 667, 70 Am. Dec. 516, and note 523; Macy v. Whaling Ins. Co. 9 Mete. (50 Mass.) 363, per Shaw, C. J.; Winsor v. Dillaway, 4 Met. (45 Mass.) 221, 223, per Shaw, C. J.; Palmer v. Blackburne, 1 Bing. 61, 14 Eng. Rul. Cas. 486, per Dallas, J., and Burrough, J.; Power v. Whitmore, 4 Mees. & S. 141, 150; Salvador v. Hopkins, 3 Burr. 1707; 1 Duer on Ins. (ed. 1845) 265.

[19] 1 Arnould on Marine Insurance, Perkins' (ed. 1850) 71. See Id. (9th ed. Hart & Simey) secs. 55 et seq.,

§ 242. Usage may be of recent origin.—Although it is said that usage must be ancient,[20] public, and continued,[1] and although it is held that a usage of short continuance is not entitled to any weight,[2] yet it is well settled that a usage may be of recent origin.[3] So in Noble v. Kenneway [4] a usage existing for three years was held sufficient, and Lord Mansfield declares in that case that "every underwriter is presumed to be acquainted with the practice of the trade he insures, whether recently established or not. If he does not know it, he ought to inform himself. It is no matter if the usage has been only for a year." So Mr. Arnould [5] says that where the trade is recent, it is only necessary that a usage be coextensive therewith, and be general and well known. In a Maine case the court [6] declares that a usage must be "certain, general, frequent, and so ancient as to be generally known and acted upon," while in a New York case [7] it is said that "the true test of a commercial usage is its having existed a sufficient length of time to have become generally known, or to warrant a presumption that contracts are made in reference to it." [8]

§ 243. Usage must be reasonable.—A usage must be valid, reasonable, and not one which would by construction result in an absurdity, for it must be assumed that an unreasonable usage or one leading to an absurdity was not contemplated by the parties in effecting the contract.[9] It is held that a general and notorious cus-

pp. 74 et seq. And see cases in two preceding notes.

[20] Collings v. Hope, 3 Wash. (C. C.) 149, Fed. Cas. No. 3003. See Commonwealth v. Mayloy, 57 Pa. St. 291.

[1] See Crosby v. Fitch, 12 Conn. 422, 31 Am. Dec. 745; Sipperly v. Steward, 50 Barb. (N. Y.) 62.

[2] Wall v. East River Ins. Co. 3 Duer (N. Y.) 264.

[3] Macy v. Whaling Ins. Co. 9 Metc. (50 Mass.) 363, 364, per Hubbard, J., *citing* 2 Starkie on Evidence, 453. See Townsend v. Whitby, 5 Harr. (Del.) 55.

[4] Doug. 3d ed. pt. 2, 513. *Cited* also in Renner v. Bank of Columbia, 9 Wheat. (22 U. S.) 581, 589, 6 L. ed. 166.

[5] 1 Arnould on Ins. (Perkins' ed. 1850) 69, 70. See Id. (9th ed. Hart & Simey) secs. 55 et seq., pp. 74 et seq.

[6] Leach v. Perkins, 17 Me. 462, 35 Am. Dec. 268, per Shipley, J.

[7] Smith v. Wright, 1 Caines (N. Y.) 43. Usage in this case carried back by some witnesses as far as thirty years, and it was objected that period was too short.

[8] See Renner v. Bank of Columbia, 9 Wheat. (22 U. S.) 581, 6 L. ed. 166, per Thompson, J. "No particular period is requisite to the establishment of a usage." 1 Phillips on Insurance (2d ed.) sec. 138. "It is quite certain that where a usage is recent or local, it may have sufficient force to affect the construction of the policy if brought home to the knowledge and recognition of the parties." 1 Parsons on Ins. (ed. 1868) 93.

[9] Collings v. Hope, 3 Wash. (U. S. C. C.) 149, 150, Fed. Cas. No. 3003, per Washington, J.; Mobile, Jackson & Kansas City R. Co. v. Bay Shore Lumber Co. 165 Ala. 610, 138 Am.

tom of steamboat captains at large river ports to insure their boats and execute premium notes therefor is reasonable and valid as against the owners.[10] But a custom of a particular port to strike off one-third the gross freight for charges and to pay two-thirds only to the assured in a freight policy is unreasonable,[11] and a usage which would continue a time policy in force at the election of the insured for an unlimited time is unreasonable.[12] So a usage for a master to sell without necessity is invalid.[13] So a usage permitting an intermediate voyage may be unreasonable, as in a case where the policy gave "liberty of other port or ports," but was indorsed, "liberty is given to deviate by going to port or ports in Europe, by paying an equitable premium therefor." [14] A local custom that insurance agents may, after the termination of their agency, cancel any policies issued through them, is unreasonable and void.[15] It

St. Rep. 84, 51 So. 956; Byrd v. Beall, 150 Ala. 122, 124 Am. St. Rep. 60, 43 So. 749; Leach v. Perkins, 17 Me. 462, 35 Am. Dec. 268; Seccomb v. Provincial Ins. Co. 10 Allen (92 Mass.) 314, per Bigelow, C. J.; Macy v. Whaling Ins. Co. 9 Mete. (50 Mass.) 363, per Shaw, J.; Bryant v. Commonwealth Ins. Co. 6 Pick. (23 Mass.) 131; London Assurance Corp. v. Thompson, 170 N. Y. 94, 62 N. E. 1066, 31 Ins. L. J. 351, 354; Ougier v. Jenning, 1 Camp. 505, note, Lord Eldon's charge to jury.

See also *Alabama.*—Loval v. Wolf, 179 Ala. 505, 60 So. 298; Shaw v. Ingraham-Day Lumber Co. 152 Ky. 329, L.R.A.1915D, 145, 153 S. W. 231.

Kentucky.—Kendall v. Russell, 5 Dana (Ky.) 501, 30 Am. Dec. 696, 698.

Massachusetts. — Farnsworth v. Hemmer, 1 Allen (83 Mass.) 494, 79 Am. Dec. 756, and note, 759; Eager v. Atlas Ins. Co. 14 Pick. (31 Mass.) 141, 25 Am. Dec. 363.

New York.—Hatch v. Luckman, 140 N. Y. Supp. 1123, 155 App. Div. 765, aff'g 118 N. Y. Supp. 689, 64 Misc. 508.

Ohio.—Columbus Coal Ins. Co. v. Tucker, 48 Ohio St. 41, 12 L.R.A. 577, 29 Am. St. Rep. 534, per Spear, J.

Pennsylvania.—Dempsey v. Dobson, 174 Pa. 122, 32 L.R.A. 761, 63 Am. St. Rep. 809, 34 Atl. 459; Jordan v. Meredith, 3 Yeates (Pa.) 318, 2 Am. Dec. 373, and note.

Texas.—Missouri Pacific R. Co. v. Fagan, 72 Tex. 127, 2 L.R.A. 75, 13 Am. St. Rep. 776, 9 S. W. 749.

"Usage, to be valid, must be reasonable. It must not tend to increase extravagantly or indefinitely the risks that the underwriter meant to assure, or to deprive the assured of the whole or a large portion of the indemnity on which he certainly relied. It must not lead to consequences that could not have been contemplated by the parties, thus repelling the presumption that they meant to adopt it as the basis of their contract." 1 Duer on Ins. (ed. 1845) 268, sec. 63, lect. ii. p. 2.

[10] Adams v. Pittsburgh Ins. Co. 95 Pa. St. 348, 40 Am. Rep. 662.

[11] McGregor v. Pennsylvania Ins. Co. 1 Wash. (C. C.) 39, Fed. Cas. No. 8811.

[12] Eyre v. Marine Ins. Co. 5 Serg. & W. (Pa.) 116, 6 Whart. (Pa.) 247.

[13] Bryant v. Commonwealth Ins. Co. 6 Pick. (23 Mass.) 131.

[14] Seccomb v. Provincial Ins. Co. 10 Allen (92 Mass.) 305.

[15] Merchants' Ins. Co. v. Prince, 50 Minn. 53, 52 N. W. 131.

is said that a usage, to be enforced by law, "must be reasonable in its provisions, for though usages apparently unreasonable may have been so long continued as to have acquired the force of law, yet the unreasonableness now apparent may have grown out of changes occurring after the usage was established." [16]

§ 244. **Usage must be uniform.**—The course of trade or custom which constitutes a usage must be uniform in its practice during its continuance, whether the usage be recent in its origin or long established; that is, its practice must be regular, uninterrupted, and constant in its observance and settled, not indeterminate nor variable in its character; [17] for occasional instances, or its practice among a few only, will not establish a usage,[18] and as was said by Shaw, C. J., in Macy v. Whaling Insurance Company,[19] it must also be "convenient and adapted not only to increase facilities in trade, but to the promoting of just dealings in the intercourse between the parties." It is said that "the course of trade must be uniform and general to enable it to be considered as a legal defense," [20] but Lord Ellenborough declares, in Vallance v. Dewar,[1] that "if a usage be general, though not uniform, the underwriters are bound to take notice of it." Mr. Duer [2] explains the word "uniform," as

[16] Macy v. Whaling Ins. Co. 9 Metc. (50 Mass.) 363, per Shaw, C. J. It is declared that by "unreasonable" is meant not that the usage itself is not reasonable, but that the unreasonableness consists in supposing that the parties included a certain usage in their contract. 1 Parsons on Insurance (ed. 1868) 102, 103. But see Ougier v. Jennings, 1 Camp. 505, where Lord Eldon instructed the jury, "If you think the usage does exist, if you think it reasonable" then sending a ship on an intermediate voyage might be reasonable.

[17] *United States.*—See Trott v. Wood, 1 Gall. (U. S. C. C.) 443, Fed. Cas. No. 14,190, per Story, J.; Collings v. Hope, 3 Wash. (U. S. C. C.) 149, Fed. Cas. No. 3003.

Alabama.—Steele v. McTyer's Admr. 31 Ala. 677, 70 Am. Dec. 516, and note, 523.

Illinois.—Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. 174 Ill. 398, 62 L.R.A. 922, 51 N. E. 811, 66 Am. St. Rep. 296.

Kentucky.—Shaw v. Ingraham-Day Lumber Co. 152 Ky. 329, L.R.A.1915D, 145, 153 S. W. 231.

Maryland.—Baltimore Base Ball & Exhibition Co. v. Pickett, 78 Md. 375, 22 L.R.A. 690, 28 Atl. 279.

Missouri.—Southwestern Freight & Cotton Press Ins. Co. v. Stanard, 44 Mo. 71, 100 Am. Dec. 255.

New York.—London Assurance Corp. v. Thompson, 170 N. Y. 94, 62 N. E. 1066, 31 Ins. L. J. 391, 394; Hatch v. Luckman, 140 N. Y. Supp. 1123, 155 App. Div. 765, aff'g 118 N. Y. Supp. 689, 64 Misc. 508.

Texas.—Missouri Pacific R. R. Co. v. Fagan, 72 Tex. 127, 2 L.R.A. 75, 13 Am. St. Rep. 776, 9 S. W. 749.

Wisconsin.—Lemke v. Hage, 142, Wis. 178, 135 Am. St. Rep. 1066, 125 N. W. 440.

[18] See §§ 239, 240 herein.

[19] 9 Metc. (50 Mass.) 363.

[20] Trott v. Wood, 1 Gall. (C. C.) 443, Fed. Cas. No. 14,190, per Story, J.

[1] 1 Camp. 508.

[2] 1 Duer on Ins. (ed. 1845), 264, sec. 58, note b.

used by Lord Ellenborough, to mean "universal," and says: "It is not necessary that the usage, when it is a usage of trade, or, in the technical application of words, to be uniform, should be universal; that is, should be followed at all times by all persons or vessels concerned or employed in the trade to which it relates, for this would be inconsistent with the meaning which in these cases is attributed to the word 'general.'" A usage which is uniform is not, however, necessarily a valid one, although of long continuance, as where it is a particular usage and not known to the assured, and where the result of its application would be unreasonable.[3]

§ 245. Parties may by express contract include or waive usage.—It is undoubtedly true that parties may by express reference in the policy to certain valid usages adopt such usages as the standard by which their rights under the contract may be determined, and the contract will be construed thereby.[4] It is likewise true, as we have before stated,[5] that the parties may always expressly contract so as to waive usage.[6]

§ 246. Usage admissible where contract ambiguous or obscure.—Where the terms of the contract are ambiguous or obscure or indefinite, or where the words have by the usages of trade acquired a particular meaning, or are technical or local, usage is admissible to explain them.[7] The "true and appropriate office of a usage or

[3] McGregor v. Insurance Co. of Pa. 1 Wash. (C. C.) 39, Fed. Cas. No. 8811, per Washington, J.

[4] Union Bank v. Union Ins. Co. Dud. (S. C.) 171; Canton Ins. Office, Ltd. v. Woodside, 90 Fed. 301, 33 C. C. A. 63, 61 U. S. App. 214, 28 Ins. L. J. 269.

[5] See § 196 herein.

[6] Schooner Reeside, The, 2 Sum. (U. S. C. C.) 567, 570, Fed. Cas. No. 11, 657, per Story, J. See also, generally, New Roads Oilmill & Manufacturing Co. v. Kline, Wilson & Co. 154 Fed. 296, 83 C. C. A. 1. See marine ins. act 1906 (6 Edw. VII. c. 4) sec. 87; Butterworth's Twentieth Cent. Stats. (1900–1909) p. 423; Chitty's Stats. Eng. (1902–1907) p. 905.

[7] *United States.*—United States v. Macdaniel, 7 Pet. (32 U. S.) 1, 13, 14, 8 L. ed. 587; St. Paul Fire & Marine Ins. Co. v. Balfour, 168 Fed. 212, 93 C. C. A. 498; Globe & Rutgers Fire Ins. Co. of N. Y. v. David Moffat Co. 154 Fed. 13, 83 C. C. A. 91; Winthrop v. Union Ins. Co. 2 Wash. (U. S. C. C.) 7, Fed. Cas. No. 17,901; Hancox v. Fishing Ins. Co. 3 Sum. (U. S. C. C.) 132, Fed. Cas. No. 6,013.

Maryland.—Allegre v. Maryland Ins. Co. 6 Har. & J. (Md.) 408, 14 Am. Dec. 289.

Massachusetts.—Bornszweski v. Middlesex Mutual Assur. Co. 186 Mass. 589, 72 N. E. 250; Mooney v. Howard Ins. Co. 138 Mass. 375, 52 Am. Rep. 277; Murray v. Hatch, 6 Mass. 477.

Missouri.—Tesson v. Atlantic Mut. Ins. Co. 40 Mo. 33, 93 Am. Dec. 293.

New York.—New York Betting & Packing Co. v. Washington Ins. Co. 10 Bosw. (N. Y.) 428, 23 N. Y. Sup. Ct. 428; Coit v. Commercial Ins. Co. 7 Johns. (N. Y.) 385, 5 Am. Dec. 282; Rankin v. American Ins. Co. 1 Hall (N. Y.) 619.

custom," says Story, J.,[8] "is to interpret the otherwise indeterminate intentions of the parties, and to ascertain the nature and extent of their contracts," and "courts have long allowed mercantile instruments to be expounded according to the custom of merchants."[9] So the "contract of insurance is presumed to have been made with reference to the usages of the place to which the contract has reference,"[10] and usage may be proved by parol, although it has its origin in law or edict of the government.[11] Evidence of local custom is admissible to supply details in oral or written contracts in regard to which the contract itself is silent, or to explain provincialisms or technical terms which have acquired a known, fixed, and definite meaning different from the ordinary import of such terms, or where such terms, if not explained, are susceptible of more than one reasonable construction.[12] And, in general, evidence of usage is admissible to apply the written contract to the subject matter of the action, to explain expressions used in a particular sense by particular persons as to particular subjects, and to give effect to language in a contract as it was understood by those who made it.[13] So evidence of usage is admissible to explain the meaning of the word "explosion" in an insurance contract.[14]

Pennsylvania.—Citizens' Ins. Co. v. McLaughlin, 53 Pa. St. 485; Eyre v. Marine Ins. Co. 5 Watts & S. (Pa.) 116.

Virginia.—Harris v. Nicholas, 5 Munf. (Va.) 483.

England.—Wigglesworth v. Dallison, 1 Doug. 207, 15 Eng. Rul. Cas. 542.

See 1 Arnould on Marine Ins. (Perkins' ed. 1850) 64; Id. (9th ed. Hart & Simey) sec. 67, p. 90, sec. 1273, p. 1591.

Proof of usage or custom is admissible only as an aid or instrument tending to aid interpretation. American Can Co. v. Agricultural Ins. Co. 12 Cal. App. 133, 106 Pac. 720, 39 Ins. L. J. 518, 524.

Where by usage words have acquired a special and peculiar meaning different from their ordinary meaning this may be shown. Ocean Steamship Co. v. Ætna Ins. Co. (U. S. D. C.) 121 Fed. 882; Paepcke-Leicht Lumber Co. v. Talley, 106 Ark. 400, 153 S. W. 833.

[8] Schooner Reeside, 2 Sum. (U. S. C. C.) 567, 569, Fed. Cas. No. 11,657.

[9] Smith v. Wilson, 3 Barn. & Adol. 728, per Parke, J.

[10] Cobb v. New England Mut. Ins. Co. 6 Gray (72 Mass.) 192, 200.

[11] Livingston v. Maryland Ins. Co. 7 Cranch (11 U. S.) 506, 3 L. ed. 421. Time policies are said by Mr. Duer (1 Duer on Insurance [ed. 1845] 205) to embrace all usages or none.

See note in 3 L.R.A.(N.S.) 248, on admissibility of evidence of custom to create an exception to written contract.

[12] Barlow v. Lambert, 28 Ala. 704, 65 Am. Dec. 374, and note 379.

[13] Smith v. Clews, 114 N. Y. 190, 4 L.R.A. 392, 11 Am. St. Rep. 627, 21 N. E. 160; Dillon v. Continental Casualty Co. 130 Mo. App. 502, 109 S. W. 89; Destrehan v. Louisiana Cypress Lumber Co. 45 La. Ann. 920, 14 So. 61, 40 Am. St. Rep. 265; Bowman v. First National Bank, 9 Wash. 614, 43 Am. St. Rep. 870, 38 Pac. 211; John O'Brien Lumber Co. v. Wilkinson, 123 Wis. 272, 101 N. W. 1050.

[14] Hartford Steam Boiler Inspec-

§ 247. Usage inadmissible to contradict or substantially vary the plain terms of the policy.—It reasonably follows the rule that parties may make such valid contracts as they wish, that usage is inadmissible to contradict, nullify, or substantially vary the positive terms in which they have expressly stipulated, where the words are clear and are of a plain and decisive character. To admit such evidence for such purpose would establish the principle that courts can, by construction, incorporate into the policy that which was never contemplated by the parties, and would allow mere presumptions and implications to overthrow the most formal and deliberate declarations of the parties.[15] It was early stated by Emerigon,[16] who refers to Vattel,[17] "that the first general rule of construction is that it is not permitted to interpret what has no need of interpretation." [18] And "if the parties have explained themselves on the point in a precise, special, and clear manner, all interpretation becomes superfluous, cum in verbis nulla est ambiguitas non debet admitti voluntatis in quaestio; and the stipulated agreement must be adhered to." [19] The words "precise," "clear," and "special," used by Emerigon, add much to the force of the rule, make it easier of application, and operate more strictly to the exclusion of usage.[20]

tion & Ins. Co. v. Pabst Brewing Co. 201 Fed. 617, 120 C. C. A. 45.

[15] Schooner Reeside, 2 Sum. (U. S. C. C.) 567, 570, Fed. Cas. No. 11,657, per Story, J. See New York Ins. Co. v. Thomas, 3 Johns. Cas. (N. Y.) 1, per Kent, J.

[16] Emerigon on Ins. (Meredith's ed.) c. ii. sec. 7, p. 49.

[17] Droit des Gens, liv. 3, c. 17.

[18] "When an instrument is conceived in clear and precise terms, when its sense is manifest and leads to nothing absurd, there is no excuse for refusing the meaning it naturally presents. To seek elsewhere conjectures to restrain or enlarge it is to wish to evade it." Emerigon on Insurance (Meredith's ed.) c. ii. sec. 7, p. 49. And he adds that when in doubt as to the interpretation, "it must be understood with reference to principles of law and to the practice of commerce."

[19] Emerigon on Insurance (Meredith's ed. 1850) c. xiii., sec. 7, p. 555. "If the covenants are clear in themselves, and contain nothing prohibited by law, the judge is not allowed to stray out of them;" that it is only where the contract is ambiguous "that the magistrate is authorized to form his decision by the light which legal equity, the common law, the nature of the contract, and the circumstances of the case may afford him." Emerigon on Insurance (Meredith's ed. 1850) c. i. sec. 5, p. 17. It will be observed that Emerigon uses the words "clear" and "precise." The words "plain and decisive character" are also used by Hubbard, J., in Macy v. Whaling Ins. Co. 9 Met. (50 Mass.) 363. So also in 1 Arnould on Marine Insurance (Perkins' ed. 1850) 64a, note, who says: "Where, however, the terms employed are clear and precise in themselves," etc. no evidence of usage is admissible. See also 1 Parsons on Ins. (ed. 1868) 84 note.

[20] See remark in 1 Parsons on Insurance (ed. 1868) 83, 84, note 1. See also 1 Arnould on Insurance (Perkins' ed. 1850) 75, rule iii. sec. 44.

So Mr. Justice Harlan, in Grace v. American Central Insurance Company [1] declares that "an express written contract embodying in clear and positive terms the intention of the parties cannot be varied by evidence of usage or custom," and there are numerous authorities of like tenor.[2]

§ 248. Same subject: cases and authorities.—Evidence of usage for vessels to go to two ports in the same island is inadmissible where the contract is written and plain, and the usage is inconsist-

[1] 109 U. S. 278, 283, 3 Sup. Ct. 207, 27 L. ed. 932.

[2] *United States.*—Winthrop v. Union Mut. Ins. Co. 2 Wash. (C. C.) 7, Fed. Cas. No. 17,901; McGregor v. Pennsylvania Ins. Co. 1 Wash. (U. S. C. C.) 39, 42, Fed. Cas. No. 8,811. See Delaware Ins. Co. of Phila. v. S. S. White Dental Manufacturing Co. 109 Fed. 334, 48 C. C. A. 382, 30 Ins. L. J. 961, certiorari denied, 183 U. S. 700, 46 L. ed. 396, 22 Sup. Ct. 936, s. c. 105 Fed. 642.

Alabama.—Byrd v. Beall, 150 Ala. 122, 124 Am. St. Rep. 60, 43 So. 749; Smith v. Mobile Nav. & Mutual Ins. Co. 30 Ala. 167.

Arkansas.—Paepcke-Leicht Lumber Co. v. Talley, 106 Ark. 400, 153 S. W. 833.

Connecticut.—Wiggin v. Federal Stock & Grain Co. 77 Conn. 507, 59 Atl. 607.

Delaware.—Lattomus v. Farmers' Mut. Fire Ins. Co. 3 Houst. (Del.) 254.

Illinois.—Delaware & Hudson Canal Co. v. Mitchell, 113 Ill. App. 429, aff'd 211 Ill. 329, 71 N. E. 1026; Illinois Mason's Benevolent Soc. v. Baldwin, 86 Ill. 479.

Iowa.—Duncan v. Green, 43 Iowa, 679.

Minnesota.—Northwestern Fire & Marine Ins. Co. v. Connecticut Fire Ins. Co. 105 Minn. 483, 117 N. W. 825.

Missouri.—Dillon v. Continental Casualty Co. 130 Mo. App. 502, 109 S. W. 89.

New Hampshire.—Cummings v. Blanchard, 67 N. H. 268, 68 Am. St. Rep. 664, 36 Atl. 556.

New York.—Hopper v. Sage, 112 N. Y. 530, 8 Am. St. Rep. 771, 20 N. E. 350; Hone v. Mutual Safety Ins. Co. 1 Sand. (N. Y.) 137, 2 N. Y. (2 Comst.) 235; St. Nicholas Ins. Co. v. Mercantile Mut. Ins. Co. 5 Bosw. (N. Y.) 238; Bargett v. Orient Ins. Co. 3 Bosw. (N. Y.) 385.

Texas.—Henry v. Green Ins. Co. of America, — Tex. Civ. App. —, 103 S. W. 836.

Virginia.—Mutual Assur. Soc. v. Scottish Union & National Ins. Co. 84 Va. 116, 4 S. E. 175, 10 Am. St. Rep. 819.

Wisconsin.—Vogt v. Schienebeck, 122 Wis. 491, 106 Am. St. Rep. 989, 100 N. W. 820, 67 L.R.A. 756.

England.—Hall v. Janson, 4 El. & B. 500, 508, per Campbell, C. J.; Crofts v. Marshall, 7 Car. & P. 597, 607, per Lord Denman; 1 Arnould on Insurance (Perkins' ed. 1850) 78 rule iv.: 1 Parsons on Insurance [ed. 1868] 85, et seq. Mr. Duer (1 Duer on Insurance [ed. 1845] 269) says, that usage must be consistent with the terms of the policy, and is never admissible to contradict its terms or to nullify or expunge them. "Usage may be admissible to explain what is doubtful. It is never admissible to contradict what is plain." Blackett v. Royal Exch. Assur. Co. 2 Cromp. & J. 244, 14 Eng. Rul. Cas. 179. "Where the terms of a contract are plain, usage can have little effect upon the construction to be placed upon it." Boldero v. East India Co. 26 Beav. 316.

ent with and repugnant to the contract.[3] So usage is held inadmissible to qualify an express stipulation as to keeping a watch nights by showing that certain rights were excepted by custom,[4] nor can the practice of an insurance company to surrender the notes of its members and cancel their policies on the happening and payment of losses be shown to contradict or vary the terms of the policy or note.[5] And usage will not permit a deviation contrary to the terms of a policy expressly giving liberty to touch at a particular port,[6] nor can evidence be received against the plain language of the policy of a custom that a marine policy on goods shipped from New Orleans to Mobile covers the overland transportation of the goods by railroad.[7] And where the policy provides in express terms that the company shall pay the amount of loss without any deduction, a custom or usage of the company which would vary or limit such express agreement is inadmissible.[8] So a local custom among insurers to pay only a certain proportion of the loss is inadmissible to vary or control the plain terms of the contract or to reduce the amount of recovery.[9] It is also held that where the contract is susceptible of a reasonable construction on its face, custom or usage is inadmissible to vary its language, although the instrument be an open or running policy and the contested clauses are scattered over the document.[10] Where the policy was drawn in accordance with the terms, and the proposal provided for insurance "on the charter of the barque 'Maria Henry,' Liverpool to port in Cuba, and thence to port of advice and discharge in Europe," evidence was held inadmissible to show a usage for vessels so chartered to go to two ports in Cuba.[11] So the conditions and agreements in a policy of life insurance form the contract between the parties, and will not be varied or controlled by the subsequent course of dealing between them, in the absence of fraud or bad faith.[12]

§ 249. Whether usage controls the plain legal import of words of the policy.—It is said that usage must be consistent with the rules

[3] Hearne v. Marine Ins. Co. 20 Wall. (87 U. S.) 488, 22 L. ed. 395.

[4] Ripley v. Ætna F. Ins. Co. 30 N. Y. 136, 86 Am. Dec. 362, and note 371.

[5] New Hampshire Mutual Fire Ins. Co. v. Rand, 4 Fost. (24 N. H.) 428. See Mutual Assur. Soc. v. Scottish Union & National Ins. Co. 84 Va. 116, 17 Ins. L. J. 570, 4 S. E. 178.

[6] Elliott v. Wilson, 4 Brown Parl. C. 470.

[7] Smith v. Mobile Nav. & Mutual Co. 30 Ala. 167.

[8] Swamscot M. Co. v. Partridge, 5 Fost. (25 N. H.) 369.

[9] Mutual Safety Ins. Co. v. Hone, 2 N. Y. (2 Comst.) 235.

[10] Orient Mutual Ins. Co. v. Wright, 1 Wall. (68 U. S.) 456, 17 L. ed. 505.

[11] Hearn v. New England Mut. M. Ins. Co. 4 Cliff. (C. C.) 200, Fed. Cas. No. 6,302.

[12] Union Central Life Ins. Co. v. Buxer, 62 Ohio St. 385, 49 L.R.A. 737, 57 N. E. 66.

of law, but exactly what is meant by "consistent" is much controverted.[13] If usage is admissible to control the plain and legal import of the words of the policy, the rule given in the last section would be too limited in its application.[14] It is held that usage can only be resorted to where the law is unsettled. Chancellor Walworth [15] declares that "if the terms employed have received a settled legal construction, that must govern, and no evidence of a particular custom or usage in opposition to such legal construction can be received." [16] So Sandford, J., declares: [17] "We find it clearly settled that a general usage, the effect of which is to control rules of law, is inadmissible, so of one which contradicts a settled rule of commercial law." [18] Mr. Arnould [19] says parol evidence "will never be admitted to set aside or control its (the policy's) plain and unambiguous terms." [20] But the same author, however,[1] also declares that usage is admissible to explain the meaning or words which are ambiguous in themselves, or made so by proof of extrinsic circumstances. Mr. Marshall says [2] that "usage is only to be consulted where the law is doubtful. Where the law is clear it must prevail." [3] He also asserts [4] that "the usage of trade often controls the general construction of the policy." In Homer v. Dorr,[5] it is declared that the

[13] Usage must be consistent with the rules of law. This rule, however, is to be explained and limited, since a usage inconsistent with an established rule of commercial law may be allowed to prevail, and a definite rule of law is frequently set aside, although plainly applicable, and every rule of law which the parties may by stipulation vary or prevent is subject to a valid usage. 1 Duer on Ins. (ed. 1845) 271 et seq. This means only that the usage must be consistent with the rules of law, in the same sense that the policy itself is a prohibited usage cannot be made valid, no matter how long practised.

[14] Winthrop v. Union Ins. Co. 2 Wash. (U. S. C. C.) 7, Fed. Cas. No. 17,901.

[15] Dow v. Whitten, 8 Wend. (N. Y.) 168.

[16] In 1 Duer on Ins. (ed. 1845) 229, it is said that this rule is true only in a very limited sense. In 1 Parsons on Ins. (ed. 1868) 98, it is said: "We apprehend that in this remark a distinction is lost sight of between law properly so called and the mere result of decisions, as to the meanings of words. Usages continually vary, and do certainly change from time to time."

[17] Hone v. Mutual Safety Ins. Co. 1 Sand. (N. Y.) 149.

[18] See this case as to the general rule of construction, also as to usage and how far usage is admissible; and same case, 2 N. Y. (2 Comst.) 235.

[19] 1 Arnould on Ins. (Perkins' ed. 1850) 78, sec. 45, rule iv.; Id. (9th ed. Hart & Simey) secs. 67, 71, pp. 90, 95.

[20] This rule is criticised as too broad; 1 Parsons on Ins. (ed. 1868) 83, note.

[1] 1 Arnould on Ins. (Perkins' ed. 1850) 75, sec. 44, rule iii.

[2] 1 Marshall on Ins. (ed. 1810) 707a.

[3] *Criticised* in 1 Duer on Ins. (ed. 1845) 235.

[4] 2 Marshall on Ins. (ed. 1810) 727.

[5] 10 Mass. 26, 28. This decision is said to be erroneous, and irreconcila-

"usage of no class of citizens can be sustained in opposition to principles of law." So it is said in Bargett v. Orient Insurance Company [6] that "no usage can exist or be proved by which the liabilities of parties to a written contract will be greater or less than the written law of the state has adjudged it to be." Mr. Parsons [7] says: "No usage can be relied upon which opposes either a rule or principle of law. . . . If terms have received by definite adjudication a fixed and definite meaning, no usage will be permitted to show that the parties had another meaning," but he also asserts, in an earlier part of his work,[8] that it must not be understood "that where words are unambiguous, and have as commonly used a plain and certain meaning, usage is never permitted to control or vary its meaning," and that it is certain "that the natural and ordinary meaning of the words, as that may be determined by common use, may be controlled by evidence of usage." Mr. Wood [9] states the rule as follows: "If the words written in the policy have received a judicial construction, and also a peculiar commercial construction by usage variant with such judicial construction, the judicial construction is to control, but if no judicial construction has been given to them, and by usage they have acquired any meaning variant from that in which they are ordinarily used, such meaning by usage may be shown, unless from the whole instrument it was evident they were used in their ordinary sense." Emerigon [10] says: "In most cases it is very probable that words have been used in their ordinary sense; that always implies a very strong presumption which cannot be overcome but by a contrary presumption still stronger;" and he adds [11] that inasmuch as insurance is a contract bona fides, "the subtleties of law are to be made to yield to that of equity, which is the soul of commerce. . . . The clauses of the contract are to be interpreted according to the style, the customs, and usages of the place where the insurance has been made, though the inclination of the common law might appear different." It is also declared in Long v. Allen [12] that evidence of usage might be received to explain or control the policy. Mr. Phillips [13] says this

ble with Long v. Allen, 4 Doug. 276, 14 Eng. Rul. Cas. 517, in 1 Duer on Ins. (ed. 1845) 246, 247. It is also said of Homer v. Dorr, "that this decision has never been acted upon," in note attached to the case. See also 1 Parsons on Ins. (ed. 1868) 96, note 3.

[6] 3 Bosw. (N. Y.) 397.

[7] 1 Parsons on Ins. (ed. 1868) 97, 98.

[8] 1 Parsons on Ins. (ed. 1868) 83.

[9] 1 Wood on Fire Ins. (2d ed.) 143.

[10] Emerigon on Ins. (Meredith's ed. 1850) c. ii., sec. 7, p. 50.

[11] Id. c. i., sec. 5, p. 17.

[12] 4 Doug. 276, 14 Eng. Rul. Cas. 517, per Buller, J., and note.

[13] 1 Phillips on Ins. (3d ed.) 86.

"is true if 'to control' means to interpret the policy, and give a meaning to it different from that imputed by the language in its ordinary acceptation, but that the use of the word in this connection is likely to convey an erroneous meaning," and that "evidence of usage cannot be admitted to control what is written in contrast with explaining it." The words of Buller, J., are, we apprehend, made clearer if considered in connection with those used by him in Brough v. Whitmore,[14] where he declares that he "would not, on account of any usage to the contrary among underwriters, overturn a solemn determination of this court." Although in Long v. Allen [15] Lord Mansfield said "The law is clear that where the risk has never commenced the premium shall be returned," but it was held, nevertheless, that a usage that in certain cases the premium should be returned, deducting a per centum, would control. Mr. Duer[16] says the distinction made by Buller, J., is perfectly accurate, since where the words are ambiguous, usage "explains" them, "but where they convey a definite meaning that the court would be bound to adopt, or their construction has been settled by law, the usage controls them, and in these cases it does set aside what . . . was the plain intention of the parties, but in controlling, the usage does not contradict the words—it merely varies by restraining or enlarging their application." He also lays down the proposition that while usage may modify or control the policy, yet it must be consistent with its terms, and is inadmissible to contradict its express words;[17] and finally he declares that "in the only cases in which the evidence has been admitted to supersede a rule of law the usage was solely derived from a use and practice between the assurers and the assured, and they contain no intimation that when the usage is of a different character the evidence could be justly received." [18]

[14] 4 Term Rep. 210.

[15] 4 Doug. 276, 14 Eng. Rul. Cas. 517.

[16] 1 Duer on Ins. (ed. 1845) 245.

[17] 1 Duer on Ins. (ed. 1845) 186, 269, 270.

[18] 1 Duer on Ins. (ed. 1845) 275, citing Renner v. Bank of Columbia, 9 Wheat. (22 U. S.) 581, 592, 6 L. ed. 166; Halsey v. Brown, 3 Day (Conn.) 46; Lennox & Kennebeck Bank v. Paige, 9 Mass. 158; Frith v. Barker, 2 Johns. (N. Y.) 328; citing Edie v. East India Co. 2 Burr. 12, 16, 4 Eng. Rul. Cas. 344; Stewart v. Aberdeen, 4 Mees. & W. 228. "It has been seriously doubted by eminent judges whether a usage not adopted nor referred to in the policy ought ever to be permitted to control its operation. . . . Yet the propriety of receiving the evidence, when subject to its just limitations, is readily conceded:" Duer on Ins. (ed. 1845) 178, sec. 29, *citing* Lord Holt in Lethiellier's case, 2 Salk. 443; Lord Eldon, in Anderson v. Pitcher, 2 Bos. & P. 164, 168; Story J., in Schooner Reeside, 2 Sum. (U. S. C. C.) 567, Fed. Cas. No. 11657, and in Palmer v. Warren Ins. Co. 1 Story (C. C.) 360, Fed. Cas. No.

§ 250. Same subject: opinions and cases.—It is held that general usage operating as a general rule of law may be pleaded against a contract plain and unambiguous in its terms.[19] So it is said: "Evidence is admissible to show that the contract, notwithstanding the common meaning of the language used, was in fact made in reference to the usage in the trade to which the contract relates." [20] Language substantially to the same effect is used in another case, where it is said that usage may be "admitted to vary and control the language used in the policy, and to give a construction different from that which it otherwise would have received or did receive." [1] A general and established rule of law may be set aside even by a particular and local usage, as in case of a usage at Lloyds, proven to have been known to underwriters. This is so decided in Stewart v. Aberdeen.[2] So a rule of law may be controlled by a particular usage between the parties known to them and the basis of contracting.[3] So a usage at Lloyds as to adjust-

10698. "A usage in the interpretation of the policy is the substitute for a judicial decision, and that which supersedes a rule of law has itself the force of law in the cases to which it applies:" 1 Duer on Ins. (ed. 1845) 261. "Upon an examination of the decisions, it will appear that in a large majority of the cases the effect of the usage as proved was to set aside a construction, or supersede a rule that the court must otherwise of necessity have followed; . . . the usage, therefore, overrules and sets aside a plain and settled construction:" Id. 256. "A usage sufficiently and clearly proved has a controlling effect to vary the plain import or settled construction of the words of the policy, or to prevent the application of an established rule of law by which the rights of the parties under their contract would otherwise be determined:" 1 Duer on Ins. (ed. 1845) 257, *citing* Preston v. Greenwood Ins. Co. 4 Doug. 28, per Lord Mansfield. "Usage is always considered in policies of insurance, even when no difficulty arises on the words themselves." The test is, "whether the rule of law that the usage supersedes is one that, in its application to their own contract, the parties themselves were competent to change. If this position be correct, the propriety of the decision of the supreme court of New York, in Frith v. Barker, 2 Johns. (N. Y.) 328, seems very questionable:" 1 Duer on Ins. (ed. 1845) 303. It was held in the decision referred to that usage is inadmissible to change a settled rule of commercial law. "Now, the rule in question is certainly one that the parties may change by an express stipulation:" 1 Duer on Ins. (ed. 1845) 303.

[19] Lattonous v. Farmers' Mut. Fire Ins. Co. 3 Houst. (Del.) 254. In this case the text was the argument of counsel for plaintiff on demurrer, which demurrer was sustained, but no opinion given.

[20] Macy v. Whaling Ins. Co. 9 Met. (50 Mass.) 363, per Hubbard, J.

[1] Eyre v. Marine Ins. Co. 5 Watts & S. (Pa.) 116, 122, per Sergeant, J. See s. c. 6 Whart. (Pa.) 249. Mr. Duer (1 Duer on Ins. [ed. 1845] 296) says this "language involves the not infrequent error of confounding a usage of trade and a usage in the interpretation of the policy."

[2] 4 Mees. & W. 211.

[3] Renner v. Bank of Columbia, 9

ment has been admitted, although contrary to the principle of indemnity, which governs marine insurance.[4] So a custom of adjusting partial losses may be shown, and must govern the general law regulating the assessment of damages under such policies.[5] "It is a principle that the general common law may be, and in many instances is, controlled by special custom, so the general commercial law may by the same reason be controlled by a special local usage so far as that usage extends."[6] So it is said in an Ohio case[7] that "if it be assumed that the custom is a general one, then it is part of the common law itself, and there would be presented an instance of two rules of law equally binding, and yet wholly inconsistent the one with the other." although the point decided in this last case was that a usage which is not according to law, though universal, cannot be set up to control the law. Mr. Lawson says: "It was no objection to a common-law custom that it was contrary to the common law of the land. . . . In general, too, evidence of a usage of trade is not inadmissible, because it is contrary to the principles of law governing such cases, for it is obvious that if proof of a usage could be rejected because it established something different from the law, no custom would ever be proved, because if it were not different it would be a part of the law."[8] and he adds:[9] "This being so plain, it is somewhat startling to find a large number of cases in the reports in which the principle is broadly laid down that a usage or custom in opposition to an established rule of law is void and of no effect," and, noting the cases, he asserts that the meaning of the various expressions used is this: "That a custom or usage which changes what would otherwise be the situation of the parties, or alters to any extent their rights according to the rules of law applicable to such cases, is invalid and ineffectual," and in a subsequent section he notes a large number of cases in insurances where usages in conflict with established rules of law have been controlled by evidence of different customs.[10] As opposed to

Wheat. (22 U. S.) 581, 582, 6 L. ed. 166, per Thompson, J., an exhaustive opinion.

[4] Palmer v. Blackburn, 1 Bing. 61.

[5] Fulton Ins. Co. v. Milner, 23 Ala. 420.

[6] Halsey v. Brown, 3 Day (Conn.) 346. See also cases *considered* at length by Mr. Duer in support of his proposition *cited* under §§ 249 and 250 herein, and also *cited* under "Proofs and Illustrations," 291 et seq. See also Id. 294, where McGregor v. Insurance Co. of Pa. 1 Wash. (C. C.) 391, and Trott v. Wood, 1 Gall. 443, Fed. Cas. No. 14190, are *cited* as supporting his proposition. See cases *cited* in 1 Parsons on Ins. (ed. 1868) 83, 84, and notes.

[7] Columbus & Hocking Coal & Iron Ins. Co. v. Tucker, 48 Ohio St. 41, 29 Am. St. Rep. 528, 534, 12 L.R.A. 577, 26 N. E. 630, per Spear, J.

[8] Lawson on Usages and Customs (ed. 1881) 465, sec. 225.

[9] Id. sec. 226.

[10] Id. sec. 233, and see Id. sec. 234.

the above cases and opinions there are numerous decisions which sustain the general proposition that usage is admissible to control a rule of law, or the plain and legal import of the words used in a policy of insurance.[11] So where the term of a lease is fixed by statute, evidence of usage to control its operation has been held inadmissible.[12] So usage to give notice of increase of risk is in-

[11] Winthrop v. Union Ins. Co. 2 Wash. (C. C.) 7, Fed. Cas. No. 17901; Rankin v. American Ins. Co. 1 Hall (N. Y.) 619, 682. Mr. Duer (1 Duer on Ins. [ed. 1845] 231) says of this case: "It was certainly no objection that the usage would have varied the construction of the policy," and that it would not have rendered a single word of it inoperative, but have only qualified its terms conditional upon usage; Lattonous v. Farmers' Mut. Fire Ins. Co. 3 Houst. (Del.) 254; Warren v. Franklin Ins. Co. 104 Mass. 521 (held custom of particular port could not vary rule of law as to damages). Usage "cannot be allowed to control the settled and acknowledged law of the state:" Higgins v. Moore, 34 N. Y. 425 (usage in this case not a general usage); Mobile Marine, Dock & Mutual Ins. Co. v. McMillan, 27 Ala. 77; St. Nicholas Ins. Co. v. Mercantile Ins. Co. 5 Bosw. (N. Y.) 238, 246. Evidence of local custom is inadmissible to contravene any express contract or provision of law: Barlow v. Lambert, 28 Ala. 704, 75 Am. Dec. 374. "We think it clearly settled by the decided weight of authority that a general usage, the effect of which is to control a rule of law, is inadmissible:" Boon & Co. v. Steamboat Belfast, 40 Ala. 184, 88 Am. Dec. 761 (in this case proof was held inadmissible of a custom by which all carriers navigating the river were relieved from liability for losses occasioned by armed bodies of men without fault or negligence of the carrier). See also Boardman v. Spooner, 13 Allen (95 Mass.) 353, 90 Am. Dec. 196; Dickinson v. Gay, 7 Allen (89 Mass.) 29, 83 Am. Dec. 656; Cranwell v. Ship Fosdick, 15 La. Ann. 436, 77 Am. Dec. 190; Cox v. Riley, 4 Ind. 368, 58 Am. Dec. 633, and note 638; Southwestern Freight & Cotton Press Co. v. Stanard, 44 Mo. 71, 100 Am. Dec. 255. Hopper v. Sage, 112 N. Y. 530, 8 Am. St. Rep. 771. A person cannot establish a usage or custom which in his own interest contravenes an established rule of commercial law: Jackson v. Bank, 92 Tenn. 154, 36 Am. St. Rep. 81. That local usage to overthrow an established rule of law is inadmissible, see Merchants' Ins. Co. v. Prince, 50 Minn. 56, 57, 52 N. W. 131, per Gilfillan, C. J. See Seccomb v. Provincial Ins. Co. 10 Allen (92 Mass.) 312–14, per Bigelow, C. J., where it is said that usage is inadmissible to vary or control the written words, and give them a different construction than that given them by settled judicial determinations, but that it is admissible to show the sense in which particular words or phrases are used, and to show that as applied to the subject-matter the language of the instruments was understood by the parties to have a special and peculiar meaning, differing from that which might ordinarily be attributed to it, and that this is especially true of policies of assurance. And see Lawson's Usages and Customs, ed. 1881, 465, secs. 226, 234, and cases collected; and articles of Jno D. Lawson, 6 S. Rev. N. S. 845, 7 Id. 1; Eaton v. Smith, 20 Pick. (37 Mass.) 156; East Birmingham Land Co. v. Dennis, 85 Ala. 565, 2 L.R.A. 836, 5 So. 317, 7 Am. St. Rep. 73.

[12] Jackson v. Billing, 22 La. Ann. 378.

admissible to control the legal effect of the policy;[13] nor can a local custom to deduct one-third new for old from the gross amount of the expenses and repairs, without first deducting the proceeds of the old materials, control a general principle of law requiring such deduction of the proceeds of the old materials.[14] Evidence is admissible of usage of words in peculiar senses in an application for insurance where, although such words severally and as first read seem plain, an ambiguity becomes apparent when they are applied to the subject-matter,[15] and when words are used in policies having a limited meaning in the trade, both parties must be assumed to have understood it in the sense in which the trade usually understood it.[16] So if any of the terms used in a policy have by the known usage of trade, or by use and practice as between insurer and insured acquired an appropriate sense, they are to be construed accordingly.[17]

§ 251. Same subject: conclusion.—We believe that Mr. Duer's position is not irreconcilable with the law as generally stated by the courts and text-writers, and is entitled to consideration. Certainly, if the parties could incorporate by express terms in their contract a usage which would have controlled the plain and ordinary meaning of words used in the policy, then may not a known usage, with reference to which the parties expressly contracted, have a like effect? We apprehend, however, that whatever distinction exists between the statement of Mr. Duer and those of Emerigon and the others above considered, is more apparent than real. Mr. Duer says that usage must be consistent with the rules of law. His illustrations are those of a particular usage known to the parties, with express reference to which the contract was made, and which became thereby a part thereof. He asserts that usage does control words that convey a definite meaning, which the court would otherwise be bound to adopt, or where their construction has been settled by law,[18] and does set aside what, judging from the terms of the policy or the rules of law, was the plain intention of the parties, "but," he adds, "in controlling, the usage does not contradict the words—it merely varies by restraining or enlarging their application," and that usage "can never be admitted to nullify or expunge"

[13] Stebbins v. Globe Ins. Co. 2 Hall (N. Y.) 632, 674.

[14] Eager v. Atlas Ins. Co. 14 Pick. (31 Mass.) 141, 25 Am. Dec. 363.

[15] Daniels v. Hudson River Fire Ins. Co. 12 Cush. (66 Mass.) 429, 59 Am. Dec. 192.

[16] Wall v. Howard Ins. Co. 14 Barb. (N. Y.) 383; Astor v. Union Ins. Co. 7 Cow. (N. Y.) 202.

[17] Coit v. Commercial Ins. Co. 7 Johns. (N. Y.) 385, 5 Am. Dec. 282. See also as to evidence of usage to control forfeiture for nonpayment of premium, chapter on Premiums.

[18] 1 Duer on Ins. (ed. 1845) 245.

the plain words of a contract.[19] The use of the word "control," in this sense, does not seem irreconcilable with the conclusion of eminent and learned judges and text-writers. We deduce, therefore, from the authorities that the presumption is that words have been used in their ordinary sense, and if words are of such a plain and decisive character that a reference to the subject-matter and context shows the evident intent of the parties to be in accordance with this presumption, then usage is inadmissible to vary or control the plain and legal import of words. This presumption, that words have been used in their ordinary sense, may be overcome by a contrary presumption still stronger: thus, if words apparently plain and unambiguous are shown to be ambiguous in fact, then evidence of usage to control their meaning is admissible. A settled judicial construction governs a commercial construction by usage, variant therewith, so far certainly, as the rights of parties are dependent upon settled rules of law, and the contract is made clearly with reference thereto. But custom or usage may undoubtedly affect and control what before was law, especially in insurance cases where the custom is of such a character that the parties may reasonably be assumed to have been fully cognizant thereof, and to have contracted in reference thereto. Where plain words have acquired by usage a meaning different from that in which they are ordinarily used, evidence of such usage is admissible, unless it is clearly evident from the subject-matter and context that the ordinary meaning was intended, and usage can never be admitted to nullify or expunge the plain words of the contract.[20]

§ 252. **Usage cannot legalize an illegal act.**—It is held that a particular usage and custom by which owners of insured property were permitted to purchase the property at sales for the benefit of the insurers, cannot have the effect of legalizing a sale which by the general law is unlawful and void.[1] And prior errors of the insurer in paying similar claims not within the terms of the policy do not constitute a custom of the trade in the community.[1a]

§ 253. **General usage may be controlled by evidence of a different usage.**—A general usage may be controlled by evidence of another and different usage. Thus, a custom for a ship to pursue a certain

[19] Id. 270.

[20] As to usage in foreign trade, see Livingston v. Maryland Ins. Co. 7 Cranch (11 U. S.) 506, 3 L. ed. 421.

[1] Robertson v. Western Marine & Fire Ins. Co. 19 La. O. S. (10 La. 143) 227, 36 Am. Dec. 673. See Bryant v. Connecticut Ins. Co. 6 Pick. (23 Mass.) 131, 144.

[1a] Sleet v. Farmers Mutual Fire Ins. Co. (1908) — Ky. —, 19 L.R.A. (N.S.) 421 (and note as to custom to pay certain classes of losses as affecting liability of company for such a loss not covered by policy) 113 S. W. 515.

course which is the safest, most usual, and expeditious in the course of the voyage insured may be controlled by evidence that it is usual and customary for one boat on a voyage to stop and aid another boat in distress.[2] So it is held that a commercial usage of long standing, such as that of adding the premiums to the invoice value, in cases of insurance, may be modified and controlled by a local usage clearly proven and shown to be known to the other party.[3]

§ 254. **Usage controls implied limitations.**—"The usage, and ordinary incidents of a risk should override any implied limitations, either as to the place or conduct of the risk." [4]

§ 255. **Usage of another similar trade or place or of another company.**—Evidence of usage in another similar trade was held by Lord Mansfield admissible, on the question whether a recently established usage existed.[5] Usage of a particular place, as of London, may be shown by proof of usage there and elsewhere.[6] But where the vessel was insured at New York, but belonged to New Bedford, where the owners resided, a local usage of the last-named place, by which taking sea elephants is not within the scope of "whaling voyage," is inadmissible, although a uniform usage of insurers to insert a permission for vessels insured on a whaling voyage to take sea elephants on payment of an additional premium is inadmissible to establish such local usage.[7] It is held that usage of the custom of other like establishments to keep a watch may be shown to explain the term "keeping a watch." [8] Where the contract is made with reference to local usages, usages of other places are not binding, for such usage cannot be considered as entering into the consideration of the parties,[9] and a usage of marine underwriters of Boston to except barratry of the master from the risks assumed, when the assured is her owner, will not import such an exception by implication in a policy underwritten at Gloucester.[10] So a policy of insurance against fire upon a vessel building in the port of Baltimore, and for a specified period, is not controlled in its operation by proof

[2] Walsh v. Homer, 10 Mo. 6; Gould v. Oliver, 2 Scott N. R. 241, 252, 5 Scott, 445, 4 Bing. N. C. 134, 14 Eng. Rul. Cas. 400.

[3] Merchants' Mut. Ins. Co. v. Wilson, 2 Md. 217.

[4] 1 Wood on Fire Insurance (2d ed.) 116. The author here changes the rule from that given in a former edition with reference to cases where the words "contained in" are used in policies describing the risk.

[5] Noble v. Kennoway, 2 Doug. (3d ed.) 510, per Lord Mansfield.

[6] Millward v. Hibbert, 3 Q. B. 120, 2 Gale & D. 142, 24 Eng. Rul. Cas. 473.

[7] Child v. Sun Mut. Ins. Co. 3 Sand. (N. Y.) 26.

[8] Brocker v. People's Mut. Ins. Co. 8 Cush. (62 Mass.) 79.

[9] Mason v. Franklin Fire Ins. Co. 12 Gill & J. (Md.) 468; Child v. Sun Mut. Ins. Co. 3 Sand. (N. Y.) 26.

[10] Parkhurst v. Gloucester Fishing Ins. Co. 100 Mass. 301, 1 Am. Rep. 105, 97 Am. Dec. 100.

of usage in other parts of the Union;[11] and a usage of towing boats by steamers on the Mississippi cannot affect a contract of insurance made at Natchez, unless shown to be so general and well-known that it is fair to presume the parties contracted with reference to it.[12] A clause in a policy of marine insurance providing that all matters of adjustment and settlement of losses shall be subject to the rules and regulations of the ports of New York, refers only to the manner of making the adjustment when a liability is admitted, and cannot decide the question of the existence of any liability by the usage of such ports when the insurance is made elsewhere.[13] So the constructive total loss of a whaling ship at a port where whaling outfits are bought and sold, and where the outfits are in safety, is not a constructive total loss of the outfits; and evidence of a usage to regard it as such at the port from which the ship sailed is inadmissible.[14] And usage of the company in matters of insurance is inadmissible to bind another company.[15] Such evidence should be limited to the custom and usage of the company directly concerned. So the practice of other insurance agents in the same town is inadmissible to establish a custom that proofs of loss are not required.[16] But it is held, however, that the phrase "fire by lightning" may be shown, by evidence of the practice of other companies, to mean that the company is not liable where there is no burning.[17]

§ 256. Evidence of usage: liberal construction.—Much stress has been placed upon the statements made by the courts in many of the early insurance cases, looking toward a liberal construction of policies in reference to usage. Thus, it is said in Long v. Allen,[18] that "in mercantile cases from Lord Holt's time, and in policies of insurance in particular, a great latitude of construction as to usage has been admitted. By usage, places come within the policy that are not within the words." This idea, however, arose in a great measure from the clumsiness of the instrument,[19] and because insurance is based upon mercantile law and the customs of merchants,

[11] Mason v. Franklin Fire Ins. Co. 12 Gill & J. (Md.) 468.

[12] Natchez Ins. Co. v. Stanton, 2 Smedes & M. (Miss.) 340, 41 Am. Dec. 592.

[13] Hazleton v. Manhattan Fire Ins. Co. 11 Biss. (U. S. C. C.) 210, 12 Fed. 159.

[14] Taber v. China Mut. Ins. Co. 131 Mass. 239.

[15] Reynolds v. Continental Ins. Co. 36 Mich. 131; American Ins. Co. v. Neiberger, 74 Mo. 167.

[16] Phœnix Ins. Co. v. Munger, 49 Kan. 178, 30 Pac. 120.

[17] Babcock v. Montgomery Co. Mut. Ins. Co. 6 Barb. (N. Y.) 637, 4 Comst. (N. Y.) 326.

[18] 4 Doug. 276, per Buller, J. See also Coggeshall v. American Ins. Co. 3 Wend. (N. Y.) 283.

[19] Gordon v. Little, 8 Serg. & R. (Pa.) 562, 11 Am. Dec. 632, per Gibson, J.

and that down to Lord Mansfield's time there had been few adjudications on questions in insurance law and the custom of merchants, usage was necessary to be resorted to for interpretation;[20] but Story, J.,[1] says that usage, though in former times freely resorted to,[2] "is now subjected by our courts to more exact and well-defined restrictions . . . and it should therefore . . . be admitted with a cautious reluctance and scrupulous jealousy."[3]

§ 257. What is sufficient evidence of usage.—The court determines the admissibility of evidence of usage, and it will, as we have seen, be cautious in this respect, and the evidence thereof ought to be clear and satisfactory to the jury.[4] The question is, did the usage claimed exist, and this must be established by instances known to the witnesses, coupled with evidence of its duration and that it is uniform,[5] and a few or occasional instances are insufficient to establish a usage.[6] So of a single witness or individual,[7] and wit-

[20] See Smith v. Wilson, 3 Barn. & Adol. 728, per Parke, J.

[1] In Rogers v. Mechanics' Ins. Co. 1 Story (U. S. C. C.) 607, Fed. Cas. No. 12016.

[2] As a rule it was, but *examine* Anderson v. Pitcher, 2 Bos. & P. 164, 168, per Lord Eldon; Lethiellier's case, 2 Salk. 443, per Lord Holt.

[3] See also Palmer v. Warren Ins. Co. 1 Story (U. S. C. C.) 360, Fed. Cas. No. 10698; Schooner Reeside, 2 Sum. (U. S. C. C.) 567, Fed. Cas. No. 11,657, per Story, J.

[4] See Bentaloe v. Pratt, Wall. Sr. (U. S. C. C.) 58, Fed. Cas. No. 1330. See Leach v. Perkins, 17 Me. 465, 35 Am. Dec. 268; Winsor v. Dillawney, 4 Metc. (45 Mass.) 221, 223; Pelly v. Royal Exch. Assur. Co. 1 Burr. 341, 349, 14 Eng. Rul. Cas. 30; Lucas v. Growing, 7 Taunt. 164; Crofts v. Marshall, 7 Car. & P. 597; Gabay v. Lloyd, 3 Barn. & C. 793; Greenleaf on Evidence (14th ed.) sec. 292 et seq.

[5] Rogers v. Mechanics' Ins. Co. 1 Story (U. S. C. C.) 603, Fed. Cas. No. 12016, per Story, J.; Martin v. Delaware Ins. Co. 2 Wash. (U. S. C. C.) 254, Fed. Cas. No. 9161; Illinois Masons' Benevolent Soc. v. Baldwin, 86 Ill. 479; Hennessy v. New York M. M. Ins. Co. 1 Old. (Nov. Sc.) 259; Durrell v. Bederly, 1 Holt N. P. 283, per Gibbs, J.; Syers v. Bridge, 2 Doug. 527, 530, per Lord Mansfield; Salisbury v. Townson, 1 Burr. 341; Millar's Ins. 418.

[6] *United States.*—Trott v. Wood, 1 Gall. (U. S. C. C.) 443, Fed. Cas. No. 14,190.

Connecticut.—Crosby v. Fitch, 12 Conn. 422, 31 Am. Dec. 745.

Dakota.—Clevenger v. Mutual Life Ins. Co. 2 Dak. 114.

Louisiana.—Herman v. Western Fire & Marine Ins. Co. 13 La. O. S. (7 La. N. S. 325) 516.

Massachusetts.—Taunton Copper Co. v. Merchants' Ins. Co. 22 Pick. (39 Mass.) 108.

New York.—Bunten v. Orient Mutual Ins. Co. 4 Bosw. (N. Y.) 254.

England.—Bond v. Nutt, 2 Cowp. 601; Cutter v. Powell, 6 Term Rep. 320, 6 Eng. Rul. Cas. 627.

Isolated instances are insufficient to prove a custom, and cannot be shown to overcome or change the express provisions of a contract of insurance. Kocher v. Supreme Council Catholic Benevolent Legion, 65 N. J. L. 649, 86 Am. St. Rep. 687, 52 L.R.A. 861, 48 Atl. 544.

[7] Parrott v. Thatcher, 9 Pick. (26 Mass.) 426; Loring v. Gurney, 5 Pick. (22 Mass.) 15.

nesses are confined to the fact of usage, and will not be permitted to give their opinions.[8]

§ 258. Evidence of usage, when admissible: cases.—The following cases illustrate when usage is admissible: Thus, an insurer is liable for a loss occurring within the general course of a trade, of which he is presumed to have knowledge, as in case goods are lost from the deck of a lighter in being transmitted from the ship at quarantine to the customary landing place.[9] And a well-known usage of boats in the Mississippi trade to touch at intermediate ports will cover additions to the cargo received in the usual manner at such ports.[10] So if goods are lost while in transportation from the shore to a ship engaged in a trading voyage, the insurer is liable if such transportation is according to usage.[11] The course of trade in a particular place governs the construction, as where the usual method of unloading and reshipping in a place was "that when there is no British ship there, then the goods are to be kept in store ships," and if it is usual to stay a certain time at a port or to go out of the way, the insurer is considered as understanding that usage.[12] So acts done by the assured to avoid confiscation under the laws of a foreign power are valid if warranted by the usage of trade.[13] Thus a concealment of papers is not a breach of warranty if, by the usage of trade, it is necessary that they should be on board although they increase the risk of capture.[14] It may be shown that it is the custom generally to charge a higher premium for unoccupied dwelling-houses,[15] also that it is a general custom to refuse risks on vacant houses.[16] So usage is admissible to explain a blank,

[8] Winthrop v. Union Ins. Co. 2 Wash. (C. C.) 7, Fed. Cas. No. 17901, per Washington, J.; Rogers v. Mechanics' Ins. Co. 1 Story (U. S.) 603, Fed. Cas. No. 12016, per Story, J.; Astor v. Union Ins. Co. 7 Cow. (N. Y.) 202; Gordon v. Little, 8 Serg. & R. (Pa.) 549, 11 Am. Dec. 632, 636, per Tilghman, C. J.; Syers v. Bridge, Doug. 512; 569; Crofts v. Marshall, 7 Car. & P. 597.

Story, J., in Rogers v. Mechanics' Ins. Co. 1 Story (C. C.) 607, Fed. Cas. No. 12016, declares that "this court has nothing to do with the private opinions of witnesses, however respectable, which respect the proper interpretation of contracts."

[9] Wadsworth v. Pacific Ins. Co. 4 Wend. (N. Y.) 33.

[10] Stillwell v. Home Ins. Co. 3 Dill. (C. C.) 80, Fed. Cas. No. 13450.

[11] Coggeshall v. American Ins. Co. 3 Wend. (N. Y.) 283.

[12] Pelly v. Royal Exch. Assur. Co. 1 Burr. 341, 348, 349, 14 Eng. Rul. Cas. 30. See also Matthie v. Potts, 3 Bos. & P. 23.

[13] Livingston v. Maryland Ins. Co. 7 Cranch (11 U. S.) 506, 3 L. ed. 421.

[14] Livingston v. Maryland Ins. Co. 6 Cranch (10 U. S.) 274, 3 L. ed. 222, 7 Cranch (11 U. S.) 506, 3 L. ed. 421.

[15] Luce v. Dorchester Mut. Fire Ins. Co. 105 Mass. 298, 7 Am. Rep. 522.

[16] Kirby v. Phœnix Ins. Co. 13 Lea (81 Tenn.) 340.

as "A B on account of ——." [17] So the nature of the subject-matter may be such that usage is admissible to construe the contract,[18] and in estimating the damage in case of partial loss evidence is competent of the custom of merchants in relation to the sale.[19] So where the insurance was "from" Amsterdam, a custom for vessels of certain tonnage to take in part of their cargo at Amsterdam and the rest at another port is admissible.[20] So evidence of a custom for one boat to stop and aid another in distress is competent.[1] Usage of a particular trade to keep goods on board for a long time after the ship's arrival is admissible.[2] So evidence is admissible of a particular custom whereby the party holding a certificate thereof kept an account of shipments made and covered by the certificate, reporting the same monthly to the agent.[3] So usage between a principal and his agent may determine their rights, as in case whether a lien on the policy exists in favor of the agent.[4] So the commencement [5] and termination of a risk may be determined by usage.[6]

So, evidence of a custom as to the time when a parol contract of insurance should become operative is admissible where the parties have agreed upon nothing in relation thereto.[6a] So a clearance for a port without intending to go there may be justified by a constant and notorious usage of the trade, as where it was the custom for ships going with British goods to France to clear for Ostend.[7] So evidence of a custom is admissible that policies executed, but not delivered, are held for the benefit of the insured.[8] So usage of commission merchants in New York to effect, without orders from their consignors, insurance on goods consigned to them for sale is admissible.[9] And usage to put into a certain port for bait where the vessel was engaged in cod-fishing may be shown.[10] So a contract may be governed in certain cases by the uniform and settled custom of the company, with reference to conditions contained in

[17] Turner v. Burrows, 5 Wend. (N. Y.) 541, 8 Id. 144.

[18] Sayles v. Northwestern Ins. Co. 2 Curt. (C. C.) 610, Fed. Cas. No. 12422, per Curtis, J.

[19] Stanton v. Natchez Ins. Co. 6 Miss. (5 How.) 744.

[20] Mey v. South Carolina Ins. Co. 3 Brev. (S. C.) 329.

[1] Walsh v. Homer, 10 Mo. 6, 45 Am. Dec. 342.

[2] Noble v. Kennoway, Doug. 492.

[3] Hartshorne v. Union Mutual Ins. Co. 36 N. Y. 172.

[4] Green v. Farmer, 4 Burr. 2214.

[5] Kingston v. Knibbs, 1 Camp. 508.

[6] Gracie v. Maryland Ins. Co. 8 Cranch (12 U. S.) 75, 3 L. ed. 492.

[6a] Cleveland Oil & Paint Manufacturing Co. v. Norwich Union Fire Ins. Co. 34 Oreg. 228, 55 Pac. 435.

[7] Planche v. Fletcher, Doug. 251.

[8] Baxter v. Massasoit Ins. Co. 13 Allen (95 Mass.) 320.

[9] DeForest v. Fulton Fire Ins. Co. 1 Hall (N. Y.) 84.

[10] Burgess v. Equitable Life Ins. Co. 126 Mass. 70, 30 Am. Rep. 654.

like policies,[11] and a usage by an incorporated benevolent society, showing a valid practical construction by it of a by-law relating to holding the annual meeting and election, is admissible in quo warranto to determine title to office in the society.[12] In all cases of local or partial usage the insurers will be bound where it was expressly communicated to them and the contract based thereon.[13] So, the local usage of a place is of importance in construing the iron safe clause, and it is proper to prove what the custom of stores is in a place or district to accommodate trade there, where such custom is one of which the insurer is bound to take notice.[13a] Again, evidence of a universal custom of insurance adjusters in respect to proofs of loss on a retail stock of merchandise is held admissible.[13b]

§ 259. Evidence of usage, when inadmissible: cases.—The following cases illustrate when usage is inadmissible: Thus, a local custom as to the materiality of an undisclosed fact respecting the risk is inadmissible, unless it is communicated to the insured or is of such a character that a presumption of knowledge thereof attaches thereto;[14] nor is evidence admissible of a usage in New York to give the insurer notice when anything is done by the assured to increase the risk.[15] So the usage of a company to require particular proof of loss does not bind the insurer where not known to him,[16] and no law or usage requires the assured to have his house, if untenanted, guarded by a keeper.[17] So a usage in a particular mill or locality to keep a watchman over Sunday is inadmissible where the policy is unambiguous.[18] In estimating a loss under an open policy of marine insurance evidence of the usage of a particular port is inadmissible to vary the rule that the damages are to be based on the market value of the goods at the inception of the risk and not

[11] Home Ins. Co. v. Favorite, 46 Ill. 263.

[12] State v. Conklin, 34 Wis. 21.

[13] Gabay v. Lloyd, 3 Bing. 793; 1 Duer on Insurance (ed. 1845) 264. See further as to when custom or usage is admissible, §§ 84, 120 herein, and chapters on Seaworthiness, Duration, Risk, and Premium.

[13a] Capital Fire Ins. Co. v. Kaufman, 91 Ark. 310, 121 S. W. 289, 38 Ins. L. J. 289.

[13b] Sherlock v. German American Ins. Co. 47 N. Y. Supp. 315, 21 App. Div. 18, case aff'd 162 N. Y. 656, 57 N. E. 1124.

As to settlement of losses and usages of Lloyds in respect thereof, see 17 Earl of Halsbury's Laws of England, p. 352; Canton Ins. Office, Ltd. v. Woodside, 90 Fed. 301, 33 C. C. A. 63, 61 U. S. App. 214, 28 Ins. L. J. 269.

[14] Hartford Protection Ins. Co. v. Harmer, 2 Ohio St. 452, 59 Am. Dec. 684.

[15] Stebbins v. Globe Ins. Co. 2 Hall (N. Y.) 632.

[16] Taylor v. Æna Life Ins. Co. 13 Gray (79 Mass.) 434, per Metcalf, J. See § 258 herein.

[17] Lowe v. Merchants' Ins. Co. 6 La. Ann. 761.

[18] Glendale Woolen Co. v. Pro-

on the invoice price.[19] Where by the terms of a policy a vessel was insured "to a port in Cuba, and at and thence to a port of advice, and discharge in Europe," and the vessel was lost in going from the port of discharge in Cuba to another port in the same island for reloading, it was held, in a suit on the policy for a loss, that evidence by the assured was inadmissible to show a usage that vessels going to Cuba might visit at two ports, one for discharge and another for loading.[20] So "the usage or custom of a particular port in a particular trade is not such a custom as the law contemplates to limit or control or qualify the construction of contracts of insurance," [1] and evidence is inadmissible of an alleged custom of insurance companies, claimed to have been known to plaintiff's agent, that upon the happening of a future event the policy should be void, said condition not having been inserted in the policy.[2] Nor is evidence admissible of a custom that when insurance is made on goods with a particular mark, those goods, so marked, must be on board, in order to charge the underwriter with the loss;[3] and there is no law or usage that requires the master of a vessel to accept a general average bond in place of the cargo, after the adjustment of loss has been completed.[4] Nor does the length of time a vessel may wait to take in her cargo without discharging the underwriters depend on the usage of the trade.[5] And it is not competent to prove a custom that notice to a broker by the agent of the company should operate to cancel a policy. So held in an action against the agent by the principal seeking recovery for a loss paid by the company which occurred after it had directed the agent to cancel.[6] So held, also, where notice of cancelation was given to the local agent.[7] A particular usage of insurance companies with respect to risks on grain in elevators does not bind the insured in the absence of proof of knowledge on his part,[8] and where the in-

tection Ins. Co. 21 Conn. 19, 54 Am. Dec. 19; Ripley v. Ætna Ins. Co. 30 N. Y. 136, 86 Am. Dec. 362.

[19] Warren v. Franklin Ins. Co. 104 Mass. 518.

[20] Hearne v. Marine Ins. Co. 20 Wall. (87 U. S.) 488, 22 L. ed. 395.

[1] Rogers v. Mechanics' Ins. Co. 1 Story (C. C.) 603, Fed. Cas. No. 12016, per Story, J. See remarks hereon in 1 Phillips on Insurance (3d ed.) sec. 140.

[2] Candee v. Citizens' Ins. Co. 4 Fed. 143, *citing* Partridge v. Phœnix Mutual Life Ins. Co. 15 Wall. (82 U. S.) 573, 21 L. ed. 229; Oelrichs v. Ford, 23 How. (64 U. S.) 49, 16 L. ed. 534.

[3] Ruan v. Gardner, 1 Wash. (C. C.) 145, Fed. Cas. No. 12,100.

[4] The Water Witch's Cargo, 29 Fed. 159.

[5] Oliver v. Maryland Ins. Co. 7 Cranch (11 U. S.) 487, 3 L. ed. 414.

[6] Franklin Ins. Co. v. Sears, 21 Fed. 290.

[7] Hodge v. Security Ins. Co. 33 Hun. (N. Y.) 583.

[8] Pettit v. State Ins. Co. 41 Minn. 299, 43 N. W. 378.

surance was upon a boat lying at a wharf in the Ohio river, evidence is not admissible of a custom to remove such boats to the ice harbor, some miles distant, for safety during the season of moving ice.[9] Where goods claimed to have been damaged by perils of the sea were landed on their arrival at New York, before a survey by the wardens of the port, a usage at that port is inadmissible to prove the liability of the master for damages sustained by goods delivered by him to the owner or consignee, unless there had been such survey, and a finding by the wardens that the goods had been stowed properly and were damaged by the perils of the sea, and that by a similar usage as between assurers and assured the survey so made must be produced, in order to charge the assurer, and that the preliminary proof is deemed insufficient unless the survey is exhibited as a part of it.[10] In a suit upon a policy of insurance to recover for a loss, where there is no question as to the rates of insurance charged and paid by the insured, evidence of the custom or usage of insurance companies as to the rates is immaterial.[11]

Parol evidence of usage or custom, either general in the community or special between the people engaged in the particular trade or business, is not admissible to show that an unconditional acceptance of an order to ship goods was subject to the exigencies of transportation and to the further condition that if the goods could not be shipped within a reasonable time the contract was no longer to be obligatory.[11a] And evidence is inadmissible to show a custom of insurers to accept applications from persons who had attempted suicide.[11b]

[9] Franklin Ins. Co. v. Humphrey, 65 Ind. 549, 32 Am. Rep. 78.

[10] Rankin v. American Ins. Co. 1 Hall (N. Y.) 619.

[11] King v. Enterprise Ins. Co. 45 Ind. 43.

[11a] R. J. Menz Lumber Co. v. E. J. McNeeley & Co. 52 Wash. 223, 28 L.R.A.(N.S.) 1007, 108 Pac. 621.

[11b] Louis v. Connecticut Mutual Ins. Co. 68 N. Y. Supp. 683, 58 App. Div. 137, case aff'd 172 N. Y. 659, 65 N. E. 1119.

CHAPTER X.

THE POLICY—ALTERATION AND MODIFICATION.

§ 265. Material alteration without consent avoids contract.
§ 266. Immaterial alteration does not avoid contract.
§ 267. Alteration when contract is inchoate.
§ 268. Alteration by a third party.
§ 269. Alteration by the insurer.
§ 269a. Substitution of corrected policy by insurer.
§ 270. Material alteration of policy may be made by consent.
§ 271. Same subject: decisions.
§ 271a. Alteration of certificate of membership: consent.
§ 272. Alteration of contract by parol.
§ 273. Same subject: decisions.
§ 274. Alteration with intent to obtain insurer's consent.
§ 275. Same subject: decisions.
§ 276. Alteration: substitution of parties.
§ 276a. Alteration or modification of standard policy.

§ 265. Material alteration without consent avoids contract.—If a completed contract of insurance is altered in any material part without the consent of the parties thereto, such alteration makes the entire contract void.[12] So a material and unauthorized alteration of the application after the delivery of the policy of which it is a part, and which is apparent on the face of the application will preclude a defense of misrepresentations.[12a] What constitutes

[12] Langhorne v. Cologan, 4 Taunt. 330; 1 Duer on Insurance (ed. 1845) 78, sec. 24, et seq.; Chitty on Contracts, 7th Am. ed. 783–85, notes; Fairlie v. Christie, 7 Taunt. 416; Phœnix Ins. Co. of Hartford v. McKernan, 100 Ky. 97, 18 Ky. L. Rep. 617, 37 S. W. 490. See in general, Baldwin v. Haskell National Bank, 104 Tex. 122, 133 S. W. 864, 134 S. W. 1178, rev'g — Tex. Civ. App. —, 124 S. W. 443.

Generally: material alteration avoids, though made innocently. Barton Savings Bank & Trust Co. v. Stephenson, 87 Vt. 433, 51 L.R.A. (N.S.) 346 (annotated on alteration of date of note) 89 Atl. 639.

[12a] Kansas Mutual Life Ins. Co. v. Coalson, 22 Tex. Civ. App. 64, 54 S. W. 388.

What is not a material alteration of copy of application, see Steeley's Creditors v. Steeley, 23 Ky. L. Rep. 996, 64 S. W. 642.

a material alteration is a question of much importance. If the words are introduced into the body of the policy and increase the risk, they are certainly material, and in consequence nullify the contract,[13] and we apprehend that any alteration would be material which would operate to so change the risk or subject matter as to make the policy essentially variant in terms from that intended by the parties at the time of its completion, and words which would legally effect this result wherever written, whether on the margin of the policy or elsewhere, constitute a material alteration,[14] for the necessary result of a material alteration is to substitute a new contract in place of the old, which can be legally effected only with the insurer's consent under an original agreement or by subsequent ratification, or through a court of proper and competent jurisdiction.[15]

§ 266. Immaterial alteration does not avoid contract.—If the alteration adds nothing to the contract nor detracts therefrom, and makes it none the less the contract legally contemplated by the parties at the time of its completion, the alteration is immaterial, and while a policy of insurance is an instrument of much solemnity, even where not under seal, its alteration in an immaterial point does not affect its validity.[16] So if the law would imply the words added, they do not operate to annul the contract,[17] and where the words "and trade" were inserted in the policy, they were held im-

[13] Forshaw v. Chabert, 3 Brod. & B. 158.

[14] Mr. Duer (1 Duer on Ins. [ed. 1845] 81) asserts that words on the margin, if material, avoid the policy. See also 1 Parsons on Ins. (ed. 1868) 138, note 1. See Forshaw v. Chabert, 6 Moore, 369, 386.

What constitutes a material alteration of contract: Generally, see Wicker v. Jones, 159 N. Car. 102, 74 S. E. 801, 40 L.R.A.(N.S.) 169, Ann. Cas. 1914B, 1083n; Barton Savings Bank & Trust Co. v. Stephenson, 87 Vt. 433, 89 Atl. 639, 51 L.R.A.(N.S.) 346 and note.

[15] See 1 Marshall on Ins. (ed. 1810) 343.

[16] Sanderson v. McCallum, 4 Moore, 5; Nichols v. Johnson, 10 Conn. 192; Sanderson v. Symonds, 1 Brod. & B. 426; Pequamket Bridge v. Mathes, 8 N. H. 139; Hunt v. Adams, 6 Mass. 519. "But in a simple contract which is merely evidence of a promise, an immaterial alteration, however made, not at all affecting the terms of the promise, seems not to be within the same principle of deeds which from the alteration may not be the deeds of the parties, while a similar alteration in a written simple contract might leave it complete evidence of the same contract:" Id., per Parsons, C. J., "When the alteration is wholly immaterial, . . . the assent of the underwriters is wholly unimportant. Those who assent are bound by the policy as altered; those who dissent, by its original form, but the liability in both classes is precisely the same, and the distinction between the two contracts, where a suit is commenced, consists, not in the nature and extent of the relief, but solely in the form of declaring:" 1 Duer on Ins. (ed. 1845) 80. See 1 Parsons on Marine Insurance (ed. 1868) 140.

[17] Hunt v. Adams, 6 Mass. 519; 1 Greenleaf on Evidence, sec. 567.

material, in view of the fact that the policy as it stood before the alteration gave by implication a power to trade.[18]

§ 267. Alteration when contract is inchoate.—Where the alteration is material, and is made before subscription while the contract is in fieri, it does not vitiate the policy,[19] for when the contract is imperfect and inchoate the assured, by preventing the inception of the risks, may prevent it from becoming operative and in effect dissolve it, but in no other case can he release himself by his own act from his own obligations.[20]

§ 268. Alteration by a third party.—If the alteration be made by a third person without the consent, co-operation, or privity of the insured, or without his being responsible therefor, it does not invalidate the policy.[1]

§ 269. Alteration by the insurer.—It is held in a Massachusetts case [2] that an alteration of the policy by an agent of the company who made a certain indorsement thereon, which was not agreed to by the parties and which would have operated to prevent a recovery did not affect the contract, but that such alteration was void. And in a Delaware case [3] it was held that the terms of the contract were not affected by an indorsement on the policy made by the secretary of an insurance company at the request of the insured, whereby the insurance was transferred from the goods in a building to the building itself. But when alterations are accustomed to be made by the president or secretary, an alteration made by either is valid.[4] And where an alteration is made in the terms of the policy by a clerk of an insurance company, and he enters the same in the record-book, sufficient notice thereof is thereby given the company.[5]

And a fraudulent alteration by insurer's agent may preclude defenses by the insurer.[5a]

Again, an application which is part of the contract may be so far severed therefrom that a material alteration in said application

[18] Sanderson v. Symonds, 1 Brod. & B. 426, 4 Moore, 42.

[19] Robinson v. Tobin, 1 Stark. 336, per Lord Ellenborough.

[20] Langhorn v. Cologan, 4 Taunt. 330; 1 Duer on Ins. (ed. 1845) 82, sec. 27.

[1] Langhorn v. Cologan, 4 Taunt. 330; Rees v. Overbaugh, 6 Cow. (N. Y.) 746; Jackson v. Malin, 15 Johns. (N. Y.) 293, per Platt, J.; Nicholas v. Johnson, 10 Conn. 192. See also, generally, Fry v. Jenkins, 173 Ill. App. 486; Wicker v. Jones, 159 N. Car. 102, 40 L.R.A.(N.S.) 169, Ann. Cas. 1914B, 1083n, 74 S. E. 801.

[2] Kennebec Co. v. Augusta Ins. & Banking Co. 6 Gray (72 Mass.) 204.

See note in 38 L.R.A.(N.S.) 630, on insurance broker as agent for insured in alteration of policy.

[3] Hoffecker v. New Castle Co. Mutual Ins. Co. 5 Del. 101.

[4] Warren v. Ocean Ins. Co. 16 Me. 439, 33 Am. Dec. 674.

[5] Washington Ins. Co. v. Dawson, 30 Md. 91. See § 272 herein, on alteration by parol.

[5a] Swan v. Watertown Fire Ins. Co. 96 Pa. 37.

by the insurer or through its negligence may preclude reserved defenses.[5b] And a letter from insurer is held not to constitute a modification there being no request therefor by insured.[6]

§ 269a. Substitution of corrected policy by insurer.—An accident insurance company has power, after the occurrence of an accident under a policy in which the occupation of the insured was incorrectly described, to substitute a corrected policy therefor, and render itself liable thereunder for such previous accident.[7]

§ 270. Material alteration of policy may be made by consent.—There is no doubt but that the parties may make such lawful alterations and modifications as they wish of contracts of insurance which have been completed between them. Such alterations or modifications may be made by indorsements on the policy, either marginal, or on its back, or by inserting words in the body of the instrument, or by a separate paper, or orally.[8] And a change made with the consent of insured's agent may be ratified by the principal's acts.[9] And the contract may upon a sufficient consideration be subsequently modified by limiting the amount recoverable.[10] But if the insurer, after issuing a policy insuring against accident, notifies the insured of a change of classification greatly lessening the amount of his indemnity, his assent to such change is not to be conclusively inferred where he did not expressly assent, nor forward his policy to have it rewritten as requested, and the dues and assessments paid and required to be paid were the same as before.[11]

Again, if, after a contract of insurance is effected, a memorandum is sent to the assured in effect modifying such terms, he is not deemed to have accepted or acquiesced in this modification, because of his silence respecting it, where it is not shown that the insurer was influenced in his conduct by the silence of the assured.[11a]

[5b] Kansas Mutual Life Ins. Co. v. Coalson, 22 Tex. Civ. App. 64, 54 S. W. 388.

[6] Pringle Bros. v. Philadelphia Casualty Co. 138 N. Y. Supp. 330, 153 App. Div. 180.

[7] Ford v. United States Mutual Accident Relief Co. 148 Mass. 153, 1 L.R.A. 700, 19 N. E. 169.

[8] Hoffecker v. New Castle County Ins. Co. 4 Houst. (Del.) 306; Mattingly v. Springfield Fire & Marine Ins. Co. 26 Ky. L. Rep. 1187, 83 S. W. 577, 34 Ins. L. J. 136; Northrup v. Mississippi Valley Ins. Co. 47 Mo. 435, 4 Am. Rep. 337; Bell v. Marine Ins. Co. 8 Serg. & R. (Pa.) 98; Robinson v. Tobin, 1 Stark. 336; 1 Phillips on Ins. sec. 109; 1 Duer on Ins. (ed. 1845) 78, secs. 24 et seq. and see cases next section.

Consideration necessary. See Patterson v. American Ins. Co. 164 Mo. App. 157, 148 S. W. 448.

[9] Belt v. American Central Ins. Co. 163 N. Y. 555, 57 N. E. 1104.

[10] Kettelmann v. Fire Assoc. of Phila. 79 Mo. App. 447, 2 Mo. App. Reptr. 487.

[11] Morse v. Fraternal Accident Assoc. 190 Mass. 417, 112 Am. St. Rep. 337, 77 N. E. 491.

[11a] Shakman v. United States

§ 271. Same subject: decisions.—Almost any change as to parties or terms may be made by indorsement with consent.[12] So the contract may be altered by a writing on the margin of the policy increasing the valuation,[13] or covering other property,[14] and the termini may be changed by a proper indorsement on the policy,[15] and an additional agreement may be made to cover certain shipments not covered by the original policy.[16] So a deviation from the risk assumed in the policy may be agreed upon between the parties by indorsement written across the policy, although it is not signed, where it has been the practice of the company to make alterations in the risk in this manner, and such change is recorded by the secretary.[17] So an indorsement may be made giving the captain authority to act as his own pilot, without prejudice to the insurance.[18]

§ 271a. Alteration of certificate of membership: consent.—A certificate of membership in an insurance benefit society is a contract which can be changed only by and with the consent of both parties.[19]

§ 272. Alteration of contract by parol.—It has been held that the alteration must be of as high a nature as the contract itself, whether made by indorsement or upon a separate paper, and that it must be subscribed by the underwriters.[20] But the authorities are now numerous, and there is no doubt but that in the absence of a statutory provision the parties may by consent alter, modify, or enlarge the terms of a policy of insurance by parol, for the fact that the

Credit System Co. 92 Wis. 366, 53 Am. St. Rep. 920, 32 L.R.A. 383, 66 N. W. 528.

[12] Howes v. Union Ins. Co. 16 La. Ann. 235.

[13] Robinson v. Tobin, 1 Stark. 336.

[14] Northrup v. Mississippi Valley Ins. Co. 47 Mo. 435, 4 Am. Rep. 337.

[15] Bell v. Marine Ins. Co. 8 Serg. & R. (Pa.) 98.

[16] Marx v. National Marine & Fire Ins. Co. 25 La. Ann. 39.

[17] Warren v. Ocean Ins. Co. 16 Me. 439, 33 Am. Dec. 674. See Kershaw v. Cox, 3 Esp. 246.

[18] Gulf of California Navigation & Express Co. v. State Invest. & Ins. Co. 70 Cal. 586, 12 Pac. 473.

[19] Russ v. Supreme Council American Legion of Honor, 110 La. 588, 98 Am. St. Rep. 469, 34 So. 697. See §§ 377–380 herein.

[20] Kaines v. Knightly, Skin. 54.

A contract varying a policy is as much an instrument as the policy itself and, therefore, can be executed only in the manner prescribed by law. Head v. Providence Ins. Co. 2 Cranch (6 U. S.) 127, 2 L. ed. 229, *cited* in Laclede Fire Brick Manufacturing Co. v. Hartford Steam-Boiler Inspection Co. 60 Fed. 358, 9 C. C. A. 7, 19 U. S. App. 510; Presbyterian Mutual Assurance Fund v. Allen, 106 Ind. 596, 7 N. E. 317; Leonard v. American Ins. Co. 97 Ind. 304; Platho v. Merchants' & Manufacturers' Ins. Co. 38 Mo. 255; Hathron v. Germania Ins. Co. 55 Barb. (N. Y.) 34. As to execution of policy, see §§ 178 et seq. herein.

contract is written does not prevent its change, enlargement, or continuance by a subsequent parol agreement.[1] So the alterations may be made by consent without a new signature,[2] but where the contract is required by statute to be in writing, it cannot be shown to have been altered by parol after its execution.[3] And where a statute requires that a contract of fire insurance, to be binding, must be made in writing, an agreement to alter such contract must be in writing.[4]

Parties may stipulate that a policy may be modified only by a writing of equal dignity and credit with the policy itself, and a "loss-payable" indorsement may be written upon the policy in pursuance of a mutual and expressly declared purpose to make it, with the indorsement, a complete and entire agreement and pre-

[1] Westchester Fire Ins. Co. v. Earle, 33 Mich. 143; Hartford Fire Ins. Co. v. Webster, 69 Ill. 392, 393; Howell v. Knickerbocker Life Ins. Co. 44 N. Y. 276, 3 Rob. (N. Y.) 232, 19 Abb. Pr. (N. Y.) 217, 4 Am. Rep. 675. Norris v. China Traders' Ins. Co. 52 Wash. 554, 100 Pac. 1025. "In the United States there is no restriction on the rights of the parties to alter their original contract at any time and in any manner they may deem expedient; but in England, although certain alterations are permitted to be made without the addition of a stamp, those that seem the most material, if unstamped, are wholly invalid:" 1 Duer on Ins. (ed. 1845) 82, sec. 28; 1 Parsons on Ins. (ed. 1868) 139 note. But this statement should be qualified in view of statutory provisions requiring the contract to be in writing, and perhaps in case of revenue stamp acts and provisions of charters and by-laws of mutual companies or societies.

Contracts of insurance may be altered by parol. Knickerbocker Life Ins. Co. v. Norton, 96 U. S. 234, 24 L. ed. 689.

Cited in: *United States.*—Mutual Reserve Fund Life Assoc. v. Cleveland Woolen Mills, 82 Fed. 508, 513, 27 C. C. A. 212, 217, 54 U. S. App. 290; London & Lancashire Fire Ins. Co. v. Storrs, 71 Fed. 120, 125, 17 C. C. A. 645, 650, 36 U. S. App. 327; Fireman's Fund Ins. Co. v. Norwood, 69 Fed. 71, 75, 16 C. C. A. 136, 140, 32 U. S. App. 490.

Massachusetts.—Emery v. Boston Marine Ins. Co. 138 Mass. 398, 412.

Michigan.—Cobbs v. Fire Assoc. of Phila. 68 Mich. 463, 464, 36 N. W. 222.

Mississippi.—Home Ins. Co. v. Gibson, 72 Miss. 58, 65, 17 So. 13.

Missouri.—Burdick v. Security Life Assoc. 77 Mo. App. 629, 635; Burnham v. Greenwich Ins. Co. 63 Mo. App. 85, 88, 1 Mo. App. Repr. 616.

Tennessee.—Dale v. Continental Ins. Co. 95 Tenn. 38, 49, 31 S. W. 266; American Central Ins. Co. v. McCrea, 8 Lea, 513, 525, 41 Am. Rep. 647.

Texas.—Cohen v. Continental Fire Ins. Co. 67 Tex. 325, 328, 60 Am. Rep. 24, 3 S. W. 296; Missouri Kansas & Texas Ry. Co. v. Cook, 8 Tex. Civ. App. 376, 381, 27 S. W. 769.

[2] Warren v. Ocean Ins. Co. 16 Me. 439, 33 Am. Dec. 674.

[3] Mitchell v. Universal Life Ins. Co. 54 Ga. 289.

[4] Lippman v. Ætna Ins. Co. 108 Ga. 391, 33 S. E. 897, 28 Ins. L. J. 886, 887, Ga. Civ. Code, sec. 2089. The court declared that such was the rule by repeated adjudications in that state.

clude a resort to parol evidence.[5] But it is also held that the rule that a written contract may be changed by a subsequent parol agreement is not changed by the fact that the contract provides that no subsequent agreement shall be valid unless in writing and endorsed on the policy, for this part of the contract stands like any other part of it.[6]

§ 273. Same subject: decisions.—Where before the expiration of the policy the insured goods were removed to another story in the same building, and the insurer, knowing such fact, issued a renewal receipt and received the consideration, it was held that this was equivalent to an indorsement or assent by parol to the change of location, and was a modification of the contract.[7] So it was held that the policy might be changed by a subsequent parol agreement, although the policy provided that "the use of general terms, or anything less than a distinct, specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction herein contained."[8] So the contract may be modified by a subsequent agreement that a mill may be run all night where the policy provides otherwise,[9] and an oral agreement to extend the insurance in an open policy to additional merchandise may be valid, notwithstanding the policy provides that it shall not be binding until countersigned at the general office, and there is no countersigning as respects the extension;[10] and notwithstanding a provision in the by-laws of an insurance company that the president shall receive applications, fix rates, and sign all policies, it may be inferred from evidence of the way in which the business of the company was actually done that the secretary had authority to make a binding oral agreement to enter an indorsement on a policy.[11] Where the loss is payable to the mortgagee, with a condition to be void in case of change in title or alien-

[5] Atlas Reduction Co. v. New Zealand Ins. Co. 9 L.R.A.(N.S.) 433, 138 Fed. 497, 71 C. C. A. 21, 34 Ins. L. J. 805, aff'g 121 Fed. 929.

[6] Mattingly v. Springfield Fire & Marine Ins. Co. 26 Ky. L. Rep. 1187, 83 S. W. 577, 34 Ins. L. J. 136.

[7] Ludwig v. Jersey City Ins. Co. 48 N. Y. 379, 8 Am. Rep. 556.

[8] Day v. Mechanics' & Traders' Ins. Co. 88 Mo. 325, 57 Am. Rep. 416.

As to right of parties to original contract to vary terms thereof, see Cowles v. United States Fidelity & Guaranty Co. 32 Wash. 120, 126, 98 Am. St. Rep. 838, 72 Pac. 1032.

As to agents' powers to vary or waive conditions and restrictions in policy, see §§ 439 et seq., 533 et seq. herein. As to agents' power to alter policy, see § 549 herein.

[9] North Berwick Co. v. New England Fire & Marine Ins. Co. 52 Me. 336.

[10] Kennebec Co. v. Augusta Ins. & Banking Co. 6 Gray (72 Mass.) 204.

[11] Emery v. Boston Marine Ins. Co. 138 Mass. 398.

ation, and the property is foreclosed, it may be shown that an agreement was made after the sale that the policy should stand as security for the insured's interest, and that the company would make the proper entries therefor in its books.[12] Where a policy was executed "upon the freight bill of a steamboat, and the boat was injured in the hull so as to lose the voyage, but the insurers and insured made a subsequent agreement "that the insurers would be bound by their policies on cargo and freight bill by a transfer of the same to another boat," it was decided that this agreement exempted the insurers from their liability as to the first boat.[13] In another case where there was no provision in the policy authorizing an indorsement for removal of the insured property, but the property was removed under an indorsement granting permission so to do, it was held that no action would lie under the original policy for the loss, and that the indorsement was a new and distinct contract by parol, upon which an action of covenant could not be sustained.[14] So an oral agreement to pay part of the amount of the insurance within a certain time, such amount to be received in full satisfaction of a claim for loss, is valid.[15] But where an indorsement was made giving liberty to deviate, it was held that parol evidence of the conversation between the parties at the time the indorsement was made was inadmissible.[16] A policy of insurance issued to an agent insuring his principal's property cannot be modified by him and the company by parol, so as to exclude such property, after the contract has been ratified by the principal.[17]

§ 274. Alteration with intent to obtain insurer's consent.—Where the insured makes an alteration on the policy purposing to obtain the insurer's consent thereto, and there are several underwriters, such alteration, if material, avoids the policy in respect to all such underwriters as do not consent.[18]

[12] Pratt v. New York Cent. Ins. Co. 55 N. Y. 505, 64 Barb. 589, 14 Am. Rep. 304.

[13] Field v. Citizens' Ins. Co. 11 Mo. 50.

[14] Shertzer v. Mutual Fire Ins. Co. 46 Md. 506. See Maryland Fire Ins. Co. v. Gusdorf, 43 Md. 506.

[15] Millers' Ins. Co. v. Kinneard, 136 Ill. 199, 26 N. E. 368.

[16] Seccomb v. Provincial Ins. Co. 10 Allen (92 Mass.) 305. *Compare* Norris v. China Traders' Ins. Co. 52 Wash. 554, 100 Pac. 1025.

[17] Johnston v. Charles Abresch Co. 123 Wis. 130, 68 L.R.A. 934, 101 N. W. 395, 107 Am. St. Rep. 995.

[18] Forshaw v. Chabert, 3 Brod. & B. 158; Campbell v. Christie, 2 Stark. 64; Laird v. Robertson, 4 Brown Parl. C. 488; Fairlie v. Christie, 7 Taunt. 416; 1 Duer on Ins. (ed. 1845) 79, sec. 24 et seq. In the case of an alteration made without fraudulent intent, with the purpose of obtaining the underwriter's consent, but which is not obtained, Mr. Parsons (1 Parsons on Marine Ins. [ed. 1868] 142) refers to Mr. Duer's (1 Duer on Ins. [ed. 1845] 80)

§ 275. **Same subject: decisions.**—Where the date when certain ships were warranted to sail was struck out and a later date inserted in the memorandum, with the purpose of getting the assent of the insurers, it was held that an underwriter was not bound who did not assent.[19] and where a blank was filled out in writing with the names and quantities of certain articles, so that the insurance might attach specifically thereon, it was held a material alteration, and not binding on an underwriter who did not give his assent.[20]

§ 276. **Alteration: substitution of parties.**—It was held in an early Massachusetts case [1] that an indorsement on the back of a policy, whereby another underwriter was substituted, was binding, although only signed by the insurance broker,[2] and evidence is admissible to show a substitution of another party in place of the original insured, as in case of the continuation of a partnership business by a member of the firm.[3] So where C. took out a fire policy, borrowed money of F., gave F. a trust deed, caused the secretary of the company to write on the policy, "loss, if any, made payable to F.," sold the property to G. subject to the trust deed, and caused an entry to be made on the company's policy register at the policy's page, "transferred to G.," and G. paid off the trust deed and received the policy from F., it was held that thereupon F.'s interest in the policy vested in G., and that the entry in the register tended to show that the company accepted G. as the insured in place of C., and not of F.[4] And where A. obtained a policy of fire insurance on his museum building and collections, and before the expiration of the policy he sold the insured property to B., and the acting secretary of the insurance company then indorsed on the policy the words "loss, if any, payable to" B., and afterward B. sold the museum collections, and the president of the company

statement that it avoids the policy, and also to Mr. Phillips' opposing view that it does not. But the latter (1 Phillips on Ins. [3d ed.] sec. 114, note 1), referring to Mr. Duer's criticism of the cases relied on by him, says: "I am indebted to Mr. Duer for pointing out my error in stating these two cases in my former editions." Mr. Parsons (1 Parsons on Marine Ins. [ed. 1868] 142) also says: "We doubt whether any universal rule on this subject, either in the affirmative or negative, would be accurate." But Mr. Duer (1 Duer on Ins. [ed. 1845] 80) also declares that "the distinction between the two contracts, where the suit is commenced, consists not in the nature or extent of the relief, but solely in the form of declaring."

[19] Fairlie v. Christie, 7 Taunt. 416, 1 Moore, 114.

[20] Langhorn v. Cologan, 4 Taunt. 330.

[1] Merry v. Prince, 2 Mass. 176.

[2] One judge dissented, and Mr. Duer (1 Duer on Ins. [ed. 1845] 145, 146) says "the propriety of the decision seems very questionable."

[3] Wood v. Rutland Mut. Fire Ins. Co. 31 Vt. 552.

[4] Griswold v. American Cent. Ins. Co. 70 Mo. 654.

made an additional indorsement on the policy in the words, "this policy is hereby changed to cover chairs, benches, and furnaces, instead of museum collection, which is removed," an action being brought upon the policy it was decided that the indorsements constituted valid contracts of insurance, and that the company was liable thereon.[5]

§ 276a. Alteration or modification of standard policy.—If it is intended to modify the provisions contained in the standard form of policies of insurance either by conditions or riders attached to the policy, such intention must be manifested by unambiguous words.[6]

[5] Northrup v. Mississippi Valley Ins. Co. 47 Mo. 435, 4 Am. Rep. 337.

[6] Hardy v. Lancaster, 166 Mass. 210, 55 Am. St. Rep. 395, 33 L.R.A. 241, 44 N. E. 209.

Standard policy; stipulations contra, additions, changes, etc., see § 176b herein.

CHAPTER XI.

WAR—ALIEN ENEMIES.

§ 281. Effect of war generally.
§ 282. Insurances on enemies' property formerly upheld.
§ 283. Insurances on enemies' property now illegal.
§ 284. Same subject: early decisions.
§ 285. Trading with enemy: mistake or ignorance no excuse.
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§ 287. Binding force here of laws of belligerent nations.
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§ 290. Same subject: loss before war.
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§ 292. Right of citizen to bring property from enemy's country.
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§ 294. Who are alien enemies: domicil.
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§ 296. Residence with intent to return.
§ 297. Change of domicil.
§ 298. Alien enemy: what is enemy's country.
§ 299. Alien enemy: commencement and cessation of hostilities.
§ 299a. Alien enemy: intention to subsequently wage war.

§ 281. **Effect of war generally.**—All intercourse between citizens of belligerent powers which is inconsistent with a state of war is prohibited by the law of nations. Such prohibition includes all negotiations, commerce, or trading with the enemy; all acts which will increase or tend to increase its income or resources; all acts of voluntary submission to it or of receiving its protection; also, all acts concerning the transmission of money or goods, and nullifies all contracts relating thereto. It further prohibits insurances upon trade with or by the enemy, and upon the life or lives of aliens engaged in service with the enemy;[7] for the subjects of one country

[7] See Kershaw v. Kelsey, 100 Mass. 561, 97 Am. Dec. 124, per the court; The Julia, 8 Cranch, 12 (U. S.) 181, 3 L. ed. 528, per Story, J.; The Rapid, 8 Cranch, 12 (U. S.) 155, 3 L. ed. 520; The Emulous, 1 Gall. U. S. (C. C.) 563, Fed. Cas. No. 4479; The Hoop, 1 Rob. Adm. 196; 3 Phil-

cannot be permitted to lend their assistance to protect by insurance the commerce or property of belligerent, alien subjects, or to do anything detrimental to their country's interest.[8] The purpose of war is to cripple the power and exhaust the resources of the enemy, and it is inconsistent that one country should destroy its enemy's property and repay in insurances the value of what has been so destroyed, or that it should in such manner increase the resources of the enemy or render it aid,[9] and the commencement of war determines, for like reasons, all trading or intercourse with the enemy which prior thereto may have been lawful.[10] All individuals, therefore, who compose the belligerent powers exist, as to each other, in a state of utter exclusion, and are public enemies.[11]

lips on Evidence, *279; Ex parte Bonsmaker, 13 Ves. Jr. 71; 3 Kent's Commentaries (5th ed.) 253.

See Hershey's Essentials of International Public Law (ed. 1912), pp. 366 et seq., secs. 349, 350, and bibliography on effect of war on corporations, and declaration of war and its immediate effects. Id. pp. 370, 371.

An alien enemy may be a corporation as well as an individual. 7 Moore's Dig. International Law (ed. 1906) p. 434.

[8] Furtado v. Rogers, 3 Bos. & P. 191, 198, 14 Eng. Rul. Cas. 125, per Lord Alvanley.

[9] "As marine insurance has for its object the protection of commerce and navigation, it would obviously be inconsistent with the very purposes of a maritime war to permit insurance on the shipping and trade of an enemy." Arnould on Ins. (Perkins' ed. 1850) 88, *87.

[10] McStea v. Matthews, 50 N. Y. 166, 170, per Church, C. J.; Griswold v. Waddington, 15 Johns. (N. Y.) 57, 16 Johns. (N. Y.) 438. In this case the effect of war upon the intercourse of hostile states is exhaustively considered. See also notes on "Belligerent rights," 91 Am. Dec. 279, 280; "Contracts with alien enemies and right to sue them in our courts," 96 Am. Dec. 624–33. Commencement of war; declaration of, see 7 Moore's Dig. of International Law (ed. 1906) p. 168, sec. 1106. Suspension of intercourse and interruption of commercial relations, see Id. p. 237, sec. 1135.

[11] The Rapid, 8 Cranch (12 U. S.) 155, 160, 3 L. ed. 520, per Johnson, J. "The citizen or native of a hostile country is thus an enemy as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of war." 7 Moore's Dig. of International Law (ed. 1906) p. 172, sec. 1109.

The following Federal decisions are of importance in this connection. In war, the belligerents and all their citizens and subjects are enemies to each other. All intercourse and communication between them are unlawful. Jecker v. Montgomery, 18 How. (59 U. S.) 110, 15 L. ed. 311; Lamar v. Browne, 92 U. S. 187, 23 L. ed. 650.

Cited in: *United States.*—Levy v. Stewart, 11 Wall. (78 U. S.) 250, 20 L. ed. 88; Hanger v. Abbott, 6 Wall. (73 U. S.) 535, 18 L. ed. 941; United States v. 1,756 Shares, Fed. Cas. No. 15,960b; United States v. 1,756 Shares, Fed. Cas. No. 15,960a; United States v. 100 Barrels of Cement, 3 Am. L. Reg. N. S. 737, Fed. Cas. No. 15,945; The Peterhoff, Blatchf. Prize Cas. 497, Fed. Cas. No. 11,024; The Hiawatha, Blatchf. Prize Cas. 14, Fed. Cas. No. 6,451; The Edward Barnard, Blatchf. Prize Cas. 123, Fed. Cas. No. 4,291; Cadwell v. Southern Exp. Co. 1 Flipp. 89, Fed.

Cas. No. 2,303; The A. J. View, Blatchf. Prize Cas. 143, Fed. Cas. No. 118; The Advocate, Blatchf. Prize Cas. 143, Fed. Cas. 940.

Indiana.—Perkins v. Rogers, 35 Ind. 145, 9 Am. Rep. 639.

New York.—Cohen v. New York Mutual Life Ins. Co. 50 N. Y. 617, 10 Am. Rep. 522.

Tennessee.—Conley v. Burson, 1 Heisk. (Tenn.) 149.

Virginia.—Manhattan Life Ins. Co. v. Warwick, 20 Gratt. (Va.) 655, 3 Am. Rep. 218.

So limited hostilities between two nations, authorized by their respective governments, constitute a public war, and the parties enemies. Bas v. Tingy, 4 Dall. (4 U. S.) 37, 1 L. ed. 731. *Cited* in Montoya v. United States, 180 U. S. 267, 45 L. ed. 524, 21 Sup. Ct. 358; Cushing v. United States, 22 Ct. Cl. 34; Metropolitan Bank v. Van Dyck, 27 N. Y. 449.

And citizens of a neutral country established in business in the enemy's country must be regarded as enemies, and their property as enemy's property. The Flying Scud v. United States (The Flying Scud) 6 Wall. (73 U. S.) 263, 18 L. ed. 755. *Cited* in The Benito Estenger, 176 U. S. 571, 44 L. ed. 593, 20 Sup. Ct. 489; The Paquete Habana (United States v. The Paquete Habana) 189 U. S. 466, 47 L. ed. 904, 23 Sup. Ct. 593; Lee v. Kaufman, 3 Hughes, 134, Fed. Cas. No. 8,191.

If one abandons his home, enters the military lines of the enemy, and is in sympathy and co-operation with the enemy, he is, during his stay, himself an enemy, and liable to be treated as such as to both person and property. Gates v. Goodloe, 101 U. S. 612, 25 L. ed. 895.

Nor will the individual acts of friendship of a subject of one nation at war, toward the other nation, affect his status as an enemy. The Benito Estenger, 176 U. S. 568, 20 Sup. Ct. 489, 44 L. ed. 592.

Again the rule that war makes all the citizens or subjects of one belligerent enemies of the government and of all the citizens or subjects of the other applies equally to civil and to international wars. United States v. Cooke (The Venice) 2 Wall. (69 U. S.) 258, 17 L. ed. 866.

Cited in: *United States.*—Burbank v. Conrad, 96 U. S. 301, 24 L. ed. 727; Desmare v. United States, 93 U. S. 611, 23 L. ed. 960; Levy v. Stewart, 11 Wall (78 U. S.) 253, 20 L. ed. 89; The Peterhoff (The Peterhoff v. United States) 5 Wall. (72 U. S.) 60, 18 L. ed. 571; The Reform (United States v. The Reform) 3 Wall. (70 U. S.) 632, 18 L. ed. 110; The Ambrose Light, 25 Fed. 446; Philips v. Hatch, 1 Dill. 576, Fed. Cas. No. 11,094; Kanawha Coal Co. v. Kanawha & O. Coal Co. 7 Blatchf. 409, Fed. Cas. No. 7,606; Brown v. Hiatt, 1 Dill. 381, Fed. Cas. No. 2,011; Carver v. United States, 16 Ct. Cl. 384.

Alabama.—Scheible v. Bacho, 41 Ala. 433.

Indiana.—Perkins v. Rogers, 35 Ind. 148, 9 Am. Rep. 639.

Iowa.—Hill v. Baker, 32 Iowa, 310, 7 Am. Rep. 193.

Mississippi.—Mims v. Armstrong, 42 Miss. 435, 97 Am. Dec. 472.

Missouri.—De Jarnette v. De Giverville, 56 Mo. 444.

New York.—Bank of New Orleans v. Matthews, 49 N. Y. 15; Pepin v. Lachenmeyer, 45 N. Y. 33; Harden v. Boyce, 59 Barb. 432.

Tennessee.—Apperson v. Bynum, 5 Coldw. 350; Bank of Tennessee v. Woodson, 5 Coldw. 350.

Virginia.—McVeigh v. Bank of Old Dominion, 26 Gratt. 835. Billgerry v. Branch, 19 Gratt. 428, 100 Am. Dec. 679.

West Virginia.—Winternitz v. Hyland, 3 W. Va. 476.

And all persons residing within the territory of the revolted states, whose property may be used to increase the revenues of the hostile power, are liable to be treated as enemies, though not foreigners. Prize

Cases, 2 Black (67 U. S.) 635, 17 L. ed. 459.

Cited in: *United States.*—Ford v. Surget, 97 U. S. 604, 24 L. ed. 1021; United States v. Farragut, 22 Wall. (89 U. S.) 423, 22 L. ed. 884; Miller v. United States (Page v. United States) 11 Wall. (78 U. S.) 306, 20 L. ed. 145; The Peterhoff (The Peterhoff v. United States) 5 Wall. (72 U. S.) 60, 18 Fed. 571; The Venice (United States v. Cooke) 2 Wall. (69 U. S.) 274, 17 L. ed. 867; The Stephen Hart, Blatchf. Prize Cas. 387, Fed. Cas. No. 13,364; The Peterhoff, Blatchf. Prize Cas. 497, Fed. Cas. No. 11,024; Elgee v. Lovell, Woolw. 120, Fed. Cas. No. 4,344; Coolidge v. Guthrie 1 Flipp, 99, Fed. Cas. No. 3,185; Caldwell v. Southern Exp. Co. 1 Flipp, 89, Fed. Cas. No. 2,303; Stovall v. United States, 26 Ct. Cl. 240; Carver v. United States, 16 Ct. Cl. 384; Ensley v. United States, 6 Ct. Cl. 290; Mills v. United States, 6 Ct. Cl. 268; United States v. 1,756 Shares, Fed. Cas. No. 15,960b; United States v. Catheart, 1 Bond, 564, Fed. Cas. No. 14,756.

Georgia.—Mayer v. Reed, 37 Ga. 487; United States v. Athens Armory, 35 Ga. 355.

Missouri.—Wellman v. Wickerman, 44 Mo. 486.

New Jersey.—Mutual Benefit Life Ins. Co. v. Hillyard, 37 N. J. L. 489, 18 Am. Rep. 741.

New York.—Bank of New Orleans v. Matthews, 49 N. Y. 15.

Ohio.—Pennywit v. Foote, 27 Ohio St. 628, 22 Am. Rep. 340.

Virginia.—Merchants Ins. Co. v. Edmond, 17 Gratt. 150.

West Virginia.—Haymond v. Camden, 22 W. Va. 197; Grinnan v. Edwards, 21 W. Va. 357; Ex parte Quarrier, 2 W. Va. 572.

So all the people of each state or district in insurrection against the United States must be regarded as enemies, until, by the action of the legislature and the executive, or otherwise, that relation is thoroughly and permanently changed. United States v. Alexander (Mrs. Alexander's Cotton) 2 Wall. (69 U. S.) 404, 17 L. ed. 915.

Cited in: *United States.*—Mitchel v. United States, 21 Wall. (88 U. S.) 351, 22 L. ed. 587; Hamilton v. Dillion, 21 Wall. (88 U. S.) 96, 22 L. ed. 533; New Orleans v. New York Mail S. S. Co. 20 Wall. (87 U. S.) 394, 22 L. ed. 358; Coppel v. Hall, 7 Wall. (74 U. S.) 554, 19 L. ed. 247; The Onachita Cotton (Withenbury v. United States) 6 Wall. (73 U. S.) 532, 18 L. ed. 939; The Peterhoff (The Peterhoff v. United States) 5 Wall. (72 U. S.) 60, 18 L. ed. 572; Gooche v. United States, 15 Ct. Cl. 287; Chesapeake and Ohio R. Co. v. United States, 20 Ct. Cl. 66; Brown v. Hiatt, 1 Dill. 381, Fed. Cas. No. 2,011; Caldwell v. Southern Exp. Co. 1 Flipp, 90, Fed. Cas. No. 2,303; Coolidge v. Guthrie, 1 Flipp, 99, Fed. Cas. No. 3,185; Elgee v. Lovell, Woolw. 121, Fed. Cas. No. 4,344; Kanawha Coal Co. v. Kanawha & O. Coal Co. 7 Blatchf. 409, Fed. Cas. No. 7,606; Philips v. Hatch, 1 Dill. 576, Fed. Cas. No. 11,094; Planters Bank v. St. John, 1 Woods, 591, Fed. Cas. No. 11,208; United States v. 1500 Bales of Cotton, Fed. Cas. No. 15,958; White v. Red Chief, 1 Woods, 41, Fed. Cas. No. 17,556; The Ambrose Light, 25 Fed. 446.

Alabama.—Scheible v. Bacho, 41 Ala. 433; Watson v. Stone, 40 Ala. 469, 91 Am. Dec. 484.

Arkansas.—Rice v. Shoak, 27 Ark. 138, 11 Am. Rep. 785; Latham v. Clark, 25 Ark. 603; Taylor v. Jenkins, 24 Ark. 340, 88 Am. Dec. 773.

Georgia.—Mayer v. Reed, 37 Ga. 488.

Indiana.—Perkins v. Rogers, 35 Ind. 153, 9 Am. Rep. 639.

Iowa.—Hill v. Baker, 32 Iowa, 310, 7 Am. Rep. 193.

Massachusetts.—Kershaw v. Kesley, 100 Mass. 570, 1 Am. Rep. 142, 97 Am. Dec. 124.

Mississippi.—Shackett v. Polk, 51 Miss. 391; Statham v. New York L. Ins. Co. 45 Miss. 594, 7 Am. Rep.

§ 282. Insurances on enemies' property formerly upheld.—Under the early English cases insurances on the property of alien enemies were countenanced if not directly upheld,[12] and so eminent an authority as Lord Mansfield, while not distinctly affirming their validity, defended such insurance,[13] upon the ground, as is said by Buller, J.,[14] of "expedience," and for a long time neither counsel nor court raised any objection to the legality of such contracts.[15]

§ 283. Insurances on enemies' property now illegal.—Certain acts of Parliament applicable to existing wars were passed in 1748 [16] and 1792 [17] and these acts were followed by decisions in the English courts holding unequivocally that such insurances were absolutely void, and it is now undisputed that insurances of enemies' property or of any interest therein are illegal and void.[18] So where

737; Durden v. Smith, 44 Miss. 553; Hill v. Bayland, 40 Miss. 631.

Missouri.—DeJarnette v. DeGiverville, 56 Mo. 444; Wellman v. Vickerman, 44 Mo. 486.

New Jersey.—Mutual Benefit Life Ins. Co. v. Hillyard, 37 N. J. L. 489, 18 Am. Rep. 741; Smith v. Gaines, 38 N. J. Eq. 67.

New York.—Bank of New Orleans v. Mathews, 49 N. Y. 15; Woods v. Wilder, 43 N. Y. 168, 3 Am. Rep. 684; Egerton v. New York & H. R. Co. 39 N. Y. 231.

Rhode Island.—Hubbard v. Harnden Exp. Co. 10 R. I. 252.

South Carolina.—Mitchell v. The Schamps, 13 Rich. Eq. 13.

Tennessee.—Gholson v. Blackman, 4 Coldw. 595; Cummings v. Diggs, 1 Heisk. 72.

Texas.—Hall v. Keese, 31 Tex. 543.

Virginia.—Small v. Lumpkin, 28 Gratt. 835; Newton v. Bushong, 22 Gratt. 638, 12 Am. Rep. 533; Billgerry v. Branch, 19 Gratt. 406, 100 Am. Dec. 679.

West Virginia.—Haymond v. Camden, 22 W. Va. 197; Hedges v. Price, 2 W. Va. 218, 94 Am. Dec. 507.

[12] Henkle v. Royal Exch. Ins. Co. 1 Ves. Sr. 318, 320.

[13] Planche v. Fletcher, Doug. 251; Gist v. Mason, 1 Term Rep. 84, 88; Tyson v. Gurney, 3 Term Rep. 477; 1 Duer on Ins. (ed. 1845) 419, sec. 9, 463, note 2.

[14] Bell v. Gilson, 1 Bos. & P. 345–54.

[15] Eden v. Parkinson, Doug. 732; Plantamour v. Staples, 1 Term Rep. 611, note. Emerigon says: "During the course of the last war, English merchants insured our goods, and thus restored to us the value of the prizes taken from us by their own cruisers. Since Frenchmen effected insurance in London for their own account, it seemed by a parity of reason that the merchants of London should be equally allowed to effect insurance in France." Emerigon on Ins. (Meredith's ed. 1850) 103.

[16] 21 Geo. II., c. 4.

[17] 33 Geo. III., c. 27.

[18] "The Reglement of Barcelona (Consulat, c. 341) forbids to insure the enemy's property, and declares such insurances null and void. The Guidon de la Mer, c. 2, art. 5, contains the same prohibition, unless, as it says, there is a safe conduct and license to trade. This also follows from the interdiction of commerce, contained in the form of declarations of war." Emerigon on Ins. (Meredith's ed. 1850) 103, c. iv., sec. 9. "By the undivided testimony of foreign jurists the rule has obtained from the earliest period that an insurance made in a belligerent country

the policy was on a ship from Boston to a port of discharge in Europe, it was held, in an action on the premium note, that it was avoided as an unlawful contract, it being shown that it was intended to make the voyage to an interdicted port of the United States and that the voyage was so made.[19] But the principle of law which invalidates insurance of an alien enemy's property does not apply to insurance against seizure by a belligerent government of the property of its own subjects.[20]

§ 284. Same subject: early decisions.—The following are the cases most frequently cited upon this subject by text-writers and the courts. In Brandon v. Curling [1] insurance was made during peace on goods on board a neutral ship from London. The consignees were French subjects, residing at Bayonne. Although the ship left port at London one day before war was declared, yet it stopped at Gravesend for papers, and did not leave there until two days later. The goods were seized at a port in Spain by Spanish officers and condemned. It was held that no recovery could be had for the loss, thus determining that a prior legal insurance on such property is made void by war supervening between the attachment and termination of the risk. Kellner v. Le Mesurier [2] was a case of a foreign ship and British capture, where the insurance was held void, since it would be repugnant to state interests for a British subject to insure against British capture. In Potts v. Bell,[3] there was a war between Holland and Great Britain. The goods were purchased in Holland on account of British merchants, resident in England, and shipped on a neutral vessel. It was held that trading with the enemy without the King's license was illegal in Brit-

upon the property of the subjects of an opposite belligerent is void, and this rule is now sanctioned by legislative or judicial adoption in every country of Europe." 1 Duer on Ins. (ed. 1845) 417, sec. 6.

See notes in 5 B. R. C. 4, on liability of marine insurer for losses arising out of war, and 5 B. R. C. 836, on validity of insurance of enemy property against seizure.

[19] Russell v. De Grand, 15 Mass. 35; The Julia, 8 Cranch (12 U. S.) 181, 3 L. ed. 528, per Story, J.; The Rapid, 8 Cranch (12 U. S.) 155, 3 L. ed. 528; The Emulous, 1 Gall. C. C. 563, Fed. Cas. No. 4,479, per Story, J. See New York Life Ins. Co. v. Clopton, 7 Bush (Ky.) 179, 189, 3 Am. Rep. 290; Sands v. New York Life Ins. Co. 50 N. Y. 626, 10 Am. Rep. 535; Griswold v. Waddington, 15 Johns. (N. Y.) 57; 16 Id. 438; Harmon v. Kingston, 3 Camp. 150, 152; Flindt v. Waters, 15 East, 260; 3 Phillips on Evidence, *279; 3 Kent's Commentaries (5th ed.) 253; Ex parte Bousmaker, 13 Ves. Jr. 71; Potts v. Bell, 8 Term. Rep. 548, 561, 2 Eng. Rul. Cas. 654, 13 Eng. Rul. Cas. 547.

[20] Driefontein Consolidated Gold Mines, Ltd. v. Janson; West Rand Consolidated Gold Mines Co. Ltd. v. De Rougemont (Eng. Consl. Ct.) [1900] 2 Q. B. Div. L. Rep. 339, 346.

[1] 4 East, 410.

[2] 4 East, 396.

[3] 8 Term Rep. 548, 2 Eng. Rul. Cas. 654, 13 Eng. Rul. Cas. 547.

ish subjects, and the insurance was wholly void. In Bristow v. Towers,[4] the parties were alien enemies when the policy was affected and at the commencement of the voyage. The judgment was for defendant upon the ground that action could not be sustained by or in favor of alien enemies. In Brandon v. Nesbit[5] the parties were alien enemies at the inception of the voyage, and were residing in France, then at war with England. The court decided that an alien enemy could not sustain an action. In Furtado v. Rodgers,[6] the insurance was on a French ship during peace. The ship was seized in a war between England and France, and was condemned by the British government. Suit was brought after peace was restored, and the insurance was held not valid against British capture. In Gamba v. Le Mesurier[7] insurance was effected during peace on a French ship and goods. This was a case of British capture after hostilities commenced between England and France, and suit was brought after peace was restored, and the underwriter was held not liable.

§ 285. Trading with enemy: mistake or ignorance no excuse.—Mistake or ignorance is not a valid excuse for trading with the enemy.[8]

§ 286. Defense of alien enemy.—Although the illegality of such insurances is a valid defense,[9] the defense of alien enemy is not favored in law,[10] and it is held in Hume Small & Company v. Providence and Washington Insurance Company[11] that although an alien may not own a vessel under pain of forfeiture, yet if he does own one, and insures it, and it is lost, the insurance company cannot set up his alienage as a bar to an action for the insurance money, and that it must be specially pleaded as a defense. It cannot be availed of where the fact of alienage merely falls out casually during the trial, and a plea that when a promissory note sued on was made, the plaintiff was a citizen of Minnesota and the defendant a citizen of Arkansas aiding the rebellion and public enemies of the United States was held good.[12]

[4] 6 Term Rep. 35.

[5] 6 Term Rep. 23, 2 Eng. Rul. Cas. 649. See note in 5 B. R. C. 583.

[6] 3 Bos. & P. 191, 198, 14 Eng. Rul. Cas. 125.

[7] 4 East, 407.

[8] The Compte de Wohronzoff, 1 C. Rob. 206. As to trading with enemy, see Hershey's Essentials of International Law (ed. 1912) pp. 366–370, secs. 349, 350.

[9] Griswold v. Waddington, 16 Johns. (N. Y.) 438, 15 Johns. 57.

[10] Shepler v. Durant, 14 Com. B. 582; Society for Propagation of the Gospel v. Wheeler, 2 Gall. (U. S. C. C.) 105, 127, Fed. Cas. No. 13,156, per Story, J.

[11] 23 S. C. 190.

[12] Rice v. Shook, 27 Ark. 137, 11 Am. Rep. 783.

§ 287. Binding force here of laws of belligerent nations.—It is declared by an eminent jurist that the prize law of the British empire became our prize law after our separation so far as adapted to us;[13] and it is also said that the general doctrines applicable to subjects of belligerent nations were applicable to the Civil War here between the North and the South so far as warranted.[14]

§ 288. Alien enemies: life insurance.—Such insurances are not only invalid in respect to maritime risks, but it is also held that the life of an alien enemy cannot be insured by his creditor,[15] and if the insured engages in hostilities against his country, the policy is thereby voided.[16] So where the insured was post-quartermaster in the Confederate service, it was held that the policy was invalidated.[17] In another case an insurance on the life of a person who went below a certain parallel fixed in the policy as the limit, and served on the staff of several Confederate generals, was held voided thereby. The policy contained a condition that the party should not enter military service, and the court declared that it would not impose upon the party the necessity of producing a commission to prove military service, and that the moment the party connected himself in any way with the belligerent service the policy became void, or even when he became a member of the belligerent government,[18] and it would necessarily follow that death in battle in the enemy's service would have like effect.[19] It is said by the court in the case of New York Life Insurance Company v. Clopton [20] that in case of a neutral, even though his domicil would make him a technical enemy, the hostility does not subject his life, like his estate, to peril, and no belligerent right is affected by the continued validity of a life insurance, and that neither authority nor principle would avoid the policy;[1] and that a policy insuring property

[13] Thirty Hogsheads Sugar v. Boyle, 9 Cranch (13 U. S.) 191, 198, 3 L. ed. 701, per Marshall, C. J.

[14] Prize Cases, 2 Black (67 U. S.) 635, 17 L. ed. 459. See § I., preliminary chapter, generally, as to how far binding are the decisions of other countries.

As to contraband of war, the Declaration of London, the British Proclamation, or Declaration of Aug. 1914, etc., during the great war, the effect thereof: This subject is hereinafter fully considered.

[15] See Sands v. New York Life Ins. Co. 50 N. Y. 626, 635, 10 Am. Rep. 535. See note, "Civil war, effect of upon" life insurance, 9 Am. Rep. 169.

[16] Hamilton v. Mutual Life Ins. Co. 9 Blatchf. (C. C.) 234, 249, Fed. Cas. No. 17,297; Sands v. New York Life Ins. Co. 50 N. Y. 626, 635, 10 Am. Rep. 535.

[17] Drillard v. Manhattan Life Ins. Co. 44 Ga. 119, 9 Am. Rep. 164.

[18] Mitchell v. Mutual Life Ins. Co. of N. Y. (Md.) *cited* in Bliss on Life Ins. 699.

[19] Bliss on Life Ins. (ed. 1872) sec. 407, *citing* Ex parte Lee, 13 Ves. Jr. 64.

[20] 7 Bush (Ky.) 179, 188, 3 Am. Rep. 290.

[1] *Citing* Keir v. Andrade, 6 Taunt. 498, 504.

exempted by law from belligerent power would not be avoided, but that a policy insuring the life of an actual enemy of the government would be invalid. The court also said that it would be "a grave question whether the implied condition as to perils of the war should be extended beyond the belligerent right of capture or destruction by the government of the insurer, and to that extent only we may admit that the continuation of the policy during war would be illegal and its pre-existing obligation become avoided."

§ 289. Effect of war on pre-existing valid contract.—The effect of war between the countries of the assured and insured upon a pre-existing valid contract is a question upon which there is a decided conflict of authority. It is held in England that in such cases, if loss happens during the war, this discharges the insurer from all liability therefor, but that the contract is not thereby made totally void, and a liability exists, capable of enforcement, when peace ensues, for losses on such contract arising before the war.[2] So Lord Ellenborough [3] declares that policies of this kind must be considered to have incorporated therein, as a part thereof, a provision that "this insurance shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and assurer," and that during the continuance of the war such contracts are illegal and void.[4] It is declared by Washington, J., in Gray v. Sims,[5] that "if the contract be legal when it is made, and the performance of it is rendered illegal by a subsequent law, the parties are both discharged from its obligations. The insured loses his indemnity and the insurer his premiums." [6] While in Furtado v. Rodgers [7] it was said that since the contract was legal in its inception, there should be no return of the premium. In the case of New York Life Insurance Company v. Clopton [8] the court argues that "both principle and policy would have dissolved a contract made before the war for 'continuing performance,' such as partnership or affreightment," and that "insurance is a contract sui generis, governed by a peculiar and

[2] Flindt v. Waters, 15 East, 260, 265, per Lord Ellenborough; 1 Duer on Ins. (ed. 1845), 444, sec. 45. See 11 Am. Law Rev. 221; Hershey's Essentials of International Public Law (ed. 1912) pp. 368, 369, sec. 350.

[3] Brandon v. Curling, 4 East, 410.

[4] See Furtado v. Rodgers, 3 Bos. & P. 191; 14 Eng. Rul. Cas. 125; Gamba v. Le Mesurier, 4 East, 407. The facts to the cases cited in this and the last note are briefly noticed in § 284 herein.

[5] 3 Wash. (C. C.) 276, Fed. Cas. No. 5729.

[6] See Leathers v. Commercial Ins. Co. 2 Bush (Ky.) 296, 92 Am. Dec. 483.

[7] 3 Bos. & P. 191, 14 Eng. Rul. Cas. 125, per Lord Alvanley.

[8] 7 Bush (Ky.) 179, 3 Am. Rep. 290.

rather arbitrary code of the modern common law. . . . Its character, however, is so far matured and established as to distinguish it essentially from ordinary commercial contracts, and especially in the effect of war, on its pre-existing validity, which the war, as a general rule, destroys, whether the contract belongs to the category of 'continuing performance' or not." And it is held in a Virginia case [9] that assessments by a mutual assurance society, chartered under the laws of Virginia and located within the enemy's lines during the Civil War to pay for losses incurred during the war, can create no liability upon property insured in the company located in loyal territory.

§ 290. Same subject: loss before war.—If a contract of insurance is otherwise valid, it would seem that war merely suspends the right of action where the loss and the right to a remedy accrues before the commencement of the war.[10]

§ 291. Same subject: that war merely suspends the contract.—Mr. Duer,[11] after an exhaustive review of the cases, says: "There are doubtless many contracts of which a war suspends the existence without dissolving the obligation. The distinction is probably this: a vested right under a subsisting contract is not effected by a subsequent war, but where the contract is executory, and would have been illegal if made in time of war, it becomes so from the time that hostilities commence, as to all acts to be performed by either party during the war." Mr. Arnould [12] declares that if the policy be effected before and the loss occurs after hostilities, the assured cannot sue upon it, even after the return of peace,[13] but where the loss occurs before war commences, the right to sue is only suspended.[14] So it has been declared to be a "well known rule of law, that where the contract of indemnity and the loss are before the commencement of hostilities, the declaration of war only suspends the remedy while the war lasts." [15] Both Mr. May and Mr. Parsons [16] adopt the language of the court in New York Life Insurance Com-

[9] Mutual Assur. Soc. v. Berkeley Co. 4 W. Va. 343.

[10] Semmes v. City Fire Ins. Co. 6 Blatchf. 445, Fed. Cas. No. 12,651, 13 Wall. (80 U. S.) 158, 20 L. ed. 490; Flindt v. Waters, 15 East, 266; Chitty on Contracts (7th Am. ed.) 182, note.

[11] 1 Duer on Ins. (ed. 1845) 478. See Hershey's Essentials of International Public Law (ed. 1912) p. 369, sec. 350.

[12] 1 Arnould on Ins. (Perkins' ed. 1850) 91, 92; 1 Id. (Maclachlan's ed. 1887) 135; Id. (9th ed. Hart & Simey) sec. 89, p. 125.

[13] *Citing* Flindt v. Waters, 15 East, 266.

[14] *Citing* Gamba v. Le Mesurier, 4 East, 407.

[15] Driefontein Consolidated Gold Mines, Ltd. v. Janson; West Rand Consolidated Gold Mines Co. Ltd. v. De Rongemont (Eng. Com'l Ct.), [1900] 2 Q. B. Div. Law Rep. 339, 346, per Mathew, J.

[16] 1 May on Ins. (3d ed.) secs. 39, 39s.

pany v. Clopton.[17] While Mr. Bacon [18] relies principally upon the doctrine of the case of New York Life Insurance Company v. Statham,[19] which holds that if a policy is conditioned to be void upon nonpayment of the annual premium, a failure to pay such premium subjects the policy to forfeiture if the assurer insists upon the condition, even though such failure to pay be caused by the intervention of war between territories in which the insurance company and the assured respectively reside, and which makes it unlawful for them to hold intercourse, but in such case the insured is entitled to the equitable value of the policy arising under the premiums actually paid. This equitable value is the difference between the cost of a new policy and the present value of the premiums yet to be paid on the forfeited policy when the forfeiture occurred, and may be recovered in an action at law or a suit in equity. The average rate of mortality is the fundamental basis of life insurance, and as this is subverted by giving to the assured the option to revive their policies or not after they have been suspended by a war (since none but the sick and dying would apply), it would be unjust to compel a revival against the company.[20] In Spratley v. Mutual Benefit Life Insurance Company [1] a citizen of Virginia, who had insured his life in 1860 in a New Jersey company, died at Petersburg, Virginia, in 1863. In 1872 his widow presented proof of the death to the agent of the company at Louisville, Kentucky, and demanded payment, and instituted suit in 1873, and it was held that notice and proof of the death should have been made and payment demanded within a reasonable time after the close of the Civil War—by January 1, 1866—and a suit thereon, either in Virginia or New Jersey, was barred by limitation; that the policy, being payable in New Jersey, was governed by the laws of that state as to limitation. In Worthington v. Charter Oak Life Insurance Company [2] a policy was taken out in 1854 by a husband upon his own life for the benefit of his wife. The insuring company was located in Connecticut. The insured was located in South Carolina when the policy was effected, and continued to reside there until his death, and the insurance was made through a local agent residing in the latter state. Premiums were paid to the agent until 1860, when he was withdrawn, and premiums were then remitted to the company in Connecticut. From 1862 to 1865 no premiums

[17] 7 Bush (Ky.) 179, 3 Am. Rep. 290. *Quoted* in the text herein in § 289, and also in this section.

[18] Bacon's Benefit Societies and Life Ins. sec. 356.

[19] 93 U. S. (3 Otto) 24, 23 L. ed. 789.

[20] See also New York Life Ins. Co. v. Davis, 95 U. S. 425, 24 L. ed. 453.

[1] 11 Bush (Ky.) 443.

[2] 41 Conn. 372, 19 Am. Rep. 495. Two judges dissented upon this point.

were paid, owing to the war and the President's proclamation forbidding intercourse between citizens of the loyal and confederate states. At the close of the war the insured tendered the premiums with interest, which were refused and liability on the policy denied by the company. No further premiums were ever paid. In 1869 the insured died, and it was held that the company was not liable. In Cohen v. New York Mutual Life Insurance Company [3] it was decided that a contract of life insurance between citizens of different states, lawful in its inception, and upon which large sums of money have been paid for premiums, is not dissolved by war between the states. The contract remains. The remedy simply is suspended, but revives with the return of peace. In another New York case the court held that vested rights under subsisting contracts are not affected by a subsequent war, except so far as relates to the remedy which is suspended during its continuance, but where the contract is executory, and would have been illegal if made in time of war, it becomes so from the time that hostilities commence as to all acts to be performed by either party during the war.[4] In a Virginia case [5] the court declares that "if the contract is partly executed, and rights under it have vested, and it cannot be dissolved without the loss or forfeiture of one of the parties, and cannot be carried into execution consistently with the duties of the parties to their countries respectively while the war lasts, in such case it should not be dissolved, but only suspended. But if it can be carried into execution notwithstanding the war, without conflicting with the obligations of allegiance of either party, it will be neither dissolved nor suspended." In this case the insurance was obtained through the agent of the company at Richmond, and the premiums subsequent to the first were there paid to the agent, and the premium for 1862 was tendered him, but he refused to receive it, and the insured died in that year, and it was held by the supreme court of Virginia, two judges dissenting, that the policy was not forfeited, but that the company must pay the sum insured, less the amount of unpaid premiums, and the court proceeded upon the theory that the insured had become vested with a right by the payment of premiums, not for a year, but for life, and that no new contract was necessary each year, but only the annual payment of premiums. While in the Kentucky case already referred to [6] it is said that "where a single act, such as the payment of a debt would perform

[3] 50 N. Y. 610.

[4] Sands v. New York Life Ins. Co. (N. Y. Sup. Ct. 1871) 4 Alb. L. J. 11, 50 N. Y. 626, 10 Am. Rep. 535.

[5] Manhattan Life Ins. Co. v. Warwick, 20 Gratt. (Va.) 614, 635, 3 Am. Rep. 218.

[6] New York Life Ins. Co. v. Cloptón, 7 Bush, 179, 184, 3 Am. Rep. 290.

a contract made before the war, a belligerent policy interdicted it, because it might aid the enemy in the prosecution of hostilities, consequently suspension of performance until the restoration of peace would effectuate the whole aim of the law, without dissolving the contract, which may be ultimately enforced in perfect consistency with the principle and end of the temporary interdict. In that class of cases it is the contract, and not the performance, that is continuing, and a suspension of remedy, and not a dissolution of the contract, is all that is necessary, befitting, and just. But in such cases as partnership or affreightment the performance is continuing and unremitting until the end of the contract shall have been consummated, and, therefore, as supervening war between the parties disables them from performing any of the incumbent duties and defeats the object of the contract, a dissolution of the contract is the natural and legal effect of the war."

The conclusion from these cases and opinions, and from other cases cited hereafter, would seem to be that where a right has vested under the contract, then a supervening war merely suspends the remedy; but where the loss happens during the war, and under a pre-existing valid contract of insurance, then if merely suspending the contract or its enforcement is within the reason and policy of the law, and would effectuate its whole aim and purpose, it will only be suspended, and not dissolved. Such a rule would not appear to be inconsistent with the reason of the rule, which prohibits all insurances of alien enemies, or their property, although it will be noted that nearly all the decisions relating to the Civil War are those pertaining to life risks, which from their very nature are of longer duration than marine and fire risks. Although in many cases these contracts of life insurance have been held to be contracts from year to year and voidable for nonpayment of premiums.[7]

[7] See Dillard v. Manhattan Life Ins. Co. 44 Ga. 119, 9 Am. Rep. 167 (that war merely suspended.)

United States.—See also: United States v. Wiley, 11 Wall. (78 U. S.) 508, 20 L. ed. 211.

Kentucky.—New York Life Ins. Co. v. Clopton, 7 Bush (Ky.) 179, 3 Am. Rep. 290.

Mississippi.—Statham v. New York Life Ins. Co. 45 Miss. 581, 7 Am. Rep. 737.

New Jersey.—Mutual Benefit Life Ins. Co. v. Hillyard, 37 N. J. L. (8 Vroom.) 444, 18 Am. Rep. 741; Hillyard v. Mutual Benefit Life Ins. Co. 35 N. J. L. 415.

New York.—Martini v. International Life Assur. Soc. 53 N. Y. 339, 13 Am. Rep. 529; Sands v. New York Life Ins. Co. 50 N. Y. 626, 10 Am. Rep. 535, 539; Cohen v. Mutual Life Ins. Co. 50 N. Y. 610, 10 Am. Rep. 522; Buchanan v. Curry, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200; Saltus v. United States Ins. Co. 15 Johns. (N. Y.) 523; Bell v. Chapman, 10 Johns. (N. Y.) 183.

Virginia.—Clement v. New York L. Ins. Co. 76 Va. 355; Connecticut

Again it is held in the Federal Supreme Court that "absolute suspension of the right of the citizens of one belligerent to sue the citizens of the other, and prohibition to exercise such right, exist during war, by the law of nations; but the restoration of peace removes the disability and opens the doors of the courts.[8] So where a debt is not confiscated, the right to enforce payment revives with the restoration of peace.[9] And complainants who, before the Civil War, had brought suit in the circuit court of the United States in Texas, against citizens of that state, to quiet title to a tract of land, had a right to proceed in such suit to protect their property from seizure, invasion, or disturbance by citizens of that state, so soon as court was opened after the cessation of hostilities, whether an official proclamation had been made or not.[10] And a holder of a bill of exchange might demand its payment by the drawee in New Orleans, and notify his indorser in Tennessee of the nonpayment, at any time after the President's order of April 29, 1865, which removed all restrictions on commercial intercourse between these places.[11]

§ 292. Right of citizen to bring property from enemy's country.—It is said by the supreme court of the United States that if an American citizen residing in an enemy's country at the breaking out of the war has the right to withdraw his property acquired before the war, it must be done within a reasonable time after knowledge thereof, and with due diligence, and that a shipment made eleven

Mut. Life Ins. Co. v. Duerson, 28 Gratt. (Va.) 630; Mutual Benefit Life Ins. Co. v. Atwood, 24 Gratt. (Va.) 497, 18 Am. Rep. 652; New York Life Ins. Co. v. Hendren, 24 Gratt. (Va.) 536; Manhattan Life Ins. Co. v. Warwick, 20 Gratt. (Va.) 614, 3 Am. Rep. 218.

England.—See Ex parte Bousmaker, 13 Ves. Jr. 71.

Contra. See New York Life Ins. Co. v. Davis, 95 U. S. 425, 24 L. ed. 453; New York Life Ins. Co. v. Statheu, 93 U. S. 24, 23 L. ed. 789; Tait v. New York Life Ins. Co. 1 Flipp. (C. C.) 288, Fed. Cas. No. 13,726; Worthington v. Charter Oak Life Ins. Co. 41 Conn. 372, 19 Am. Rep. 495; Dillard v. Manhattan Life Ins. Co. 44 Ga. 119, 9 Am. Rep. 167; Abell v. Pennsylvania L. Ins. Co. 18 W. Va. 400.

See generally, as to effect of war, Bliss on Life Insurance (ed. 1872) secs. 406–17. "No policy of insurance issued to a citizen of the commonwealth by an authorized company, organized under the laws of a foreign country, shall be invalidated by the occurrence of hostilities between such foreign country and the United States." Mass. acts 1887, c. 214, sec. 84.

[8] Caperton v. Bowyer, 14 Wall. (81 U. S.) 216, 20 L. ed. 882; Levy v. Stewart, 11 Wall. (78 U. S.) 244, 20 L. ed. 86.

Cited in McKinzie v. Hill, 51 Mo. 307, 11 Am. Rep. 450.

[9] Hanger v. Abbott, 6 Wall. (73 U. S.) 532, 18 L. ed. 939.

[10] Masterson v. Howard, 18 Wall. (85 U. S.) 99, 21 L. ed. 764.

Cited in Bond v. Moore, 93 U. S. 595, 23 L. ed. 983.

[11] Bond v. Moore, 93 U. S. 593, 23 L. ed. 983.

months after was too late.[12] But this right to withdraw property was subsequently denied by the same court, with the exception where the act is done with the consent of the citizen's own government.[13]

§ 293. War: license to trade.—Inasmuch as the power of Congress to regulate commerce between the United States and foreign nations and among the several states is general, and has no limitations except those prescribed by the Constitution itself,[14] there is no doubt of the power of the government to authorize trading with an enemy or the protection of enemy's property, and it may grant privileges or licenses to trade.[15] Thus, during the Civil War the subject was regulated by Congress, but by the act of July 16, 1861,[16] the President alone had power to license commercial intercourse between places within the lines of military occupation by forces of the United States and places under the control of insurgents against it. "The sovereign may license trade, but in so far as it is done it is a suspension of war and a return to the condition of peace. It is said there cannot be at the same time war for arms and peace for commerce. The sanction of the sovereign is indispensable for trade." [17] It is held to be of itself an illegal act to sail under an enemy's license.[18]

[12] The St. Lawrence, 9 Cranch (13 U. S.) 121, 3 L. ed. 676, per Story, J.; 1 Gall. (C. C.) 467, Fed. Cas. No. 12,232. See Amory v. McGregor, 15 Johns. (N. Y.) 24.

[13] The Rapid, 1 Gall. (U. S. C. C.) 304, 8 Cranch (12 U. S.) 155, 3 L. ed. 520; The Mary, 8 Cranch (12 U. S.) 388, 3 L. ed. 599, 601, 1 Gall. (C. C.) 621, Fed. Cas. No. 9,184, per Story, J.; The Alexander, 8 Cranch (12 U. S.) 169, 3 L. ed. 524. See The Lady Jane, 1 Rob. 202; The Venus, 8 Cranch (12 U. S.) 253, 3 L. ed. 553; Marshall, C. J., and Livingston, J., dissenting. See Walker's International Law (ed. 1895) 125 et seq. "I adopt the conclusion that the property of subjects withdrawing themselves in good faith from a hostile country within a reasonable time after knowledge of the war is not stamped with the illegal character of trading with an enemy, but it is to be considered, by a just exception from the general rule, as exempt from confiscation." See 1 Duer on Marine Ins. (ed. 1845) 565, sec. 11.

[14] Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1, 6 L. ed. 23.

[15] See The Schooner Rapid, 1 Gall. (C. C.) 295, Fed. Cas. No. 11,576, per Story, J., who says: "It must be considered as a settled principle of maritime and national law that all trade with the enemy, unless with the permission of the sovereign, is interdicted."

[16] See also act of July 2, 1864.

[17] Coppell v. Hall, 7 Wall. (74 U. S.) 542, 554, 19 L. ed. 244, per Swayne, J. See McKee v. United States, 8 Wall. (75 U. S.) 163, 19 L. ed. 329; Maddox v. United States, 15 Wall. (82 U. S.) 58, 21 L. ed. 61; The Sea Lion, 5 Wall. (72 U. S.) 630, 18 L. ed. 618; The Ouachita Cotton, 6 Wall. (73 U. S.) 521, 18 L. ed. 935; The Reform, 3 Wall. (70 U. S.) 617, 18 L. ed. 389; United States v. Lane, 8 Wall. (75 U. S.) 185, 19 L. ed. 445; Butler v. Naples, 9 Wall. (76 U. S.) 766, 19 L. ed. 822; Mitchell v. Harmony, 13 How. (54 U. S.) 115, 14 L. ed. 75; affirming 1 Blatchf. (C. C.) 549, Fed. Cas. No. 6,082.

§ 294. Who are alien enemies: domicil.—Though the term "enemies," when strictly construed, means public enemies,[19] the question whether a party is an alien enemy or not depends upon his domicil, rather than upon the place of his birth; for although one born out of the allegiance to the government or out of the jurisdiction of the United States, and not naturalized, may be an alien,[20] yet domicil is the test of an alien enemy. And if one be domiciled in a country at war with the United States, he is an alien enemy without reference to his place of birth.[1] And if he has resided long enough in the enemy's country to acquire a domicil there, he is subject to all the disabilities of an enemy with relation to his property.[2] And where a country is part of an enemy's country, under

Concerning licenses to trade, see Halleck's International Law and Laws of War (ed. 1861) 675; Hall's International Law (ed. 1880) 478, sec. 196; Wheaton's International Law (ed. 1863) 554, 582, 690–92; Walker's International Law (ed. 1895) 123.

[18] Craig v. United States Ins. Co. 2 Pet. (C. C.) 410, Fed. Cas. No. 3,340; The Ariadne, 2 Wheat. (15 U. S.) 143, 4 L. ed. 405; The Julia, 1 Gall. (C. C.) 594, Fed. Cas. No. 7,575; The Aurora, 8 Cranch (12 U. S.) 203, 3 L. ed. 536; The Hiram, 1 Wheat. (14 U. S.) 440, 4 L. ed. 131; Maisonnaire v. Keating, 2 Gall. (C. C.) 325, Fed. Cas. No. 8,978; The Julia, 8 Cranch (12 U. S.) 181, 3 L. ed. 528; The Langdon Cheves, 4 Wheat. (17 U. S.) 103, 4 L. ed. 525. See Walker's International Law (ed. 1895) 115.

[19] Monongahela Ins. Co. v. Chester, 43 Pa. St. 491. See note at end of § 281 herein.

[20] See note "Who are aliens," 84 Am. Dec. 210–13. Enemy character: Belligerent domicil, see 7 Moore's Dig. of International Law (ed. 1906) p. 424, sec. 1189. Domicil (I) a source of civil status: (II) Belligerent domicil. See 3 Moore's Dig. of International Law (ed. 1906) secs. 487, 488. See also Id. secs. 489, 491. See note at end of § 281 herein.

[1] The Venice, 2 Wall. (69 U. S.) 57, 58, 17 L. ed. 818; Sloop Charter, 2 Dall. (2 U. S.) 41; The Venus, 8 Cranch (12 U. S.) 253, 3 L. ed. 553; Willeson v. Patterson, 7 Taunt. 438; United States v. Farragut, 22 Wall. (89 U. S.) 406, 22 L. ed. 879; The Schooner Edward Barnard, Blatchf. Pr. Cas. 122; The Mary and Susan, 1 Wheat. (14 U. S.) 46; The Flying Scud, 6 Wall. (73 U. S.) 263, 18 L. ed. 755; Rogers v. Schooner Amado, Newb. Adm. 400; The Prize Cases, 2 Black. (67 U. S.) 635, 17 L. ed. 459; Potts v. Bell, 8 Term Rep. 548, 2 Eng. Rul. Cas. 654, 13 Eng. Rul. Cas. 547; Porter v. Freudenberg [1915] 1 K. B. 857, 5 B. R. C. 548. See Note "Enemies, who are," 88 Am. Dec. 779, 780; 1 Kent's Commentaries, (13th ed.) 74, et seq.; Hall's International Law (ed. 180) 428, sec. 168, et seq.; Wheaton's International Law (ed. 1863) 559, 565, 573; Walker's International Law (ed. 1895) 107, sec. 40; Lawrence's Principles of International Law (3d ed. 1909) pp. 318–322, secs. 176, 177.

Civil status determined by domicil no matter what may have been ones birthplace. Maxey on International Law (ed. 1906) p. 61. See also 7 Moore's Dig. of International Law (ed. 1906) p. 428, sec. 1189, as to domicil; meaning of etc. See Hershey's Essentials of International Law (ed. 1912) pp. 252–256, secs. 237–243, and bibliography on p. 273.

[2] United States v. Cargo Schooner El Telegrafo, Newb. Adm. 383; The Frances (Gillespie's Claim) 8 Cranch (12 U. S.) 363, 3 L. ed. 591;

the recognized rules of war, all persons residing therein during a war with the United States, are to be deemed enemies without regard to their nationality and even citizens of the United States there domiciled and doing business are included. So a neutral, or a citizen of the United States, domiciled in an enemy's country, not only in respect to his property, but also as to his capacity to sue, is deemed as much an alien enemy as a person actually born under the allegiance and residing within the dominions of the hostile nation.[3] A partnership between parties domiciled in Savannah and New York was held dissolved by the Rebellion.[4] But it is decided that securities held by a citizen and resident of New York prior to the Civil War upon a resident of North Carolina, could not be extinguished durante bello, either through the agency of the courts there or through the former agents and attorneys of such nonresi-

affirming 1 Gall. (U. S.) 614, Fed. Cas. No. 5,034. Domicil distinct from residence; Essentials of domicil; Domicil of origin; Domicil of Choice, see Maxey on International Law (ed. 1906) pp. 62, 63.

[3] Juragua Iron Co. v. United States, 212 U. S. 297, 308, 53 L. ed. 520, 29 Sup. Ct. 383, in opinion of the court, per Mr. Justice Harlan, *quoting* from Whitings War Powers Under the Constitution, 340, 342. See above case at end of this section. See Wheaton's International Law (5th English ed.) pp. 442 et seq.

If a foreign war break out, a citizen abroad should return to his country, without delay; if a civil war break out and he reside in a rebellious section, he should at once return to and support the regular established government. The Wm. Bagaley v. United States (The William Bagaley) 5 Wall. (72 U. S.) 377, 18 L. ed. 583.

Cited in Gates v. Goodloe, 101 U. S. 617, 25 L. ed. 897; Foster v. United States, 5 Ct. Cl. 416; Desmare v. United States, 10 Ct. Cl. 390; Seymour v. Bailey, 66 Ill. 298; Hall v. Connecticut Mut. L. Ins. Co. 68 Ill. 361.

In a civil war, those are to be treated as enemies who, although subjects of the lawful government, are residents of the territory under the control of the party resisting that government, and their property may be lawfully confiscated. Page v. United States (Miller v. United States) 11 Wall. (78 U. S.) 268, 20 L. ed. 135.

Cited in Manley v. Park, 62 Kan. 561, 64 Pac. 28; Micou v. Benjamin, 26 La. Ann. 721; State v. United States & C. Exp. Co. 60 N. H. 255; Opinion of Justices, 66 N. H. 632, 33 Atl. 1076.

Persons residing in the insurrected states at any time during the Civil War must be considered as enemies, without regard to their personal sentiments or dispositions. The Peterhoff v. United States (The Peterhoff) 5 Wall. (72 U. S.) 28, 18 L. ed. 564.

Cited in The Benito Estenger, 176 U. S. 571, 44 L. ed. 593, 20 Sup. Ct. 489; Scheible v. Bacho, 41 Ala. 433; Perkins v. Rogers, 35 Ind. 153, 9 Am. Rep. 639; Hill v. Baker, 32 Iowa, 310, 7 Am. Rep. 193.

[4] Woods v. Wilder, 43 N. Y. 164, 3 Am. Rep. 684. See The William Bagaley, 5 Wall. (72 U. S.) 377, 379, 18 L. ed. 583; The Cheshire, 3 Wall. (70 U. S.) 231, 18 L. ed. 175; The San Jose Indiano, 2 Gall. (U. S. C. C.) 268, Fed. Cas. No. 12,322; The Friendschaft, 4 Wheat. (17 U. S.) 105, 4 L. ed. 525.

dent.[5] The residence of a consul or minister in a foreign country, on account of his official duties in such capacity, does not change his domicil,[6] but if he engages in mercantile business in such foreign country, the trade is affected by the hostile character of the country.[7] But the consul of a belligerent may, it is held, engage as a merchant in the commerce of a neutral state where he resides;[8] and it is declared that the character of property is determined by the domicil of the owners.[9] In regard to corporations, they are now considered to be citizens of the state of their incorporation and transaction of business.[10] So where a foreign insurance corpora-

A firm doing business in the enemy's territory, where the active member of the firm resided, must be ruled by his status, in reference to the property of the firm under his control in the enemy's country. The Wm. Bagaley v. United States (The William Bagaley) 5 Wall. (72 U. S.) 377, 18 L. ed. 583.

[5] Blackwell v. Willard, 65 N. C. 555, 6 Am. Rep. 749.

[6] Wheat v. Smith, 50 Ark. 266, 7 S. W. 161. See The Indian Chief, 3 Rob. Adm. 12; Arnold v. United Ins. Co. 1 Johns. Cas. (N. Y.) 363; Bark Pioneer, Blatchf. Pr. Cas. 666; 7 Moore's Dig. of International Law (ed. 1906) p. 431. Privileges and immunities of consuls, generally, see 5 Moore's Dig. of International Law (ed. 1906) pp. 32 et seq. secs. 702 et seq.

[7] The Indian Chief (Milton's case) 3 Rob. Adm. 12, 27, 28. Mr. Phillips (1 Phillips on Insurance [3d ed.] 114; sec. 168) says: "The commercial national character of a consul is not affected by his office, but is determined, like that of other persons, by his residence and the various other circumstances that constitute national character as affecting that of his property." Wheaton's International Law (ed. 1863) 573, sec. 19; Hall's International Law (ed. 1880) 431.

[8] The Sarah Christiana, 1 Rob. Adm. 239, per Sir Wm. Scott.

[9] Livingston v. Maryland Ins. Co. 7 Cranch 11 (U. S.) 506, 542, 3 L. ed. 421, per Story, J.; Arnold v. United Ins. Co. 1 Johns. Cas. (N. Y.) 363, 368, affirmed, Jenks v. Hallett, 1 Caines (N. Y.) 60; The Vigilantia, 1 Rob. Adm. 13, 14, per Sir Wm. Scott.

[10] Lafayette Ins. Co. v. French, 18 How. (59 U. S.) 404, 15 L. ed. 451; Louisville C. & C. R. Co. v. Letson, 2 How. (43 U. S.) 497, 11 L. ed. 353.

But it is said by Mr. Phillips that the national character of a corporation is that of its members: 1 Phillips on Ins. (3d ed.) sec. 167; and so in Arnould on Ins. (Perkins' ed.) 94, sec. 55, note 1, both *citing* Hope Ins. Co. v. Boardman, 5 Cranch (9 U. S.) 57, 3 L. ed. 36; Bank of United States v. Devaux, 5 Cranch (9 U. S.) 61, 62, 3 L. ed. 38; Society for Propagation of the Gospel v. Wheeler, 2 Gall. (U. S. C. C.) 105, Fed. Cas. No. 13,156; Hatch v. Chicago Rock Island & Pacific Rd. Co. 6 Blatchf. (U. S. C. C.) 105, Fed. Cas. No. 6,204; Minot v. Philadelphia, Wilmington & Baltimore Rd. Co. 2 Abb. (U. S. C. C.) 323, Fed. Cas. No. 9,645. See Wood v. Hartford Fire Ins. Co. 13 Conn. 202, 33 Am. Dec. 395, note 399; Shelby v. Hoffman, 7 Ohio St. 450; Thompson on Corporations, ed. 1895, vol. i., sec. 12; Id. vol. vi., secs. 7421–25.

Corporations as citizens under Federal Constitution, see notes, 60 L.R.A. 230, 14 L.R.A. 580; Joyce on Franchises (ed. 1909) sec. 291.

Bibliography. As to effect of war on corporations, see Hershey's Essen-

tion, upon compliance with the insurance laws of New York, has been authorized to do business there, and has established a permament general agency, and conducts its business there as a distinct organization in the same manner as domestic corporations, it will be regarded, as to the business transacted there, as domiciled and subject to the same obligations and liabilities as domestic institutions.[11] And substantially the same ruling obtains in Ohio.[12] So a foreign corporation is an "inhabitant" under the first section of the Judiciary Act of that district in which it is engaged in business.[13] An insurance company is also an inhabitant, for the purposes of taxation, of the town where it has its principal place of business.[14] But an American corporation doing business in Cuba was, during the war with Spain, an enemy to the United States with respect of its property found and then used in Cuba, and such property could be regarded as enemy's property, liable to be seized and confiscated by the United States in the progress of the war, subject also under the laws of war to be destroyed whenever, in the conduct of military operations, its destruction was necessary for the safety of troops or to weaken the power of the enemy.[14a]

§ 295. Alien enemy: what constitutes domicil.—What constitutes domicil depends almost exclusively upon whether the party intends to remain in a given country or state, either permanently or for a definite period, or whether his abode is taken up for a temporary purpose with the intent to return.[15] Thus the intent to reside an

tials of International Law (ed. 1912) pp. 370, 371. See 7 Moore's Dig. of International Law (ed. 1906) p. 434, to point that alien enemy may be a corporation.

See note in 5 B. R. C. 333, on status of corporation as alien enemy.

[11] Martin v. International Life Ins. Soc. 53 N. Y. 339, 13 Am. Rep. 529.

See note in 70 L.R.A. 693, on constructive domestic residence of foreign corporation.

[12] New York Life Ins. Co. v. Bert, 23 Ohio St. 105.

[13] Gilbert v. New Zealand Ins. Co. 49 Fed. 884, 15 L.R.A. 125.

See note in 14 L.R.A. 184, on residence of corporation for purpose of Federal jurisdiction in state other than that where created.

[14] City of Portland v. Union Mut. Life Ins. Co. 79 Me. 231, 9 Atl. 613. But see International Life Assur. Soc. v. Commissioners Taxes, 28 Barb. (N. Y.) 318. A corporation is said not to be a citizen of the United States within the 14th Amendment: Insurance Co. v. City of New Orleans, 1 Woods (U. S. C. C.) 85, Fed. Cas. No. 7,052.

[14a] Juragua Iron Co. v. United States, 212 U. S. 297, 53 L. ed. 520, 29 Sup. Ct. 385, see this case near beginning of this section. See note in 5 B. R. C. 333.

[15] Hallowell v. Saco, 5 Greenl. (Me.) 143; Harvard College v. Gore, 5 Pick. (22 Mass.) 372, 374. For definition of "domicil," see note 34 Am. St. Rep. 313: Wood v. Roeder 45 Neb. 311, 63 N. W. 853; Arnold v. United Ins. Co. 1 Johns. Cas. (N. Y.) 366, 367, per Kent, J.; Story's Conflict of Laws (7th ed.) c. iii., sec. 43, p. 36. "Domicil how acquired," see note 34 Am. St. Rep. 314, see note for definition of "domicil," 59 Am. Dec. 111–15; note: terms "inhabitancy," "residence," "citizen-

indefinite time will establish a commercial domicil.[16] And if a citizen of one country goes into another and remains there, and engages in trade and commerce, he becomes by the law of nations a merchant of that country and acquires a domicil there.[17] So British subjects residing and trading in Portugal are to be deemed Portuguese subjects.[18] A foreigner coming to the United States for health, and remaining and engaging in trade, acquires a domicil here.[19] If the domicil is acquired for mercantile purposes in the enemy's country, the person acquiring such domicil becomes an alien enemy,[20] for the domicil in an enemy's country is, as has been stated,[1] the test of hostile status. So a business in a hostile country is stamped with the national character of such country.[2] So if a neutral who, having resided in the hostile country, withdraws therefrom, or who, never having resided there, retains a business or trading house there, the entire commerce of the house is stamped with the hostile character of the enemy.[3] The intention to return at some future period to one's native country does not destroy the presumption of domicil, since if there be any doubt as to the time or certainty of the return, this will not avail against the presumption of hostile residence, or where the intention is fixed as of a definite and certain time at a period distantly removed, this is not sufficient;[4] and where the intent to permanently reside in the country is avowed, or where it is otherwise ascertained, it makes no difference how recently the residence may have been established, or that it may have been for only a day or two.[5] So the character of the

ship," 32 Am. Dec. 427, 429. Change of domicil, see 7 Moore's Dig. of International Law (ed. 1906) p. 433, sec. 1193; Maxey on International Law ed. 1906) p. 67.

[16] The Venus, 8 Cranch (12 U. S.) 279, 3 L. ed. 553.

[17] The Indian Chief, 3 Rob. Adm. 12.

[18] The San Jose Indiano, 2 Gall. (U. S. C. C.) 268, 293, Fed. Cas. No. 12,322, per Story, J.; The Friendschaft, 3 Wheat. (16 U. S.) 52, 4 L. ed. 322, per Marshall, C. J.

[19] Elbers v. Union Ins. Co. 16 Johns. (N. Y.) 128. In this case there was a warranty in the policy that the property was Swedish, which the court held was not complied with. But see on this point, Duguet v. Rhinelander, 2 Johns. Cas. (N. Y.) 476, reversing 1 Johns. Cas. (N. Y.) 360.

See note in 9 L.R.A.(N.S.) 1159, on change of domicil as affected by removal for benefit of health.

[20] McConnell v. Hector, 3 Bos. & P. 114, per Alvanley, C. J.; Tabbs v. Bendelack, 4 Esp. 107; 1 Kent's Commentaries (13th ed.) 74. See also as to neutral engaging in enemies' commerce, The San Jose Indiano, 2 Gall. (U. S. C. C.) 268, 286, Fed. Cas. No. 12,322, per Story, J.

[1] See last section and cases thereunder.

[2] The Friendschaft, 4 Wheat. (17 U. S.) 105, 4 L. ed. 525.

[3] The Friendschaft, 4 Wheat. (17 U. S.) 105, 107, 4 L. ed. 525; The San Jose Indiano, 2 Gall. (C. C.) 268, Fed. Cas. No. 12,322.

[4] 1 Duer on Ins. (ed. 1845) 500, sec. 9.

[5] Case of Mr. Whitehall, cited in The Diana, 5 C. Rob. Adm. 60, per

trade is immaterial where the party is domiciled bona fide in the United States, intending to indefinitely reside here, although he had emigrated here from a foreign country.[6]

§ 296. Residence with intent to return.—Where a person's residence in a country exists only for a special or temporary purpose, with the intent to return within a short time to his own country, this does not constitute such residence his domicil, nor invest the party with a commercial character at variance with his actual domicil,[7] and this was held true in a case where the stay was prolonged sixteen months and the party intended to and did return;[8] and it was so held where the party was a naturalized citizen and had a commercial domicil in the United States, and was detained by business in another country over one year.[9] The intent to return, however, must have some limit, for it cannot absolutely govern in all cases, since the time of the continuance of the residence and the attendant circumstances may make the party's domicil that of the place where he continuously resides, although his going to and residing in another country may have been incepted in a special purpose,[10] for if the residence, although originating in a special purpose, be continued for a long period of time, it may be reasonably assumed that the special purpose has become affected by other purposes and designs, or that the intent of returning has been indefinitely postponed. This intent, however, depends largely upon circumstances, and is subject to some latitude

Sir Wm. Scott; s. c. given in 1 Duer on Ins. (ed. 1845) 496, sec. 3, as follows: "The property of a British merchant, who had removed to a Dutch island in the West Indies at a time when a war between England and Holland was expected, at the breaking out of actual hostilities, was condemned as that of an enemy, although he had resided in the island only a day or two previous to its capitulation to a British force, but he was proved to have gone there with the avowed design of forming a permanent establishment, and by this design he was held to be concluded;" and in a note thereto he refers to remarks of Chief Justice Marshall on this case in The Venus, 8 Cranch (12 U. S.) 288, 3 L. ed. 553. See also 1 Kent's Commentaries (13th ed.) 76, 77.

[6] Livingston v. Maryland Ins. Co. 7 Cranch (11 U. S.) 506, 542, 3 L. ed. 421.

[7] See The Harmony, 2 C. Rob. Adm. 324; Wheaton's International Law (ed. 1863) 560; Id. (5th English ed.) p. 444. As to evidence generally to show change of domicil, see Viles v. City of Waltham, 157 Mass. 542, 34 Am. St. Rep. 311, 32 N. E. 901. Change of domicil, see first note under § 295 herein.

[8] Sears v. City of Boston, 1 Met. (42 Mass.) 250.

[9] The Ann Green, 1 Gall. (U. S. C. C.) 274, Fed. Cas. No. 414; White v. Brown, 1 Wall. Jr. (U. S. C. C.) 217, Fed. Cas. No. 17,538; The Friendschaft, 3 Wheat. (16 U. S.) 51, 4 L. ed. 322.

[10] See The Harmony, 2 C. Rob. Adm. 322, 328, per Sir Wm. Scott; Wheaton's International Law (ed. 1863) 560. Id. (5th English ed.) p. 444.

of application. Thus, residing in a country shortly before and up to the beginning of war, with intent to return, should not be held binding. The party should be permitted a reasonable time to disclose his actual intention, and disengage himself, but a continuous residing in such country thereafter and identifying himself with its interests and commerce, and aiding its resources by payment of taxes, or otherwise adding to its strength as a belligerent, would establish a domicil there, against which the original special purpose ought not to avail as a defense.[11] But if a man is forcibly restrained and his residence is involuntary, that is not his domicil.[12]

§ 297. Change of domicil.—A domicil once acquired is presumed to continue, and is retained until another is acquired.[13] Nor is intent alone sufficient to constitute a change in domicil. There must also be a consummation of the intention—an actual change in fact, some overt act.[14] And if a hostile subject goes to his native

[11] The Harmony, 2 C. Rob. Adm. 324, per Sir Wm. Scott; Fifty-two Bales of Cotton, Blatchf. Pr. Cas. 644; reversing Id. 309; The Brig Sarah Starr, Blatchf. Pr. Cas. 650; Id. 69; Schooner Gilpin, Blatchf. Pr. Cas. 661; reversing Id. 291; Wheaton's International Law (ed. 1863) 560. Id. (5th English ed.) p. 444. The above is also substantially the opinion of Mr. Duer. 1 Duer on Insurance (ed. 1845) 489; Tabbs v. Bendelack, 4 Esp. 108; The St. Lawrence, 9 Cranch (13 U. S.) 120, 3 L. ed. 676.

[12] The Ocean, 5 Rob. Adm. 84; Bromley v. Heseltine, 1 Camp. 77, per Lord Ellenborough.

[13] *Illinois.*—Knowlton v. Knowlton, 155 Ill. 158, 35 N. E. 595.

Iowa.—State v. Adams, 45 Iowa, 99, 24 Am. Rep. 760.

Kentucky.—See Fidelity Trust & Safety Vault Co. v. Preston, 96 Ky. 277, 28 S. W. 658.

Massachusetts.—Keilburn v. Bennett, 3 Met. (44 Mass.) 199, 201, per Wilde, J. Arlington v. North Bridgewater, 23 Pick. (40 Mass.) 176, per Shaw, C. J.

Mississippi.—Mayo v. Equitable Life Assur. Soc. 71 Miss. 590, 15 So. 791.

Nebraska.—Wood v. Roeder, 45 Neb. 311, 63 N. W. 853.

New Hampshire.—Moore v. Wilkins, 10 N. H. 456, per Parker, C. J.

England.—Sparenburgh v. Bannatyne, 1 Bos. & P. 163, per Eyre, C. P.

[14] *United States.*—The Frances, 1 Gall. (U. S. C. C.) 614, Fed. Cas. No. 5,034, 8 Cranch (12 U. S.) 335, 3 L. ed. 581.

Louisiana.—Gravillon v. Richards, 13 La. 293, 33 Am. Dec. 563, and note.

Maryland.—Ringgold v. Barley, 5 Md. 186, 59 Am. Dec. 107, and note, 113.

Massachusetts.—Otis v. City of Boston, 12 Cush. (66 Mass.) 44; Kilburn v. Bennett, 3 Met. (44 Mass.) 199.

Mississippi.—Hariston v. Hariston, 27 Miss. 704, 61 Am. Dec. 530.

Missouri.—State v. Sanders, 106 Mo. 88, and see note 32 Am. Dec. 428.

Nebraska.—Wood v. Roeder, 45 Neb. 311, 63 N. W. 853.

New Jersey.—Cadwallader v. Howell, 3 Harr. (18 N. J. L.) 138.

Pennsylvania.—Price v. Price, 156 Pa. St. 617, 27 Atl. 291.

Virginia.—Brown v. Butler, 87 Va. 621, 13 S. E. 71.

England.—The Citto, 3 Rob. Adm. 38.

See note in 33 L.R.A.(N.S.) 766, on gaining new domicil or residence

country for a temporary or special purpose only, intending to return, this does not change his character of alien enemy.[15] So if a domicil be once acquired the party cannot be deprived of his rights in this respect by a temporary residence in his native country.[16] But if the intent to abandon a foreign domicil is coupled with the fact of abandonment, as where a party leaves such domicil with the intent not to return, the acquired national character changes, and especially is this true in case of a return under such conditions to one's native country, for in such case the domicil of both attaches in transitu the instant of abandonment of the acquired foreign domicil.[17] But a merchant must actually return to his native country with intent to remain, to overcome the hostile character arising from residence in the enemy's country, but his withdrawal from that country must be limited to a reasonable time, or delay must have proceeded from necessity or compulsion, and where the withdrawal was a long time after the war had commenced, his property was nevertheless held liable to confiscation.[18] The right of a naturalized citizen of this country domiciled in England to ship his property from that country after the war has commenced is distinctly denied in the United States courts in a case where such an attempt was made, although without knowledge of the war, the parties still being residents of England, the court holding that the right of such party surprised by war in the country of his domicil to make his election to return to his adopted country, or to remain in the country of his domicil and have his property protected meanwhile, was not warranted by the principles of equity or the law.[19] It seems to be settled in this country that a person

before abandoning occupation of old residence by purchasing or hiring property in new locality with intention of establishing permanent residence there.

[15] See The Friendschaft, 3 Wheat. (16 U. S.) 52, 4 L. ed. 322; The Ann Green, 1 Gall. (U. S. C. C.) 274, Fed. Cas. No. 414.

[16] Wilson v. Maryat, 8 Term. Rep. 31.

[17] The Indian Chief, 3 Rob. Adm. 12, per Sir Wm. Scott; The Frances, 8 Cranch (12 U. S.) 335, 3 L. ed. 581; The Joseph, 1 Gall. (U. S. C. C.) 614, Fed. Cas. No. 5,034; The St. Lawrence, 1 Gall. (U. S. C. C.) 467, Fed. Cas. No. 12,232. See The Gray Jacket, 5 Wall. (72 U. S.) 342, 18 L. ed. 646; The Peterhoff, 5 Wall. (72 U. S.) 28, 18 L. ed. 564; Story's Conflict of Laws (7th ed.) c. iii., p. 53, sec. 48. See the dissenting opinion of Chief Justice Marshall, in The Venus, 8 Cranch (12 U. S.) 299, 3 L. ed. 553.

See note in 40 L.R.A.(N.S.) 986, on whether domicil is lost by abandonment without intention of returning before acquiring a new one.

[18] The St. Lawrence, 1 Gall. (U. S. C. C.) 471, 9 Cranch (13 U. S.) 120, 3 L. ed. 676; and see cases in preceding note.

[19] The Venus, 8 Cranch (12 U. S.) 253, 283, 3 L. ed. 553; Chief Justice Marshall and Mr. Justice Livingston dissented. See Desty's Federal Citations, 731, as to this case. See The Rapid, 1 Gall. (U. S. C. C.) 304,

cannot be permitted to emigrate into another country flagrante bello, and thereby acquire a neutral domicil which will protect his trade against the belligerent powers.[20]

§ 298. Alien enemy: what is enemy's country. —We have seen that the national character of a country, whether it be hostile or neutral, determines that of its inhabitants,[1] and it also becomes necessary, in order to decide who are alien enemies, to determine what constitutes the enemy's country. It was said in regard to the Civil War that the enemy's territory was that south of the line of war, or, in other words, the line of demarcation claimed and held by the Confederate forces,[2] and that "all persons residing within this territory whose property may be used to increase the revenue of the hostile power are in the contest liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their government, and are none the less enemies." In case of acquisitions made during the war, if the country is in possession of the conqueror, and the government under his control, it thereby becomes part of his domain for every commercial and belligerent purpose;[3] but if such country retains its own government and civil power, it will still remain neutral.[4] But a mere cession by treaty is insufficient; the territory must be solemnly delivered by the ceding power.[5]

per Story, J.; The Mary, 1 Gall. (C. C.) 621, Fed. Cas. No. 9,184; The Lady Jane, 1 Rob. Adm. 202; The St. Lawrence, 9 Cranch (U. S.) 121, per Story, J. See remarks on the decision in 1 Duer on Insurance, (ed. 1845) 503-10, secs. 12, 21; 1 Arnould on Insurance (Perkins' ed. 1850) 102, and note; 1 Kent's Commentaries (6th ed.) 78; 1 Parsons' Marine Insurance (ed. 1868) 30, note 3. But see Amory v. McGregor, 15 Johns. (N. Y.) 24, 58 Am. Dec. 205. As to the right of a subject of one country who is not domiciled but merely resident of a foreign country, to export thence his property after war breaks out, see 1 Duer on Insurance (ed. 1845) 561-66, secs. 9-11, and notes.

[20] The Dos Hermanas, 2 Wheat. (15 U. S.) 76, 98, 4 L. ed. 189, per Story, J.; 1 Kent's Commentaries, (5th ed.) 75. See The Santissima Trinidada, 7 Wheat. (20 U. S.) 283, 284, 348, 5 L. ed. 454, per Story, J. But see Duguet v. Rhinelander, 2 Johns. Cas. (N. Y.) 476, reversing 1 Johns. Cas. (N. Y.) 360; Jackson v. New York Ins. Co. 2 Johns. Cas. (N. Y.) 191, overruled by last case; 1 Duer on Ins. (ed. 1845) 521.

[1] See also The Indian Chief, 3 Rob. Adm. 12, and cases cited therein; The Henrick and Maria, 4 Rob. Adm. 43, 61.

[2] Prize Cases, 2 Black (67 U. S.) 635, 17 L. ed. 459.

[3] Thirty Hogsheads of Sugar v. Boyle, 9 Cranch (13 U. S.) 191, 3 L. ed. 701, per Marshall, C. J.

[4] Hagedorn v. Bell, 1 Mees. & S. 450. See The San Jose Indiano, 2 Gall. (U. S. C. C.) 268, 292, Fed. Cas. No. 12,322; The Henrick, 4 Rob. Adm. 43, per Sir Wm. Scott.

[5] 1 Duer on Insurance (ed. 1845) 437, sec. 37, *citing* The Fama, 5 Rob. Adm. 106; The Bolleta, 1 Ed. Adm. 171.

§ 299. Alien enemy: commencement and cessation of hostilities. —Whether a contract of insurance is valid and in force, or whether property is subject to condemnation on the ground of trade with the enemy, or whether a party is an alien enemy, depends upon the existence of war, and necessarily the date of the commencement and cessation of hostilities is of vital importance. It would seem, therefore, in all reason and justice to the parties concerned, that the intentions of the government should be plainly manifested, and that the fact should be so public and notorious that the presumption necessarily exists that the parties had knowledge of the existence of war, and this should satisfactorily appear to the court. In relation to the commencement of hostilities a formal declaration of war would certainly seem to fix a definite time, although such formal declaration is unnecessary.[6] The War of 1812 between Great Britain and this country was immediately commenced by us after the act of Congress declaring a state of war, which seems to have been deemed a formal notice, although the declaration was not formally communicated to the British government.[7] It is held, however, that where the declaration of war, although made, was not known at the foreign port of shipment at the time the vessel sailed and goods of a citizen were shipped thereon, and there was no opportunity to countermand the order after notice of the war, that there was no such illegality as to affect the importation,[8] from which it may fairly be implied that even though the declaration of war may fix a definite time, yet the rights of parties may remain unchanged when justifying circumstances exist. A state of war may exist without any formal declaration of it by either party, and this is true both of a civil and foreign war, and that a civil war exists and may be prosecuted on the same footing as if those opposing the government were foreign invaders, whenever the regular course of justice is interrupted by revolt so that the courts cannot be kept open.[9] Mr. Wheaton says: "A treaty of peace

[6] See 1 Duer on Ins. (ed. 1845) 592, sec. 35. "There is no difficulty where a public declaration or manifesto precedes an actual war. The war then exists from the time it is declared:" Id.

As to declaration of war and its immediate effects; bibliograph on, see Hershey's Essentials of International Public Law, p. 370.

[7] The American minister was recalled in the early part of 1811. The declaration of war was approved by the President on June 18, 1812. See Cooper's American Politics, book v. p. 110; book i., pp. 17, et seq. But see Wheaton's International Law (ed. 1863) 532. Id. (5th English ed.) pp. 412 et seq.

[8] The Merrimack, 8 Cranch (12 U. S.) 317, 3 L. ed. 575.

[9] Prize Cases, 2 Black (67 U. S.) 635, 17 L. ed. 459. *Cited* in Ford v. Surget, 97 U. S. 613, 24 L. ed. 1024; Swinnerton v. Columbian Ins. Co. 37 N. Y. 186, 93 Am. Dec. 760. See The Brig Sally Magee, Blatchf. Pr. Cas. 379, 382. See Walker's Inter-

binds the contracting parties from the time of its signature. Hostilities are to cease between them from that time, unless some other period be provided in the treaty itself; but the treaty binds the subjects of the belligerent nations only from the time it is notified to them." [10] But in the Civil War between the North and South there is some conflict of opinion both as to the time when the war commenced and when it ceased. In Leather v. Commercial Insurance Company,[11] Robertson, J., giving the opinion of the court says, referring to the proclamation of blockade of May 2, 1861: "But that proclamation did not attempt to affect interior intercourse and commerce between the people of the conflicting states, and cannot be understood as having any such legal effect, and so Congress seemed to think when by the act of July 13, 1861, it authorized the President to issue a proclamation interdicting all commercial intercourse between the citizens of the then and thereby recognized belligerent states. This enactment was impliedly an authoritative recognition of the fact that insurrection had culminated into war. Before that time the national government had not acknowledged that secession had become belligerence, with all belligerent rights and obligations resulting, according to the laws of technical war, and this statute necessarily implies also that Congress did not consider previous intercourse between all the states as illegal, and consequently did not recognize such a previously subsisting war as per se made commercial intercourse contraband and contracts void. And history, verified by the presentment of this note for payment in New Orleans after the second of May, 1861, shows that after the blockade there was some commercial intercourse between the contesting states which had never been adjudged unlawful, and will, we presume, never be so decided. But before contracts shall be nullified by war both reason and justice require that the contracting parties should have cause to know when they contracted that they violated the laws of an existing war. And to give notice of the congressional recognition of such a state of war was the sole object of requiring the President to proclaim the fact of recognition by the act of the 13th of July, 1861, and that proclamation was made on the 16th of August, 1861, and before that time contracts and other acts of commercial

national Law (ed. 1895) 103 et seq. See also references to other writers at end of this chapter.

[10] Wheaton's International Law, (ed. 1863) 884. Id (5th English ed.) pp. 412 et seq.; Hall's International Law (ed. 1880) 482; Halleck's International Law and Law of War (ed. 1801) c. 34, p. 844; Walker's Manual of International Law (ed. 1895) 156; 1 Duer on Insurance (ed. 1845) 593.

[11] 2 Bush (Ky.) 296, 92 Am. Dec. 483.

intercourse were not made illegal by the war." The Prize cases [12] related to vessels in port or upon the high seas after the time allowed by proclamation by the President for blockade, and it was held that such proclamation of April 27 and 30, 1861, prohibited in effect all commercial relations and was of itself conclusive evidence of war. The court was divided, four of the justices dissenting, and holding that commercial relations did not cease till August 16, 1861. [13] And the court in Perkins v. Rogers,[14] says of these cases: "The decision pronounced by the majority of the court has been overruled by several decisions rendered, and the opinion expressed by the minority of the court has since been approved and recognized as the law." In Smith v. Charter Oak Life Insurance Company [15] a citizen of Virginia had his life insured in a Connecticut company. The premium had been paid for several years until May, 1861, when they were refused by the company. After the death of the assured the beneficiary brought an action for damages against the company for dissolving the contract by its refusal to receive premiums. The action was sustained and damages given for the value of the policy when dissolved with interest on that amount, it being held that nonintercourse between the states could not be pleaded as justifying the

[12] 2 Black (67 U. S.) 635, 17 L. ed. 459.

[13] It was also decided that when the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, civil war exists; and hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land. Prize Cases, 2 Black (67 U. S.) 635, 17 L. ed. 459.

Cited in: *United States.*—Coppell v. Hall, 7 Wall. (74 U. S.) 554, 19 L. ed. 247; Texas v. White, 7 Wall. (74 U. S.) 740, 19 L. ed. 242; New Orleans v. New York Mail S. S. Co. 20 Wall (87 U. S.) 394, 22 L. ed. 358; Ford v. Surget, 97 U. S. 608, 24 L. ed. 1022; La Plante v. United States, 6 Ct. Cl. 319; Bailey v. Milner, 1 Abb. (U. S.) 265, 1 Nat. Bankr. Reg. 423, Fed. Cas. No. 740; Brown v. Hiatt, 1 Dill. 380, Fed. Cas. No. 2,011; Cuyler v. Ferrill, 1 Abb. U. S. 169, Fed. Cas. No. 3,523; Ex parte McCann, 5 Am. L. Reg. N. S. 158 note, Fed. Cas. No. 8,679; Phillips v. Hatch, 1 Dill. 576, Fed. Cas. No. 11,094; United States v. Cathcart, 1 Bond, 564, Fed. Cas. No. 14,756; United States v. 269½ Bales of Cotton, Woolw. 246, Fed. Cas. No. 16,583.

Arkansas.—Hawkins v. Filkins, 24 Ark. 308.

Georgia.—Bailey v. Milner, 35 Ga. 334.

Kentucky.—Martin v. Horton, 1 Bush, 631; Corbin v. Marsh, 2 Duv. 209.

New York.—Allen v. Bridgers, 52 Barb. 604; Swinnerton v. Columbian Ins. Co. 37 N. Y. 178, 93 Am. Dec. 560; Robinson v. International L. Assur. Soc. 42 N. Y. 62, 1 Am. Rep. 400.

Pennsylvania.—Kneedler v. Lane, 3 Grant, Cas. 519; Ford v. Surget, 36 Phila. Leg. Int. 29.

Rhode Island.—Hubbard v. Harnden Exp. Co. 10 R. I. 253.

Tennessee.—Smith v. Brazelton, 1 Heisk. 54, 2 Am. Rep. 678.

Texas.—State v. White, 25 Tex. Supp. 616.

[14] 35 Ind. 124, 9 Am. Rep. 639.

[15] 64 Mo. 330.

nonpayment on the ground that the proclamation by the President of August 16, 1861, made pursuant to the act of Congress of July 13, 1861, was the date of prohibition of commercial intercourse. in The Protector,[16] Chief Justice Chase, who delivered the opinion of the court, says: "The question in the present case is, When did the Rebellion begin and end? In other words, What space of time must be considered as excepted from the operation of the statute of limitations by the war of the Rebellion? Acts of hostility by the insurgents occurred at periods so various and of such different degrees of importance, and in parts of the country so remote from each other, both at the commencement and close of the late Civil War, that it would be difficult, if not impossible, to say on what precise day it began or terminated. It is necessary, therefore, to refer to some public act of the political departments of the government to fix the dates, and for obvious reasons those of the executive department which may be, and in fact was at the commencement of hostilities obliged to act during the recess of Congress, must be taken. The proclamation of intended blockade by the President may, therefore, be assumed as marking the first of these dates, and the proclamation that the war had closed as marking the second. But the war did not begin or close at the same time in all the states. There were two proclamations of intended blockade, the first of the 19th of April, 1861, embracing the states of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas. The second of the 27th of April, 1861, embracing the states of Virginia and North Carolina, and there were two proclamations declaring the war had closed, one issued on the second day of April, 1866, embracing the states of Virginia, North Carolina, South Carolina, Georgia, Florida, Mississippi, Tennessee,

[16] Freeborn v. The Protector, 12 Wall. (79 U. S.) 700, 20 L. ed. 463.

Cited in: *United States.*—McElrath v. United States, 102 U. S. 426, 438, 26 L. ed. 189, 191; Coleman v. Tennessee, 97 U. S. 509, 533, 24 L. ed. 1120, 1128; Lamar v. Browne, 92 U. S. 187, 193, 23 L. ed. 650, 653; Raymond v. Thomas, 91 U. S. 712, 714, 23 L. ed. 434, 435; Masterton v. Howard, 18 Wall. (85 U. S.) 99, 105, 21 L. ed. 764, 766; United States v. Muhlenbrink, 1 Woods, 570, Fed. Cas. No. 15,831; Griffin v. United States, 25 Ct. Cl. 295; Carter v. United States, 23 Ct. Cl. 328; Hodges v. United States, 18 Ct. Cl. 703; Carver v. United States, 16 Ct. Cl. 383; Gooch v. United States, 15 Ct. Cl. 287; Raines v. United States, 11 Ct. Cl. 652; Sierra v. United States, 9 Ct. Cl. 231.

Arkansas.—Hall v. Denekla, 28 Ark. 511.

Illinois.—Hall v. Connecticut Mutual Life Ins. Co. 68 Ill. 360.

Iowa.—Bishop v. Knowles, 53 Iowa, 272, 5 N. W. 139.

Louisiana.—Aby v. Brigham, 28 La. Ann. 841.

Rhode Island.—Hubbard v. Harnden Exp. Co. 10 R. I. 253.

Virginia.—Isaacs v. City of Richmond, 90 Va. 30, 38, 17 S. E. 760; Portsmouth Ins. Co. v. Reynolds, 32 Gratt. 628; Walker v. Beauchler, 27 Gratt. 524.

Alabama, Louisiana, and Arkansas, and the other issued on the 20th of August, 1866, embracing the state of Texas. In the absence of more certain criteria of equally general application, we must take the date of these proclamations as ascertaining the commencement and close of the war in the states mentioned in them." In Portsmouth Insurance Company v. Reynolds [17] the policy provided against loss "by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power." April 17, 1861, the "ordinance of secession" was passed; and April 21st, by order of the United States, the navy-yard buildings at Portsmouth were fired; the fire spread to the insured buildings, which were destroyed, and it was decided that the "ordinance" was not in force when the buildings were fired; that the United States government did not become foreign to the state of Virginia by its passage, and an action was maintainable on the policy. In McStea v. Nathan,[18] Church, C. J., in his opinion, says: "It is pertinent, therefore, to inquire whether such intercourse was permitted by the government, and if so, up to what period. The Prize cases [19] recognize the acts of the President prior to the assembling of Congress as the acts of the government, having equal effect upon this question as if authorized by Congress. The first proclamation bears date April 15, 1861, prior to which time several of the states had passed ordinances of secession, several of the forts and some public property had been seized, and Fort Sumter had been attacked. The proclamation, after reciting that the laws of the United States were obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, made a call for militia, to the number of seventy-five thousand men, and contains this clause: 'I deem it proper to say that the first service assigned to the force hereby called forth will probably be to repossess the forts, places, and property which have been seized from the Union, and in every event the utmost care will be observed, consistently with the objects aforesaid, to avoid any devastation, *any destruction of, or interference with property, or any disturbance with peaceful citizens in any part of the country.*' The terms of this proclamation repel the idea of prohibiting or restricting free business intercourse between citizens of different sections of this country. On the contrary, it pledges protection to property and the lawful pursuits of peaceful citizens. It seeks only to repossess the property which had been seized, and put down the unlawful combination to resist the laws. The next is a proclamation of intended blockade, bearing date April 19, 1861. The president in his proclamation, after

[17] 32 Gratt. (Va.) 613.
[18] 50 N. Y. 166, 171.
[19] 2 Black (67 U. S.) 635, 17 L. ed. 459.

reciting that an insurrection had broken out in several states, and that a combination of persons threatened to grant pretended letters of marque and reprisal, proceeds to say that 'with a view to the same purposes before mentioned, and to the protection of the public peace and the lives and property of quiet and orderly citizens pursuing their lawful avocations, until Congress shall have assembled and deliberated on the said unlawful proceedings, or until the same shall have ceased,' he deems it advisable to set on foot a blockade of the ports of states in which the insurrection existed. Upon the authority of the Prize cases, this was an act of war upon the part of the government, and justifiable as a war measure based upon the existence of a state of war. But so far as it operated as a restriction upon trade, it was confined to the commerce of the ports, and ostensibly in preventing the filling out of vessels to cruise upon pretended letters of marque and reprisal, and it expressly assumed to protect the lives and property of quiet and orderly citizens pursuing their lawful avocations, *'until Congress shall have assembled and deliberated.'* Nothing is plainer to my mind than the intention by this proclamation to avoid any interference with the business relations of the citizens of this country, except so far as the blockade would have that effect until the meeting of Congress. It seems incongruous to hold that a proclamation which expressly declares protection to citizens in their lawful avocations should have the legal effect of invalidating all business transactions. The next material act of the government bearing upon this question was the act of Congress of July 13, 1861, the fifth section of which declares that in a certain specified contingency 'it may, and shall be, lawful for the President, by proclamation, to declare that the inhabitants of such state, or any section or part thereof where such insurrection exists, are in a state of insurrection against the United States, and thereupon all commercial intercourse between the same and the citizens of the rest of the United States shall cease and be unlawful so long as such hostility shall continue.' This was the first intimation on the part of the government of an intention to prohibit commercial intercourse, while, as we have seen, every previous expression repelled such intention. The fair construction of this act is to regard it both as an admission of the lawfulness of commercial intercourse up to that time and a permission to continue it until the President should issue the proclamation. It is urged that this act provided merely for a warning or notification to the people that war existed so that they might know and protect their rights, but this view is inconsistent with the terms of the act. It authorizes an act to be done, the effect of which, if done, is declared to be to prohibit commercial intercourse from the time

the act is done. It does not purport to prohibit such intercourse, nor to declare a state of war the legal consequence of which would be to prohibit it. The language of the act is utterly inconsistent with the claim that such intercourse was then, or had been, unlawful. In pursuance of this act the President, on the 16th day of August, 1861, issued his proclamation declaring certain states in a state of insurrection, and that commercial intercourse with the citizens of other states was unlawful. From that period such intercourse became unlawful, and up to that period, by the implied or express permission of the government, it was lawful. If the war had ceased on the 15th day of August, 1861, and the proclamation of the 16th had never been issued, can there be any doubt that the ordinary business relations of the citizens of the respective sections of the Union would have been unaffected? It may well be that the citizens of the insurrectionary states should be regarded as public enemies for the purpose of enforcing the blockade, and that when the courts were interfered with so as to practically prevent an appeal the running of the statute of limitations should be suspended, and that these should be regarded as in consequence of an existing state of war, but they are not necessarily inconsistent with the continuance of ordinary business relations, and certainly not with the rights of the government to permit such continuance. The language used by the government is capable of no other construction than an intention to permit business intercourse. Such must have been the general understanding of the people, and good faith demands that it be maintained." In Woods v. Wilder,[20] it was held that a bill of exchange drawn by a member of a partnership in Savannah on his copartners in New York, on August 23, 1861, was illegal and void, by virtue of the proclamation of August 16, 1861.[1] War between the United States and Spain existed in April 21, 1898, when diplomatic relations were broken off, and Spain, in a communication to the United States minister at Madrid, accepted the resolution of Congress for intervention in Cuba

[20] 43 N. Y. 164, 3 Am. Rep. 684.

[1] See further on this question notes on "Belligerent rights," 91 Am. Dec. 279, 280. "Levying war against United States, what is," 94 Am. Dec. 579–81; Wheaton's International Law (ed. 1863) 514, 523, 526; 1 Duer on Insurance (ed. 1845) 592–94, secs. 35, 36; Hall's International Law (ed. 1880) pt. iii. c. 1, p. 315; Halleck's International Law and Laws of War (ed. 1861) c. xv. p. 350; Walker's Manual of International Law (ed. 1895) pp. 103, 154. As to the commencement and close of the Civil War in the United States and the different states, see Adger v. Alston, 15 Wall. (82 U. S.) 555, 21 L. ed. 234; Lamar v. Browne, 92 U. S. 187, 23 L. ed. 650; Batesville Institute v. Kaufmann, 18 Wall. (85 U. S.) 151, 21 L. ed. 775; Grossmeyer

as a declaration of war, although the formal decree by Spain and the declaration of war by Congress were not made until afterwards.[2]

§ 299a. Alien enemy: intention to subsequently wage war.—In an English case it appeared that gold, the property of a company carrying on business in the Transvaal was insured with British underwriters, by a policy containing a clause against capture, for transit from mines in the Transvaal to the United Kingdom, and during transit was seized by the Transvaal government. The policy was made, and the loss occurred, before the actual commencement of hostilities between her Majesty's government and the Transvaal. The company sued on the policy, and the underwriters defended on the ground that the plaintiffs were alien enemies, and the loss was by arrest, restraint, or detainment of the Transvaal government, incidental to actual or expected hostilities against her Majesty, and made for a purpose connected therewith, namely, to supply that government with funds with which to levy war on her Majesty. It was agreed that no dilatory plea should be set up based upon the fact that the plaintiff company was alien and could not sue while the war lasted, but the case should be dealt with as if the war were over. It was held that the intention of the Transvaal government to wage war subsequently could not be treated as creating an actual state of war, and that the commencement of the war, which took place a few days later, could not have the effect of making the seizure a hostile act; and, furthermore, that the subsequent breaking out of war did not invalidate the contract of insurance, and the plaintiffs were entitled to recover.[3]

§ 299b. Alien enemies: status of: power of government over: acts of Congress: effect of war declaration.—In addition and as pertinent to what we have stated under this chapter and elsewhere upon this subject as affecting their contract rights, especially those of insurance, the questions of who are alien enemies, their status in this country, the power of the government and the jurisdiction of

v. United States, 4 Ct. Cl. 1; Ross v. Jones, 22 Wall. (89 U. S.) 576, 22 L. ed. 730.

The rebellion was closed in all cases where private rights are affected by the time of its termination, August 20, 1866. McElrath v. United States, 102 U. S. 426, 26 L. ed. 189; United States v. Anderson, 9 Wall. note (76 U. S.) 56, 19 L. ed. 615; McKee v. Rains, 10 Wall (77 U. S.) 22, 19 L. ed. 860.

Cited in Lunenburg v. Shirley, 132 Mass. 500.

[2] The Pedro, 175 U. S. 354, 20 Sup. Ct. 138, 44 L. ed. 195.

Cited in The Buena Ventura (The Buena Ventura v. United States) 175 U. S. 387, 44 L. ed. 207, 20 Sup. Ct. Rep. 148.

[3] Driefontein Consolidated Gold Mines, Ltd. v. Janson; West Rand Central Gold Mines Co. Ltd. v. De Rougemont (Eng. Com'l Ct.) [1900] 2 Q. B. Div. L. Rep. 339, 346. *Cited* in Porter v. Freudenberg (Kreglinger v. Samuel & Rosenfeld) [1915]

the courts over them further appears from the following acts of Congress and Federal decisions.

The Revised Statutes of the United States provide:

(a) *Removal of alien enemies.*—" § 4067. Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted or threatened against the territory of the United States, by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upward, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and the degree of the restraint to which they shall be subject, and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety." [3a]

(b) *Time for removal.*—" § 4068. When an alien who becomes liable as an enemy, in the manner prescribed in the preceding section, is not chargeable with actual hostility, or other crime against the public safety, he shall be allowed, for the recovery disposed, and removal of his goods and effects, and for his departure, the full time which is or shall be stipulated by any treaty then in force between the United States and the hostile nation or government of which he is a native citizen, denizen, or subject; and where no such treaty exists, or is in force, the President may ascertain and declare

1 K. B. 857, 112 L. T. N. S. 313, 84 L. J. K. B. N. S. 1091, 29 Can. Cas. 189, 32 R. P. C. 109, [1915] W. N. 43, 31 T. L. R. 162, 59 Sol. J. 216, 5 B. R. C. 546, per Lord Reading, Ch. J. See also note Id. 583.

[3a] Act July 6, 1798, sec. 1, v. 1, p. 577.

In the Passenger Cases (Smith v. Turner; Norris v. City of Boston) 7 How. (48 U. S.) 283–573, 12 L. ed. 702 (which has been cited in connection with the above sec. 4067, and which has also been cited, explained, or distinguished in numerous decisions upon the points discussed therein) no opinion was rendered but exhaustive opinions of the judges explaining the statutes and the points of conflict with the Constitution and laws of the United States are reported. The following, however, is taken from the official syllabus: "Statutes of the State of New York & Massachusetts, imposing taxes upon alien passengers arriving in the ports of those states, declared to be contrary to the Constitution and laws of the United States and therefore null and void."

such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality." [3b]

(c) *Jurisdiction of United States courts and over alien enemies.*—" § 4069. After any such proclamation has been made, the several courts of the United States, having criminal jurisdiction and the several justices and judges of the courts of the United States, are authorized, and it shall be their duty, upon complaint against any alien enemy resident and at large within such jurisdiction or district, to the danger of the public peace or safety, and contrary to the tenor or intent of such proclamation, or other regulations which the President may have established, to cause such alien to be duly apprehended and conveyed before such court, judge, or justice; and after a full examination and hearing on such complaint and sufficient cause appearing, to order such alien to be removed out of the territory of the United States, or to give sureties for his good behavior, or to be otherwise restrained, conformably to the proclamation or regulations established as aforesaid, and to imprison, or otherwise secure such alien, until the order which may be so made shall be performed." [3c]

(d) *Duties of marshal in removing alien enemies.*—" § 4070. When an alien enemy is required by the President, or by order of any court, judge, or justice, to depart and to be removed, it shall be the duty of the marshal of the district in which he shall be apprehended to provide therefor, and to execute such order in person, or by his deputy, or other discreet person to be employed by him, by causing a removal of such alien out of the territory of the United States; and for such removal the marshal shall have the warrant of the President, or of the court, judge, or justice ordering the same, as the case may be." [3d]

It is declared by Mr. Chief Justice Marshall that no doubt is entertained as to the power of the government in such cases, and that war gives to the sovereign full right to take the persons and

[3b] Act July 6, 1798, c. 66, sec. 1, vol. 1, p. 577; act July 6, 1812, c. 130, vol. 2, p. 781.

[3c] Act July 6, 1798, c. 66, sec. 2, vol. 2, p. 577.

Alien enemy: right to sue: liability to be sued: right to appear and defend: right of appeal, see Porter v. Freudenberg (Krelinger v. Samuel & Rosenfeld) [1915] 1 K. B. 857, 112 L. T. N. S. 313, 84 L. J. K. B. N. S. 1001, 20 Com. Cas. 189, 32 R. P. C. 109 [1915] W. N. 43, 31 T. L. R. 162, 59 Sol. J. 216, 5 B. R. C. 548.

Alien enemy: limited liability company registered in England: share capital held by alien enemies: right to sue, see Continental Tyre & Rubber Co. Ltd. v. Daimler Co. (Same v. Thomas Tilling, Ltd.) [1915] 1 K. B. 893, [1915] W. N. 441, 84 L. J. K. B. N. S. 927, 20 Com. Cas. 209, 59 Sol. J. 232, 5 B. R. C. 304 & note.

Alien enemies as litigants. See note 5 B. R. C. 583.

Alien enemy: right to habeas corpus, see note 5 B. R. C. 600.

See §§ 289–291 herein.

confiscate the property of the enemy wherever found. But that "The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall chuse[3e] to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court." This opinion was given in 1814 in a case holding that enemy's property found in the United States on land at the commencement of hostilities cannot be confiscated without authority of the legislature and that a declaration of war does not of itself enact a confiscation of enemy property and that the legislature must declare its will to confiscate property.[3f]

In Lockington v. Smith,[3g] decided in 1817, in an opinion delivered by Washington, J., there was an order made on February 23, 1813, requiring all alien enemies residing within forty miles of tide water, forthwith to apply to the marshal of the district in which they resided, for passports to retire to such places beyond that distance from tide water as said marshal should designate. Said marshals were at the same time instructed and required to take into custody and convey to the place assigned to them all those to whom the said order had reference who were engaged in commerce, and who did not immediately conform to said order. There were also other instructions to the marshals. It was held that the act of Congress of July 6, 1798, conferred upon the President of the United States all means for enforcing such orders as he might give in relation to the execution of those powers; that the marshals were the proper officers to execute said orders; that after the President's establishing such regulations as he deems necessary in relation to alien enemies it was not necessary to call in the aid of the judicial authority on all occasions to enforce them and that the marshal could act without such latter authority; that by the provisions of the law Congress intended to make the judiciary auxiliary to the executive in effecting its great objects and each department was to act independently of the other except that the former was to make the ordinances and the latter the rule of decision.

The status of alien enemies the power of the government and jurisdiction of the courts over them in this country at the present

[3d] Act July 6, 1798, c. 66, sec. 3, vol. 1, p. 578.

[3e] "Chuse:" so in opinion in official report.

[3f] Brown v. United States, 8 Cranch (12 U. S.) 110, 121, 3 L. ed. 504, Story, J., dissented.

[3g] Peters (U. S. C. C.) 466, Fed. Cas. No. 8448.

time in what has been designated as "The Great War" is also set forth in the subjoined Proclamation of the President of the United States.[3h]

[3h] The Proclamation by the President of the United States of April 6, 1917, reads: "Whereas, the Congress of the United States, in the exercise of the constitutional authority vested in them, have resolved, by joint resolution of the Senate and House of Representatives, bearing date this day, that the state of war between the United States and the Imperial German Government which has been thrust upon the United States is hereby formally declared:

"Whereas, it is provided by Section 4067 of the Revised Statutes, as follows:" (Giving here said section in full, see above text).

"Whereas, by sections 4068, 4069 and 4070 of the revised statutes, further provision is made relative to alien enemies:

"Now, therefore, I, Woodrow Wilson, President of the United States of America, do hereby proclaim to all whom it may concern that a state of war exists between the United States and the Imperial German Government; and I do specifically direct all officers, civil or military, of the United States that they exercise vigilance and zeal in the discharge of the duties incident to such a state of war; and I do, moreover, earnestly appeal to all American citizens that they, in loyal devotion to their country, dedicated from its foundation to the principles of liberty and justice, uphold the laws of the land and give undivided and willing support to those measures which may be adopted by the constitutional authorities in prosecuting the war to a successful issue and in obtaining a secure and just peace;

"And, acting under and by virtue of the authority vested in me by the Constitution of the United States and the said sections of the revised statutes, I do hereby further proclaim and direct that the conduct to be observed on the part of the United States towards all natives, citizens, denizens, or subjects of Germany, being males of the age of fourteen years and upwards, who shall be within the United States and not actually naturalized, who for the purpose of this proclamation and under such sections of the revised statutes are termed alien enemies, shall be as follows:

"All alien enemies are enjoined to preserve the peace towards the United States and to refrain from crime against the public safety, and from violating the laws of the United States and of the states and territories thereof, and to refrain from actual hostility or giving information, aid or comfort to the enemies to the United States, and to comply strictly with the regulations which are hereby or which may be from time to time promulgated by the President; and so long as they shall conduct themselves in accordance with law they shall be undisturbed in the peaceful pursuit of their lives and occupations and be accorded the consideration due to all peaceful and law-abiding persons, except so far as restrictions may be necessary for their own protection and for the safety of the United States; and towards such alien enemies as conduct themselves in accordance with the law, all citizens of the United States are enjoined to preserve the peace and to treat them with all such friendliness as may be compatible with loyalty and allegiance to the United States.

"And all alien enemies who fail to conduct themselves as so enjoined, in addition to all other penalties prescribed by law, shall be liable to restraint, or to give security, or to remove and depart from the United States in the manner prescribed by sections 4069 and 4070 of the Re-

vised Statutes and as prescribed in the regulations duly promulgated by the President;

"And pursuant to the authority vested in me, I hereby declare and establish the following regulations, which I find necessary in the premises and for the public safety:

"(1) An alien enemy shall not have in his possession, at any time or place, any firearm, weapon or implement of war, or component part thereof, ammunition, maxim or other silencer, bomb or explosive or material used in the manufacture of explosives;

"(2) An alien enemy shall not have in his possession at any time or place or use or operate any aircraft or wireless apparatus, or any form of signalling device, or any form of cipher code, or any paper, document or book written or printed in cipher or in which there may be invisible writing;

"(3) All property found in the possession of an alien enemy in violation of the foregoing regulations shall be subject to seizure by the United States;

"(4) An alien enemy shall not approach or be found within one-half mile of any Federal or state fort, camp, arsenal, aircraft station, Government or naval vessel, navy yard, factory, or workshop, for the manufacture of munitions of war or of any products for the use of the Army or Navy;

"(5) An alien enemy shall not write, print or publish any attack or threats against the Government or Congress of the United States or either branch thereof or against the measures or policy of the United States or against the person or property of any person in the military, naval or civil service of the United States or of the states or territories or of the District of Columbia or of the municipal governments therein;"

"(6) An alien enemy shall not commit or abet any hostile acts against the United States or give information, aid, or comfort to its enemies;

"(7) An alien enemy shall not reside in or continue to reside in, to remain in, or enter any locality which the President may from time to time designate by an executive order as a prohibitive area, in which residence by an alien enemy shall be found by him to constitute a danger to the public peace and safety of the United States, except by permit from the President and except under such limitations or restrictions as the President may prescribe;

"(8) An alien enemy whom the President shall have reasonable cause to believe to be aiding or about to aid the enemy or to be at large to the danger of the public peace or safety of the United States, or to have violated or to be about to violate any of these regulations, shall remove to any location designated by the President by executive order, and shall not remove therefrom without permit, or shall depart from the United States if so required by the President;

"(9) No alien enemy shall depart from the United States until he shall have received such permit as the President shall prescribe, or except under order of a court judge, or justice, under sections 4069 and 4070 of the Revised Statutes;

"(10) No alien enemy shall land in or enter the United States except under such restrictions and at such places as the President may prescribe;

"(11) If necessary to prevent violation of the regulations, all alien enemies will be obliged to register;

"(2) An alien enemy whom there may be reasonable cause to believe to be aiding or about to aid the enemy, or who be at large to the danger of the public peace or safety, or who violates or who attempts to violate or of whom there is reasonable grounds to believe that he is about to violate, any regulation to be promulgated by the President or any crimi-

nal law of the United States, or of the states or territories thereof, will be subject to summary arrest by the United States Marshal, or his deputy, or such other officers as the President shall designate, and to confinement in such penitentiary, prison, jail, military camp, or other place of detention as may be directed by the President.

"This proclamation and the regulations herein contained shall extend and apply to all land and water, continental or insular, in any way within the jurisdiction of the United States."

TITLE IV.

PARTIES—AGENTS—BENEFICIARIES.

CHAPTER XII.

PARTIES TO THE CONTRACT—THE INSURED.

§ 305. Who may be parties to the contract.
§ 306. Who are not parties.
§ 306a. Parties: husband or wife.
§ 307. Parties: infants.
§ 307a. Same subject: statutes.
§ 307b. When infant bound.
§ 307c. Corporation or partnership as party insured.
§ 307d. Municipal corporation as party insured.
§ 307e. Parties: employees under employers' liability and fidelity or guaranty insurance.
§ 308. When aliens may be insured.
§ 309. Relations of insurer and insured.
§ 309a. Same subject: title guaranty.
§ 309b. Relation of insured to each other.
§ 310. Name of assured need not be set out in policy.
§ 311. Name: evidence admissible to show actual party in interest.

§ 305. Who may be parties to the contract.—All persons capable of contracting may become parties to the contract of insurance. This rule is so well settled as not to require the citation of authorities in its support.[4]

§ 306. Who are not parties.—One whose life is insured by a policy issued to another is not a party to the contract, and cannot recover back money paid by himself for premiums nor avoid the policy for fraud,[5] and a stranger to the policy who pays the pre-

[4] As to insurable interest and, right of parties to insure, see §§ 912 et seq. herein.

"Insured" and "assured," see § 1 herein.

Constitutional protection of right to contract, see Southern Home Ins. Co. v. Putnal, 57 Fla. 199, 49 So. 922.

[5] North American Life Ins. Co. v. Wilson, 111 Mass. 542. See §§ 75, 869, 1148 herein.

mium thereon, without any contract with the person entitled to the benefit of the policy, is a mere volunteer, and obtains no title thereto nor lien on the insurance.[6]

§ 306a. Parties: husband or wife.—The husband is not the party insured, although the policy is upon his property where the policy was taken in his wife's name, and she paid the premium, accepted and retained the policy, and the only contract assented to by the insurer was with her.[7]

And a life policy the application for which is signed by a married woman as applicant and by her husband whose life is proposed for insurance, when the policy recites a payment by the wife, and declares that it assures the life of her husband for her sole use, agreeing to pay her the amount for her sole use if living, and, if not living, then to her children or their guardian for their use, though it does not expressly declare that the promise is made to the wife, is a contract between insurer and the wife, though it appears that the husband made the application, representing himself as agent for the wife and that he paid all the premiums.[7a]

§ 307. Parties: infants.—It is held that an infant may enter into a contract for insurance, which will be obligatory upon the company but voidable by the infant.[8] So a contract of insurance made with an infant, is not for necessaries and is voidable at his election, but binds the insurer.[9] And a policy on the life of a minor, payable to him, if living, at maturity, and to his executors, administrators or assigns, if he dies before maturity, together with the notes given by him for premiums thereon, is not void, though voidable. Nor is the minor's assignment of the policy during his minority necessarily void.[10] Nor is the infant bound by his warranties

[6] Lockwood v. Bishop, 51 How. Pr. (N. Y.) 221. See §§ 75, 869, 1148 herein.

[7] Agricultural Ins. Co. v. Fritz, 61 N. J. L. 211, 39 Atl. 910, 27 Ins. L. J. 710.

As to husband's insurable interest, see §§ 1048–1052 herein.

As to effect on wife's rights of paying to husband insurance on her property, see Kaufman v. State Savings Bank, 151 Mich. 65, 18 L.R.A. (N.S.) 630, 114 N. W. 863, 123 Am. St. Rep. 259.

[7a] Millard v. Brayton, 177 Mass. 533, 52 L.R.A. 117, 83 Am. St. Rep. 294, 59 N. E. 436.

Wife and children as beneficiaries, see §§ 804 et seq. herein.

[8] Monaghan v. American Fire Ins. Co. 53 Mich. 238, 18 N. W. 797. See also Gonackey v. General Accident, Fire & Life Assur. Corp. 6 Ga. App. 381, 65 S. E. 53; Simpson v. Prudential Ins. Co. 184 Mass. 348, 100 Am. St. Rep. 560, 63 L.R.A. 741, 68 N. E. 673; Imperial Life Ins. Co. v. Charlebois (Quebec, S. C.) 22 Canadian L. T. 417. See note 61 Am. St. Rep. 62.

See note in 57 L.R.A. 496, on insurance on life of minor.

[9] Pippen v. Mutual Benefit Life Ins. Co. 130 N. Car. 23, 25, 57 L.R.A. 505, 40 S. E. 822.

[10] Union Central Life Ins. Co. v. Hilliard, 63 Ohio St. 478, 81 Am.

in a contract of life insurance.[11] And a minor's rights, under an insurance on his property, where the policy is issued to him by general agents, are not affected by a rule of the insurer, and instructions to that effect to its agents, not to insure minor's property, where neither he nor the person acting for him in procuring the policy had notice of such rule or instructions.[12]

But it is also decided that a mutual benefit society incorporated under the laws of New York,[13] said laws being silent as to the limitation of the age of members, cannot insure the lives of minors,[14] since mutuality of obligation being the fundamental principle upon which these corporations are established under this act, and the relation between the members and the society being one of contract, an infant cannot become a member, since he is not able to contract.[15] In Illinois a view contrary to that expressed in the New York case has been taken, it being said that since there is no legal obligation to pay the dues, and the only result of a failure to pay is suspension from membership, an infant may, upon the performance of the conditions prescribed, become a member and be entitled to the benefits of a contract[16] which provides that "no person shall become a member who is under ten or over seventy years of age." It has also been held that insurance against loss by fire is not a contract for necessaries binding upon an infant.[17]

§ 307a. Same subject: statutes.—That section of the New York Insurance Law which provides that a minor is not incompetent to

St. Rep. 644, 53 L.R.A. 462, 59 N. E. 230.

[11] O'Rourke v. John Hancock Mutual Life Ins. Co. 23 R. I. 457, 57 L.R.A. 496, 50 Atl. 834, 91 Am. St. Rep. 643.

[12] Johnson v. Scottish Union & National Ins. Co. 93 Wis. 223, 67 N. W. 416, 26 Ins. L. J. 59. *Cited* in Link v. New York Life Ins. Co. 107 Minn. 33, 35, 119 S. W. 488.

[13] Stats. 1883, c. 175.

[14] In re Globe Mut. Benefit Assn. 43 N. Y. 756, 17 N. Y. Supp. 852, Van Brunt, P. J., dissenting, aff'd 135 N. Y. 280, 17 L.R.A. 547, 32 N. E. 122.

[15] Van Brunt, P. J., dissented from this view, but held, upon other grounds, that a minor could not become a member. Infant as member of co-operative company, see note 17 L.R.A. 547.

[16] Chicago Mut. Life Ind. Assn. v. Hunt, 127 Ill. 257, 20 N. E. 56, 2 L.R.A. 549. The statute was silent in this case as to the age of members, but the certificate of association provided that "no person shall become a member who is under ten or over seventy years of age." "It follows that unless the society is permitted by the express provisions of the law governing its organization to admit infants into its membership, a contract between the society and a person who has not attained the age of majority is one into which the society may not enter:" Niblack's Mutual Benefit Societies (ed. 1888) sec. 142. *Examine* Insurance of Minors, In re (Atty. Genl.) 5 Det. L. N. No. 18, under Mich. acts 1887, act 187, secs. 16, 166.

[17] New Hampshire Mutual Fire Ins. Co. v. Noyls, 32 N. H. 345.

contract for insurance [18] is not declaratory of the common law but is in contravention thereof. And a claim that the policy sought to be rescinded is an endowment policy and not merely a policy of insurance will not be sustained as it will be presumed that the legislature had knowledge of the different forms of insurance commonly in use and its failure to specify what insurance an infant might, under the statute, be lawfully permitted to take out would indicate that such infant might validly contract for insurance in any form commonly used.[19] And under the above statute a person may recover the amount of premiums paid by him at the infant's request the same as he might recover for necessaries furnished. If, however, a recovery is not sought upon this theory but the suit is strictly upon a written request made by the infant with such third person to pay the premium and a written agreement to repay the amount advanced, there can be no recovery without alleging and proving the payment of the premium by such third person.[20] The New York statute [1] which fixes the amount of insurance which a person liable for the support of a child may take upon such child's life, limits the total amount of such insurance and does not alone restrict the amount by a single policy.[2]

Receiving infants as members of a co-operative or assessment insurance company organized under the New York Laws of 1883 [3] is unlawful and may be prevented by injunction.[4]

§ 307b. When infant bound.—An infant may be precluded from disaffirming his contract of life insurance by his conduct subsequent to his attaining majority, unless there be fraud.[5] And if an infant surrenders a life policy for its cash value it binds him and his per-

[18] Section 55, Laws 1892, c. 690, as am'd by Laws 1902, c. 437, makes an infant over fifteen years of age competent to contract for insurance for the benefit of such minor or of certain specified relatives, or to contract for the surrender of such insurance, or to give a valid discharge for any benefit accruing, or for money payable under the contract.

[19] Hamm v. Prudential Ins. Co. of America, 122 N. Y. Supp. 35, 137 App. Div. 504, s. c. (mem.) 138 App. Div. 933, 123 N. Y. Supp. 1119.

[20] Equitable Trust Co. of N. Y. v. Moss, 134 N. Y. Supp. 533, 149 App. Div. 615, s. c. (mem.) 150 App. Div. 905, 135 N. Y. Supp. 1110.

[1] Consol. Laws, c. 28, sec. 55.

[2] Flynn v. Prudential Ins. Co. of America, 207 N. Y. 315, 100 N. E. 794, rev'g 130 N. Y. Supp. 546, 145 App. Div. 704.

[3] Chapter 175.

[4] In re Globe Mutual Benefit Assoc. 135 N. Y. 280, 17 L.R.A. 547, 32 N. E. 122.

Insurance on life of infant. The payment of premiums upon a policy of insurance effected prior to the date when the Children Act, 1908, making it an offense for a person to insure the life of an infant which he has undertaken to nurse for reward, does not constitute an offense under said act. Glasgow Parish Council v. Martin, [1910] S. C. (J.) 102 Ct. of Just.

[5] Link v. New York Life Ins. Co. 107 Minn. 33, 119 S. W. 488.

sonal representatives.[6] If an infant's personal contract is fair and reasonable and there is no fraud, overreaching or undue influence by the other party, and both parties have wholly or partially executed it, so that its benefits have been received by the infant, who has, however, parted with what he has received and the nature of the benefits precludes their being restored he cannot recover what he has paid, but if the contract was fair and reasonable what the infant has paid in excess of value received may be recovered.[7]

§ 307c. Corporation or partnership as party insured.—A manufacturing corporation may insure its property and so become obligated upon its premium notes.[8] So it is decided in a Federal case that a manufacturing company was the insured where it was plainly so named in the policy, even though the loss was payable to another as interest might appear.[9] And it is held that any association of individuals, whether a corporation or only a partnership, may make contracts and take out insurance on personal property owned by it.[10]

§ 307d. Municipal corporation as party insured.—If the charter of a city [11] empowers it to exact and maintain certain public buildings the city acquires as incidental to the power thus granted the right to contract for indemnity against loss of such buildings by fire and such right can be exercised by insuring on the mutual plan, especially so where the legislature had located such a company within the city limits, and the fire insurance companies created by the legislature prior to a certain date were generally organized upon such plan.[12]

§ 307e. Parties: employees under employers' liability and fidelity or guaranty insurance.—It is held that an injured employee has no rights legal or equitable or any title or interest against a liability company in or to a policy issued by such company under an in-

[6] Pippen v. Mutual Benefit Life Ins. Co. 130 N. Car. 23, 57 L.R.A. 505, 40 S. E. 822.

[7] Johnson v. Northwestern Mutual Life Ins. Co. 56 Minn. 365, 372, 26 L.R.A. 187, 189, 59 N. W. 992, 45 Am. St. Rep. 473.

[8] St. Paul Trust Co. v. Wampach Manufacturing Co. 50 Minn. 93, 52 N. W. 274, under Laws 1881, c. 91, being "an act authorizing the formation of millers' and manufacturers' mutual insurance companies."

Corporations as Persons, see Joyce on Franchises (ed. 1909) secs. 64–66.

[9] American Cereal Co. v. Western Assur. Co. (U. S. C. C.) 148 Fed. 77, 36 Ins. L. J. 134.

Insured and assured, see § 1 herein.

As interest may appear, see §§ 920, 2030, 3641 herein.

[10] Holbrook v. St. Paul Fire & Marine Ins. Co. 25 Minn. 229. Copartners: insurable interest. See §§ 912, 944, 945 herein. As to express, implied, or incidental powers of corporations in general, see Joyce on Actions and Defenses by and against Corporations (ed. 1910) sec. 223.

[11] N. J. Pamph. L. 1866, p. 116.

[12] French, Receiver, v. Millville City, 66 N. J. L. 393, 49 Atl. 465, aff'd (mem.) 67 N. J. L. 349, 51 Atl. 1109.

demnity contract with the employer.[13] So in Oregon no privity exists between insured and an employee under an employers' liability insurance.[14] Under a New York decision a steam boiler insurance policy covering loss of life to employees of assured is deemed to have been intended at most as a pecuniary indemnity to the employees' legal representatives for loss consequent upon his death.[15] In a New Jersey case under an employers' liability insurance contract, in equity the insurer becomes the principal debtor to the insured employee and the assured the surety.[16]

An insurance under an indemnity policy taken out by insured for the benefit of employees will not include an employee whose name did not appear in the schedule of names attached when the policy was issued.[17] So a transfer of a policy of casualty insurance will not extend its terms to cover a class of employees that were not included, at the time of its execution, in a policy insuring an employer against liability to its employees.[18]

A guarantee company's liability to a bank is not a joint liability with that of its cashier, where, in the bond for the cashier as such there is no provision by which he assumes an obligation directly to the bank for his own defalcations, especially so where the cashier seems to have been made a party merely that he might enter into certain obligations to the guaranty company in case of his defalcation.[19] Where a fidelity bond for the indemnity of an employer against the dishonesty of an employee who has made the application and pays the premium and delivers the same to the employer, and said bond contains an undertaking of the employee to the obligor that the latter shall not be bound unless the employee signs the bond it must be so signed to be binding upon the obligor in the

[13] Kinnan v. Fidelity & Casualty Co. 107 Ill. App. 406. See Burke v. London Guarantee & Accident Co. 93 N. Y. Supp. 652, 47 Misc. 171; Finley v. United States Casualty Co. 113 Tenn. 592, 83 S. W. 2. See §§ 27a et seq. herein.

On injured employee's right to reach fund under employer's liability policy see notes in 7 L.R.A.(N.S.) 958, 48 L.R.A.(N.S.) 19.

[14] Scheuerman v. Mathison, 74 Oreg. 40, 144 Pac. 1177.

[15] Embler v. Hartford Steam Boiler Inspection & Ins. Co. 158 N. Y. 431, 44 L.R.A. 512, 53 N. E. 212, aff'g 40 N. Y. Supp. 450, 8 App. Div. 186. In this case loss was payable to assured for benefit of injured person.

[16] Beacon Lamp Co. v. Travellers Ins. Co. 61 N. J. Eq. 59, 47 Atl. 579.

[17] United Zinc Cos. v. General Accident Ins. Corp. 125 Mo. App. 41, 102 S. W. 605.

On what employees are covered by indemnity policy see note in 41 L.R.A.(N.S.) 963.

[18] Maryland Casualty Co. v. Little Rock Ry. & Electric Co. 92 Ark. 306, 122 S. W. 994.

[19] Guarantee Co. of North America v. Mechanics' Saving Bank & Trust Co. 80 Fed. 766, 26 C. C. A. 146, rev'd for want of jurisdiction in the circuit court, 173 U. S. 582, 43 L. ed. 818, 19 Sup. Ct. 551.

absence of waiver of such signing. And the signing by the obligor of the bond and its delivery to the employee does not make the latter the former's agent with authority to bind the former by waiver of the signature.[20]

§ 308. When aliens may be insured.—An alien friend may enter into and enforce a contract of insurance.[1] So an alien enemy residing here by permission of the government may sue and be sued in our courts, and he or his agent receive payment of the debt.[2] Alien enemies residing in a hostile country may, by treaty between the belligerent powers, have all the rights and remedies which are enforceable in the courts.[3] So the war itself has been held to create by necessity a contract with an alien enemy which would be enforceable in time of peace,[4] as in case of ransom bills;[5] and a contract with an alien enemy before the war may be fulfilled during war by performance or payment to an agent in the United States appointed before the war.[6] So if an alien enemy have the privilege or license to trade or hold property he may be insured,[7] and it is held that an enemy's license to trade is the legitimate subject of insurance.[8]

§ 309. Relations of insurer and insured.—The relation between the parties to a contract of insurance is that of debtor and creditor, of one contracting party to another contracting party, but not that of trustee and cestui que trust. It is a legal, rather than an equitable, relation.[9] So after liability actually attaches under a policy

[20] United States Fidelity & Guaranty Co. v. Ridgely, 70 Neb. 622, 97 N. W. 836.

[1] Pisani v. Lawson, 6 Bing. (N. C.) 90.

[2] Clark v. Morey, 10 Johns. (N. Y.) 70; Buchanan v. Curry, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200. See United States v. Grossmayer, 9 Wall. (76 U. S.) 72, 19 L. ed. 627. See note, "Contracts with alien enemies and right to sue them in our courts," 96 Am. Dec. 624–33.

On alien enemies as litigants see note in 5 B. R. C. 583.

[3] Society for the Prop. of the Gosp. v. Wheeler, 2 Gall. (U. S. C. C.) 105, 127 Fed. Cas. 13, 156, per Story, J.

[4] Griswold v. Waddington, 16 Johns. (N. Y.) 451, per Chancellor Kent.

[5] Ricord v. Bettenham, 3 Burr. 1734; Cornu v. Blackburne, Doug. 641. See also Antoine v. Morehead, 6 Taunt. 237 (a case of a bill of exchange drawn by a British prisoner in France for his support, which was indorsed to an alien enemy and held enforceable after the war).

[6] United States v. Grossmayer, 9 Wall. (76 U. S.) 72, 19 L. ed. 627; Buchanan v. Curry, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200; Kershaw v. Kelsey, 100 Mass. 561, 97 Am. Dec. 124, per Gray, J.

[7] Kensington v. Inglis, 8 East, 273; McStea v. Matthews, 50 N. Y. 166, per Church, C. J.; Fenton v. Pearson, 15 East, 419. See Clarke v. Morey, 10 Johns. (N. Y.) 69.

[8] Perkins v. New England Ins. Co. 12 Mass. 214; Hayward v. Blake, 12 Mass. 176. But see 1 Duer on Insurance (ed. 1845) 588, 589, sec. 32.

[9] See Bewley v. Equitable Life Ins. Co. 61 How. Pr. (N. Y.) 345.

See also the following cases:

Connecticut.—Lothrop v. Stedman, 42 Conn. 583, 589.

of insurance, the entire relation between the parties is changed from that of insurer and insured to that of debtor and creditor; and clauses in the policy which provide that certain acts or omissions of insured shall invalidate it are thereafter inoperative.[10]

In mutual benefit associations the by-laws, articles of association, and certificates of membership determine the rights of the members and of the association, and may be enforced by the parties and beneficiaries according to their respective rights as therein provided,[11] for the rights of the insured or of persons claiming insurance in either a mutual insurance company or a mutual benefit society arise out of and depend upon the contract between the parties, and must be ascertained and fixed by that contract, regardless of the character of the company.[12] So it is held in New York that the holder of a policy in a mutual company is in no sense a partner of the corporation, but his relation with the company is one of contract, measured by the terms of the policy.[13] So it is held in an Indiana case that the relation of the company to a member is a contractual one and a distinct legal entity,[14] and this has also been held as to the relation of members of a beneficial association.[15] Again, where a party contracts for the insurance of property and pays the premium, and the loss is made payable to him, the agreement to pay the loss is a contract with the person who pays the consideration.[16] So if by the terms of the policy the loss is made payable to a mortgagee, the contract is one for the benefit of the mortgagee.[16a] Notwithstanding the above decisions, it is held, as we have noted elsewhere,

Indiana.—Willcutts v. Northwestern Mutual Life Ins. Co. 81 Ind. 300, 307.

Kentucky. — Commonwealth v. Richardson, 29 Ky. L. Rep. 622, 94 S. W. 639.

Massachusetts.—Pierce v. Equitable Life Assurance Soc. 145 Mass. 56, 1 Am. St. Rep. 433, 12 N. E. 858.

New York.—Bogardus v. New York Life Ins. Co. 101 N. Y. 328, 4 N. E. 522.

Ohio.—Examine State v. Standard Life Assn. 38 Ohio St. 281.

England.—Matthew v. Northern Assur. Soc. L. R. 9 Ch. D. 80; Re Haycock's Policy, L. R. 1 Ch. D. 611.

[10] Seyk v. Miller's National Ins. Co. 74 Wis. 67, 3 L.R.A. 523, 41 N. W. 443.

[11] Union Mut. Assn. v. Montgomery, 70 Mich. 587, 38 N. W. 588, 14 Am. St. Rep. 519. See §§ 316–319 herein.

[12] So held in Block v. Valley Mutual Ins. Assn. 52 Ark. 201, 12 S. W. 702, 20 Am. St. Rep. 166.

[13] Uhlman v. New York Life Ins. Co. 109 N. Y. 421, 17 N. E. 363, 4 Am. St. Rep. 482. See §§ 316–319 herein.

[14] Schmidt v. German Mutual Ins. Co. 4 Ind. App. 340, 30 N. E. 939.

[15] Logsdon v. Supreme Lodge of Fraternal Union of America, 34 Wash. 666, 76 Pac. 292.

[16] Traders' Ins. Co. v. Pacaud, 150 Ill. 245, 37 N. E. 460, 41 Am. St. Rep. 355. *Examine* Agricultural Ins. Co. v. Fritz, 61 N. J. L. 211, 39 Atl. 910, 27 Ins. L. J. 710.

[16a] Maxey v. New Hampshire Fire Ins. Co. 54 Minn. 272, 55 N. W. 1130, 40 Am. St. Rep. 325.

that in construing a life policy in a mutual benefit society the courts will, as far as possible, hold it to be in the nature of a testament, and treat it as a will,[17] and an insured member in a mutual or fraternal benefit society has no interest or property in the fund, but only the power of appointment, which must be exercised to become operative.[18]

In Massachusetts, it is decided that one who holds a policy on the tontine plan is a creditor at the termination of the tontine period, and not a member of the company, and is therefore entitled to an accounting.[19] But in a New York case[20] the action was for an accounting, and it was claimed "that the relation between the plaintiff and defendant is not one solely of contract, but that as to the participation in the profits of this tontine system that relation is similar to one of trustees and cestui que trust." The court, in determining this claim, said: "We are convinced, after a careful examination of the character of the relations existing between these parties that it cannot be said that the defendant is in any sense a trustee of any particular fund for the plaintiff, or that it acts, as to him and in relation to any such fund, in a fiduciary capacity. It has been held that the holder of a policy of insurance even in a mutual company, was in no sense a partner of the corporation which issued the policy, and that the relation between the policy holder and the company was one of contract measured by the terms of the

[17] Chartrand v. Brace, 16 Col. 19, 29 Pac. 152, 12 L.R.A. 209, 25 Am. St. Rep. 235; Supreme Council Catholic Knights of America v. Densford, — Ky. —, 56 S. W. 172, 173. *Compare* Southern Mutual Life Ins. Co. v. Durdin, 132 Ga. 495, 131 Am. St. Rep. 210, 64 S. E. 264. See § 738 herein.

[18] Rollins v. McHatton, 16 Col. 203, 25 Am. St. Rep. 260, 27 Pac. 254; Northwestern Masonic Aid Assoc. v. Jones, 154 Pa. St. 99, 35 Am. St. Rep. 810, 26 Atl. 253; Cook v. Supreme Conclave Improved Order of Heptasophs, 202 Mass. 85, 88 N. E. 584.

[19] Pierce v. Equitable Life Assur. Soc. 145 Mass. 56, 1 Am. St. Rep. 433, 12 N. E. 858. *Examine* Peters v. Equitable Life Assur. Soc. 200 Mass. 579, 86 N. E. 885.

[20] Uhlmann v. New York Life Ins. Co. 109 N. Y. 421, 17 N. E. 363, 27 Cent. L. J. 360, 4 Am. St. Rep. 482. *Quoted from and considered at length* in Equitable Life Assurance Soc. v. Brown, 213 U. S. 25, 46–49, 53 L. ed. 682, 29 Sup. Ct. 404, upon point that by decisions of the highest courts of New York the society's relation to its policy-holders is not that of trustee, but that the relation is one of contract.

Cited (in dissenting opinion) in Langdon v. Northwestern Mutual Life Ins. Co. 199 N. Y. 188, 205, 92 N. E. 440 (to point that under such form of policy relation is not that of trustee and cestui que trust but merely of debtor and creditor). A case of an action brought in part to reform a policy so as to correspond with a claimed special contract: Burns v. Burns, 190 N. Y. 211, 82 N. E. 1107 (to point that relation one of contract merely). *Distinguished* in Thomas v. New York & Greenwood Lake Co. 139 N. Y. 163, 180, 34 N. E. 877. *Quoted*

policy.[1] Upon the payment of the premiums by the various policy holders embraced in the tontine class the money immediately becomes the property of the company, and no title thereto remains in any of the policy holders. Under such a policy as this there is no obligation on the part of the corporation to keep the premiums paid on such policies separate and apart from its other funds. Nor is there any obligation on its part to invest such funds in any particular way or at any particular time. The contract contemplates the fact that the funds will be invested; but the character of such investment is left absolutely to the discretion of the defendant, except as it may be limited by the laws of the state. . . . The question is distinctly up, as to what rights the plaintiff had after the expiration of the ten-year period, the policy itself being in force; and unless there was some relation fiduciary in its nature, the right to an accounting on that ground cannot be claimed. We think the payment of a premium by the policy holders of this class of policies is much more like that of a deposit in a bank by a depositor, as to which it is conceded that there is no such relation as that of trustee and cestui que trust.[2] By the very terms of this policy the amount of the fund is necessarily uncertain. What it may be depends, not only upon the number of policies taken out during the period, but upon the number of policies in the class which may lapse or become forfeited, and upon the amount of the proper expenses of the company which shall justly become chargeable to this fund. So that the dividend which may come to the plaintiff, or any other policy holder, depends upon numerous contingencies, and in relation to all these matters the parties have agreed in specific terms, contained in the policy itself, that this surplus or fund, derived as already stated, 'shall be apportioned equitably among such policies of the same class as shall complete their ten-year dividend period.' Here is the extent of the obligation of the defendant—that it shall equitably apportion this sum. As has been said, there is no title in the plaintiff to any specific moneys. There is, in reality, no specific or separate fund, as it is made up simply by a system of debits and credits contained in the books of the company, which debits and credits are made during the running of the tontine period. There is no separation of the fund belonging to this system, and no legal necessity for such separation from any other fund or property be-

from Russell v. Pittsburgh Life & Trust Co. 132 App. Div. 217, 227, 116 N. Y. Supp. 841. See also McDonnell v. Mutual Life Ins. Co. of N. Y. 116 N. Y. Supp. 35, 131 App. Div. 643.

[1] See Cohen v. New York Mutual Life Ins. Co. 50 N. Y. 610, 10 Am. Rep. 522; People v. Security Life Ins. & Annuity Co. 78 N. Y. 114, 34 Am. Rep. 522.

[2] See Foley v. Hill, 2 H. L. Cas. 32.

longing to defendant. The situation of the parties is that of debtor and creditor simply, the amount of such debt being determinable by this equitable apportionment, which, taking the language of the policy into consideration, necessarily means that the apportionment is to be made by the corporation through its officers." And it was held that equity would not order an accounting on the principle of trusteeship. The court also says of the Massachusetts case above noted that it "was decided under the peculiar wording of the statute of Massachusetts in regard to complicated accounts, and we do not think it should be followed by the courts of this state." The New York case is also in accord with the decision in a case in the United States circuit court, where it is held that no trust relationship, which can give equity jurisdiction, exists between the holder of a tontine policy and an insurance company in which he is entitled to a share of the assets.[3] In later Federal decisions it is held that the relation between the holder of a matured semi-tontine policy and the insurer is that of debtor and creditor and involves no trust relation.[4] So in a Wisconsin case it is held that the nature of the obligation of an insurance company to a holder of a tontine dividend policy is that of debtor and creditor under the stipulations of the agreement.[5]

A "participating policy" of life insurance, whereby surplus profits of the company are shared with others holding like policies, does not create a trust relation between the parties.[6]

§ 309a. Same subject: title guaranty.—A corporation organized for the purpose, among others, of examining and guaranteeing titles to real estate and which in all matters relating to conveyancing and searching titles holds itself out to the public and assumes to discharge the same duties as an individual conveyancer or attorney has the same responsibilities and its duty to its employer is governed by the principles applicable to attorney and client.[7]

[3] Hunton v. Equitable Life Assur. Soc. 45 Fed. 661.

[4] Everson v. Equitable Life Assur. Co. (U. S. C. C.) 68 Fed. 258, aff'd 71 Fed. 570, 18 C. C. A. 251, which is *cited* as "on all fours" in Grieb v. Equitable Life Assur. Soc. (U. S. C. C.) 189 Fed. 498, 502, aff'd 194 Fed. 1021, 114 C. C. A. 658, on opinion below. See also Peters v. Equitable Life Assur. Soc. 200 Mass. 579, 86 N. E. 885.

[5] Timlin v. Equitable Life Assur. Soc. 141 Wis. 276, 124 N. W. 253, 39 Ins. L. J. 295, 301, *citing* Uhlman v. New York Life Ins. Co. 109 N. Y. 421, 17 N. E. 363, 4 Am. St. Rep. 482; Gadd v. Equitable Life Assur. Co. 97 Fed. 834.

[6] Taylor v. Charter Oak Life Ins. Co. 9 Daly (N. Y.) 489.

[7] Ehmer v. Title Guarantee & Trust Co. 156 N. Y. 10, 50 N. E. 420.

Cited in Trenton Potteries Co. v. Title Guarantee & Trust Co. 176 N. Y. 65, 75, 68 N. E. 132 (which distinguishes between the contract of insurance and contract of searching in such cases); Glyn v. Title Guarantee & Trust Co. 132 App. Div. 859,

§ 309b. Relation of insured to each other.—Each policy holder in any insurance company, whether mutual or not, has an associated relation whereby he is interested in the engagements of all, as out of the coexistence of many risks, arises the law of average, which underlies the whole business.[8]

§ 310. Name of assured need not be set out in policy.—It is not necessary to the validity of the policy that the name of the assured should appear therein. He may be described in other ways than by name.[9] If the interest of a person other than that of the one named in the policy is intended to be protected, words must be used in the contract sufficiently clear to indicate an intention to protect interest covered.[10]

A party may insure as agent or trustee, naming the actual party in interest;[11] or one may insure in his own name goods held in trust by him, and he can recover for their entire value, holding the excess over his own interest for the benefit of those who have intrusted the goods to him;[12] and insurance in the name of a manager of a warehouse for account of whom it may concern, applies to the benefit of any person who may own property therein at the time of a loss, though such property was not therein when the policy was issued.[13] So an agent may insure in his own name as agent;[14] or a consignee may effect an insurance in his own name on account of whom it concerns, loss payable to him, and, in case of loss, may maintain an action thereon;[15] or the policy may be left blank and the name filled in, or it may be made for "whom it may concern," or to the "estate of;"[16] and a policy on "account of ——," or "for

861, 117 N. Y. Supp. 424 (upon point of relation of attorney and client).

See § 27i herein.

[8] New York Life Ins. Co. v. Statham, 93 U. S. 24, 23 L. ed. 789.

Cited in Connecticut Mutual Life Ins. Co. v. Home Ins. Co. 17 Blatchf. (U. S. C. C.) 142, 147, Fed. Cas. No. 3107.

See § 17 herein.

[9] Weed v. London Fire Ins. Co. 116 N. Y. 106, 114, 22 N. E. 231; Weed v. Hamburg-Bremen Fire Ins. Co. 133 N. Y. 394, 31 N. E. 231.

As to description of parties or their interest, see §§ 1689 et seq.

[10] Stanley v. Fireman's Ins. Co. 34 R. I. 491, 84 Atl. 601, 42 L.R.A. (N.S.) 79.

[11] Holmes v. United Ins. Co. 2 Johns. Cas. (N. Y.) 329. As to right of agent to insure, see §§ 609 et seq. herein.

[12] California Ins. Co. v. Union Compress Co. 133 U. S. 387, 19 Ins. L. J. 385, 33 L. ed. 730, 10 Sup. Ct. 365.

[13] Morotock Ins. Co. v. Cheek, 93 Va. 8, 57 Am. St. Rep. 782, 24 S. E. 464.

[14] Davis v. Boardman, 12 Mass. 80; Marts v. Cumberland Ins. Co. 44 N. J. L. 478.

[15] Sturm v. Atlantic Mut. Ins. Co. 63 N. Y. 77.

[16] Fire Ins. Assn. v. Merchants' Transportation Co. 66 Md. 339, 7 Atl. 905, 59 Am. Rep. 162; Turner v. Burrows, 8 Wend. (N. Y.) 144; Clinton v. Hope Ins. Co. 51 Barb. (N. Y.) 647, 45 N. Y. 454. But see

——," is equivalent to a policy "for whom it may concern."[17] If property is insured "on account of whom it may concern," there is a privity between the insurance company and the actual owner of the property from the time of the insurance and the contract is with him as the assured.[18] If one is named by mistake it may be cured by indorsement,[19] and in such case a recovery may be had in the name of the real party in interest, for the indorsement may be regarded as a new contract of insurance with him.[20]

§ 311. Name: evidence admissible to show actual party in interest.—If the name of the person for whose benefit the insurance is obtained does not appear upon the face of the policy, or if a blank is left in the policy for the name of the person on whose account the insurance is effected, or if the designations used are applicable to several persons, or if the description of the assured is imperfect or ambiguous, or the policy be "to whom it may concern," evidence aliunde may be resorted to to ascertain the meaning of the contract and to show who are the real parties in interest.[1] So in an action upon a policy in the name of a party not the owner, a letter from an owner, directing the plaintiff to obtain insurance on the vessel in his own name, and stating the interest of the plaintiff in the vessel insured, is admissible in evidence for the plaintiff.[2] In such cases the risk attaches to the interest of the party actually intended to be covered, and he may sue,[3] even though such intention may have been unknown to the insurer.[4] But the party intended must have been in contemplation of the contract, or the insured must have

State v. Standard Life Assn. 38 Ohio St. 281.

[17] Burrows v. Turner, 24 Wend. (N. Y.) 276, 35 Am. Dec. 622. See Turner v. Burrows, 8 Wend. (N. Y.) 141.

[18] Pacific Mail S. S. Co. v. Great Western Ins. Co. 65 Barb. (N. Y.) 334.

[19] Sohns v. Rutgers Fire Ins. Co. 4 Abb. App. (N. Y.) 279.

[20] Sohns v. Rutgers Fire Ins. Co. 4 Abb. App. (N. Y.) 279.

[1] Weed v. London Assoc. Ins. Co. 116 N. Y. 106, 114, 22 N. E. 229; Clinton v. Hope Ins. Co. 45 N. Y. 454; Burrows v. Turner, 24 Wend. (N. Y.) 276, 35 Am. Dec. 622; Weed v. Hamburg-Bremen Fire Ins. Co. 133 N. Y. 394, 31 N. E. 231; Protection Ins. Co. v. Wilson, 6 Ohio St. 553.

[2] Vairin v. Canal Ins. Co. 10 Ohio 223.

[3] Crosby v. New York Ins. Co. 5 Bosw. (N. Y.) 369, 377. See also Hooper v. Robinson, 98 U. S. 528, 25 L. ed. 219; The Sidney, 23 Fed. 88; Newson v. Douglass, 7 Har. & J. (Md.) 417, 16 Am. Dec. 317; Clinton v. Hope Ins. Co. 45 N. Y. 454; Cincinnati Ins. Co. v. Rieman, 1 Disn. (Ohio) 396.

[4] The Sidney, 27 Fed. 119 (dismissed in 139 U. S. 331, 35 L. ed. 177, 11 Sup. Ct. 620); Buck v. Chesapeake Ins. Co. 1 Pet. (26 U. S.) 151, 7 L. ed. 90; Newson v. Douglass, 7 Har. & J. (Md.) 417, 16 Am. Dec. 317. See also Hurlburt v. Pacific Ins. Co. 2 Sum. (U. S. C. C.) 471, Fed. Cas. No. 6,919.

subsequently adopted it, for this clause does not cover any and everybody who may chance to have an interest in the thing insured.[5] And if a bailee holding the property of another, insures it against loss or damage by fire, for the protection of his special interest therein and that of the owner, the fact such owner was not a party to the contract of insurance at its inception, does not, after he has adopted and ratified it, and after loss and notice, permit the parties and those claiming under them, to contradict, vary, or modify the contract by showing that it does not embody the agreement actually made.[6] Where a party who has an insurable interest in a house owned by another takes out a policy in the owner's name, and upon its loss collects the insurance money as the owner's agent, he is liable to the owner therefor without a prior demand, and cannot defend on the ground that he intended the insurance to cover his own interest.[7] Where a policy is issued by a mutual insurance company "for whom it concerns" to one who has no interest in the property insured, the owner of the property, by whose authority the policy was obtained, may maintain an action, subject to any right given to the insurers by the terms of the policy to deduct any amount due them from the insured.[8] But it was held, in an Iowa case that an action at law could not be maintained by Caroline Zimmerman upon a policy issued to "C. Zimmerman, where the application was referred to as a part of the policy and was signed Conrad Zimmerman."[9] And a policy of insurance made in the name of a particular person who is the owner of a small proportion of the property insured cannot be made to cover the interest of others upon parol proof that the application for insurance was for such others, as well as for the party named, and that this was well known to the insurers, and that it was the intention of all the parties that the policy was to cover the interest of all the owners.[10] Again, an Indiana Insurance Company located at Evansville, in said state, in order to do business in Ohio and avoid the laws of that state prescribing the terms upon which insurance companies might carry on business therein, issued to persons, who insured with their agents, H. & B., in Ohio, certain slips, certifying that H. & B. were insured in the property therein described under an open policy, numbered 38, which the insurance company

[5] Newson v. Douglass, 7 Har. & J. (Md.) 417, 16 Am. Dec. 317; Hooper v. Robinson, 98 U. S. 528, 25 L. ed. 219; Waring v. Indemnity Ins. Co. 45 N. Y. 606.

[6] Johnston v. Charles Abresch Co. 123 Wis. 730, 107 Am. St. Rep. 995, 101 N. W. 395.

[7] Looney v. Looney, 116 Mass. 283.

[8] Cobb v. New England Mutual Marine Ins. Co. 6 Gray (Mass.) 192.

[9] Zimmerman v. Farmers' Ins. Co. 76 Iowa, 352, 41 N. W. 39.

[10] Finney v. Bedford Commercial Ins. Co. 8 Metc. (Mass.) 348, 41 Am. Dec. 515.

had previously issued to H. & B., its own managing agent at Evansville. H. & B. insured plaintiff on a cargo of salt in a barge on the Ohio river; they received the premium from plaintiff and delivered to him a slip certifying that they, the agents, were insured under the open policy, number 38. The company knew that plaintiff was the owner of the salt, and knew everything material to the risk. The salt was shipped by plaintiff to S. & Co., Memphis, who was expected to make advances thereon and pay charges therefor, and S., one of the firm, was made appointee in the slip or insurance certificate to receive the insurance in case of loss. The salt became a total loss by the perils insured against; proof was made of loss, and the plaintiff's interest therein. It was held that parol evidence was admissible to show that plaintiff was the party intended to be insured, although the contract was in writing and there was no ambiguity on its face concerning the same; that the company was bound to know what its agents, H. & B., knew, and could not set up the latter's want of interest in the property, and could not evade liability by saying that the contract was void; that even if it should be held void because H. & B., while acting as agents for the company, could not insure themselves, nevertheless the writings and parol proof showed a valid parol contract to insure plaintiff; that the action was properly brought in plaintiff's name.[11] The court says: "In applying insurance contracts to the proper subject-matter and the party or parties intended to be covered by the risk, courts have been liberal in receiving parol testimony in favor of the assured. It is well settled that when a written contract is made by an agent in his own name, the undisclosed principal may sue upon it, and prove by parol evidence that the contract was made for his benefit, and this may be done although the other party had no knowledge of the agency, and supposed he was dealing with the one who was acting for himself.[12] If by mistake a policy is issued in the husband's name on his wife's property such mistake may be shown by their testimony.[13]

[11] Daniels v. Citizens' Ins. Co. 5 Fed. 425.

[12] *Citing: United States.*—Thompson v. Railroad Co. 6 Wall. 73 (U. S.) 134, 137, 18 L. ed. 765; Insurance Co. v. Chase, 5 Wall. (72 U. S.) 509, 18 L. ed. 524.

Iowa.—Anson v. Winnesheik Ins. Co. 23 Iowa, 85.

Massachusetts.—Shawmitt Sugar Refining Co. v. Hampden Ins. Co. 12 Gray (78 Mass.) 540; Huntington v. Knox, 7 Cush. (61 Mass.) 371; Rider v. Ocean Ins. Co. 20 Pick. (37 Mass.) 259.

Ohio.—Protection Ins. Co. v. Wilson, 6 Ohio St. 561.

England.—Arcangelo v. Thompson, 2 Campb. 620.

Story on Agency, sec. 61.

On the point that parol insurance is valid, the court *cites* Relief Ins. Co. v. Eggleston, 96 U. S. 572, 574, 24 L. ed. 841; Sanborn v. Fireman's Ins. Co. 16 Gray (Mass.) 448, 77 Am. Dec. 419.

[13] Fredericks v. Hanover Fire Ins. Co. 28 Pitts. L. J. 259, 56 Leg. Intel. 47, 15 Lancaster L. Rev. 150, 7 Pa. Dist. R. 79, under Pa. act May, 1887.

CHAPTER XIII.

PARTIES—MEMBERS OF MUTUAL INSURANCE COMPANIES, MUTUAL BENEFIT, ETC., SOCIETIES.

§ 316. Parties: members of mutual insurance companies and mutual benefit societies.
§ 317. Membership exists when contract is completed.
§ 318. Obligations and rights of members generally.
§ 318a. Same subject: title to company's property.
§ 318b. Property rights of company and members: constitutional law.
§ 319. Relations of members of mutual companies: partnership.

§ 316. Parties: members of mutual insurance companies and mutual benefit societies.—Members of mutual insurance companies and of mutual benefit societies, the legal status of which is that of insurance companies, sustain a dual relation, since each member is at once the insured and insurer. In one aspect his relation is substantially that of a policy holder, or a party who has contracted upon a consideration for an indemnity or for the payment of money upon the happening of a specified contingency. He has all such rights against the corporation or association as are defined by his contract with it and which could validly be enforced thereunder. In another aspect he is a member of the corporation, and becomes an indemnifier of the other members as the corporation or association represents to each member the aggregate of the other members. The members have, or may have, a voice in the management of the company's affairs,[14] and their corporate rights depend upon the charter or articles of association, and the by-laws and rules of the organization, as these embody the compact between the corporation or association and its members, and to this resort must be had for the settlement of such questions as involve their duties and rights with relation to the organization.[15] A benefit society sustains a relation to

[14] See State v. Standard Life Assn. 38 Ohio St. 281: Condon v. Mutual Reserve Assoc. 87 Md. 99, 73 Am. St. Rep. 169, 44 L.R.A. 149, 42 Atl. 944; Huber v. Martin, 127 Wis. 412, 3 L.R.A.(N.S.) 653, 115 Am. St. Rep. 1023, 7 Am. & Eng. Ann. Cas. 400, 105 N. W. 1031, 35 Ins. L. J. 334.

[15] Ryan v. Knights of Columbus, 82 Conn. 91, 72 Atl. 574; Chamberlain v. Lincoln, 129 Mass. 70; Gros-

its members other than that of a life insurance company; the fund raised is practically a trust fund made up of their contributions.[16] It is held in Massachusetts [17] that a statute providing that the conditions of insurance shall be stated in the body of the policy [18] does not apply to the obligations of the insured as a member of the corporation; and that the contract of each member contains obligations on the part of the corporation which enter into and qualify the contract of every other member. It is necessary and equitable that each person who gets insured in such company or society should become subject to the same obligations toward his associates that he requires from them toward himself.[19]

But where a company is organized upon the mutual plan, having no capital stock, and receives, as a substitute therefor, notes for premiums in advance, the makers of such notes do not thereby become stockholders of the corporation.[20] So where a person procured a policy of insurance for a term of years at a fixed annual premium, and paid the first year's premium in advance, and gave a note payable in instalments at the commencement of each of the years during which the policy ran, it was decided that the assured did not thereby become a stockholder, or liable for the debts of the company, and that when the company failed all obligation to pay the note terminated.[1] And it is held in Maine [2] that a mutual insurance company has no stockholders, and its original corporators cannot be regarded as such so as to be entitled to assets remaining after dissolution and paying the company's liabilities. But it is declared in a New York case that where the statute [3] provides that an insurance company may sue or be sued by any of "its members or stock-

venor v. United Soc. 118 Mass. 78; Commonwealth v. Massachusetts Fire Ins. Co. 112 Mass. 116, 120, per the Court; Planters' Ins. Co. v. Comfort, 50 Miss. 662, 668, per the court; Rosenberger v. Washington Mutual Fire Ins. Co. 87 Pa. St. 207; Diehl v. Adams County Mutual Ins. Co. 58 Pa. St. 443, 98 Am. Dec. 302; Commonwealth v. St. Patrick's Soc. 2 Binn. (Pa.) 441, 4 Am. Dec. 452; Farmers' Mutual Ins. Co. v. Mylin (1888) — Pa. —, 15 Atl. 710; Bradfield v. Union Mut. Ins. Co. 9 Week. N. C. 436.

The provisions of the application and the policy determine the relative rights and liabilities of members of a mutual benefit insurance corporation which is not incorporated. Sergeant v. Goldsmith Dry Goods Co. — Tex. Civ. App. —, 159 S. W. 1036.

[16] Blair v. Supreme Council American Legion of Honor, 208 Pa. 262, 101 Am. St. Rep. 934, 57 Atl. 564.

[17] Commonwealth v. Massachusetts Fire Ins. Co. 112 Mass. 116.

[18] Mass. Stat. 1864, c. 196.

[19] Baxter v. Chelsea Mut. Fire Ins. Co. 1 Allen (Mass.) 294, 79 Am. Dec. 730.

[20] Hill v. Nautilus Ins. Co. 4 Sand. Ch. (N. Y.) 577.

[1] Farmers' & Merchants' Ins. Co. v. Smith, 63 Ill. 187.

[2] Titcomb v. Kennebunk Mut. Fire Ins. Co. 79 Me. 315, 316, 9 Atl. 732.

[3] N. Y. Laws, 1853, c. 463, sec. 107.

holders," the word "members" is synonymous with "stockholders." [4] In another case in that state it is held that notwithstanding charter provisions by which membership is limited to those persons holding capital stock notes, still all those are members of a mutual fire insurance company, organized under the New York Laws of 1892,[5] who hold insurance in such companies.[6] Under a Wisconsin decision, policy holders in mutual insurance companies are, as regards rights and remedies, stockholders therein the same as owners of stock in a stock corporation, there being no charter provision to the contrary.[7] Sometimes, however, the members of mutual insurance companies are made stockholders by the statute of incorporation.[8] Again the holders of certificates are not creditors within the meaning of a statute relative to proceedings in equity against corporations.[9] As such member, the company's books are, in law, as much his as other members;[10] but until the act of insurance is consummated he is a stranger to the organization.[11] It is held in Pennsylvania that where one becomes a member of a mutual insurance company, he has a right to vote for the directors, and that they are none the less his representatives, though they are incompetent, extravagant, or careless of their trust.[12]

§ 317. Membership exists when contract is completed.—A person becomes a member or co-corporator of a mutual insurance company or mutual benefit society, whose legal status is that of an insurance company, when the contract is completed, and prior to that time he is a stranger to the organization,[13] and this rule clearly applies where the charter expressly provides that a person must take out a policy to become a member and that only holders of unexpired policies can be deemed to be members, for, in such case, no one

[4] People v. Security Life & Annuity Co. 78 N. Y. 114, 7 Abb. N. C. (N. Y.) 198, 34 Am. Rep. 522.

[5] Chapter 690.

[6] Raegener v. Willard, 60 N. Y. Supp. 478, 44 App. Div. 41.

[7] Huber v. Martin, 127 Wis. 412, 3 L.R.A.(N.S.) 653, 115 Am. St. Rep. 1023, 7 Amer. & Eng. Ann. Cas. 400, 105 N. W. 1031, 35 Ins. L. J. 334.

[8] "All persons insuring upon the mutual plan in any company organized in accordance with the provisions of this act shall constitute its members and stockholders," etc.; and providing also the extent of their liability. Kan. Laws, 1875, c. iii., secs. 5, 8.

[9] Hill v. Nautilus Ins. Co. 4 Sand. Ch. (N. Y.) 577.

[10] Diehl v. Adams County Mutual Ins. Co. 58 Pa. St. 443, 98 Am. Dec. 302.

[11] Cumberland Valley Mutual Protection Co. v. Schell, 29 Pa. St. 31. See § 53 herein.

[12] Koehler v. Beeber, 122 Pa. 291, 23 Week. Not. Cas. 558, 16 Atl. 354.

[13] See §§ 53–53e herein. Commonwealth v. Mutual Fire Ins. Co. 112 Mass. 116. See Bruner v. Brotherhood of American Yeomen, 136 Iowa, 612, 111 N. W. 977; Cumberland and Valley Mutual Protection Co. v. Schell, 29 Pa. St. 31.

When one is full member of mutual benefit society and not member

can rightly be treated as a member at any time for any purpose unless he then holds an unexpired policy; and if there is no charter provision on the subject membership commences only with the taking out of a policy and lasts only for the policy period.[14] So, in a case involving the question of the relative powers of agents in mutual and in stock companies,[15] it is held that the insured does not become a member in a mutual company until the policy is issued to him, and that prior to that time he stands in same relation to a mutual company as he would to a stock company.[16] And a contract with a mutual benefit society must become effective and binding prior to the member's death; otherwise no liability exists as against the company.[17]

But where a party had a policy on his barn, and subsequently applied for insurance on its contents, it was decided that at the time of the latter application he was a member.[18] Where the secretary of the defendant company, who was its general agent for that purpose, received applications of more than fifty persons for insurance and membership in the company, accompanied by their premium notes, etc., and plaintiff's application and premium note were so received, and his due-bill for the ten per cent and fees required to be paid in advance was accepted by the secretary, and the board of directors thereupon completed the organization of the company, it was held that the plaintiff (like all other persons whose application, etc., had been so received up to the time of such organization) was a member of the company, liable to assessment for the payment of subsequent losses of other members, and entitled to a policy upon the property described in his application, although the directors had not formally approved of such application or indorsed their approval thereon, on the day of such organization, as required by the by-laws.[19]

solely of social class, see Supreme Council of Order of Chosen Friends v. Bailey, 21 Ky. L. Rep. 1627, 55 S. W. 888. When one becomes a social member only see Asselto v. Supreme Tent Knights of Maccabees of the World, 172 Pa. St. 5, 43 Atl. 400.

[14] Huber v. Martin, 127 Wis. 412, 3 L.R.A.(N.S.) 653, 115 Am. St. Rep. 1023, 7 Am. & Eng. Ann. Cas. 400, 105 N. W. 103, 35 Ins. L. J. 334. See §§ 53–53c herein.

[15] See § 393 herein.

[16] Fidelity Mutual Fire Ins. Co. v. Lowe, 4 Neb. (unof) 159, 93 N. W. 749. *Citing* Eilenberger v. Protective Mutual Fire Ins. Co. 89 Pa. 464. See §§ 53–53c herein.

[17] Sovereign Camp Woodmen of the World v. Hall, 104 Ark. 538, 148 S. W. 526, 41 L.R.A.(N.S.) 517. See § 104 herein.

[18] Farmers' Mut. Ins. Co. v. Mylin, — Pa. —, 15 Atl. Rep. 710. See Fuller v. Madison Mutual Ins. Co. 36 Wis. 599; Tyrell v. Washburn, 6 Allen (88 Mass.) 466.

[19] Van Slyke v. Trempealeau County Farmers' Mut. Ins. Co. 48 Wis. 683, 5 N. W. 236, 39 Wis. 390, 20 Am. Rep. 50.

All persons are ipso facto members of a mutual accident company on the mutual plan where they are insured therein, and the fact that they are trustees for their employees who may sustain injury does not affect their membership.[20]

§ 318. Obligations and rights of members generally.—Where one becomes a member of such organizations as are the subject of consideration herein, he becomes bound by the charter and by-laws or articles of association and rules of the society or association.[1] He is bound, aside from the express provisions of the policy relating to the point at issue, to take notice of the by-laws of the company.[2] Nor can he, as such member, deny the validity of by-laws which he

[20] Wermuth v. Minden Lumber Co. 129 La. 912, 57 So. 170.

[1] *Alabama.*—United Order of the Golden Cross v. Hooser, 160 Ala. 334, 49 So. 354.

Arkansas. — Sovereign Camp Woodmen of the World v. Hall, 104 Ark. 538, 41 L.R.A.(N.S.) 517, 148 S. W. 526.

Connecticut.—Ryan v. Knights of Columbus, 82 Conn. 91, 72 Atl. 574.

Delaware. — King v. Wynema Council No. 10, Daughters of Pocahontas I. O. R. M. 25 Del. (2 Boyce's) 255, 78 Atl. 845 (constitution and by-laws constitute contract in beneficial or fraternal associations. By them each party is bound).

Illinois.—Quinn v. North American Union, 162 Ill. App. 319 (fraternal).

Indiana.—Supreme Lodge Knights of Pythias v. Knight, 117 Ind. 489, 3 L.R.A. 409, 20 N. E. 479; Supreme Lodge Knights of Pythias v. Graham, 49 Ind. App. 535, 97 N. E. 806.

Iowa.—Boeck v. Modern Woodmen of America, 162 Iowa, 159, 143 N. W. 999 (by accepting certificate agrees to be bound: mutual benefit society); Walsh v. Ætna Life Ins. Co. 30 Iowa, 133, 6 Am. Rep. 664; Simeral v. Dubuque Mutual Fire Ins. Co. 18 Iowa, 319; Coles v. Iowa State Mutual Ins. Co. 18 Iowa, 425.

Minnesota.—Hesinger v. Home Benefit Assn. 41 Minn. 516, 43 N. W. 481; Mitchell v. Lycoming Mut. Ins. Co. 51 Pa. St. 402.

Missouri.—Burchard v. Western Commercial Travelers' Assoc. 139 Mo. App. 606.

Nebraska.—Swett v. Antelope County Farmers' Mutual Ins. Co. 91 Neb. 561, 136 N. W. 347 (valid by-law binds).

New York.—Stanton v. Eccentric Assoc. of Firemen, No. 50 of International Brotherhood of S. F. 114 N. Y. Supp. 480, 130 App. Div. 129 (might be bound by by-law whether reasonable or not).

See §§ 53–53c, 188, 188a herein.

Member impliedly agrees to be bound by constitution etc., by joining fraternal benefit association. O'Brien v. Rittman, 176 Ill. App. 237.

Constitution binds member of fraternal beneficiary association when terms of certificate make it part thereof. Howton v. Sovereign Camp Woodmen of the World, 162 Ky. 432, 172 S. W. 687.

A member of a benefit order which is in effect a mutual life insurance company is obligated by the rules of the society as well as by the general laws applicable to insurance. Home Forum Mutual Benefit Order v. Jones, 5 Okla. 598, 50 Pac. 165, 27 Ins. L. J. 8.

[2] *Connecticut.*—Treadway v. Hamilton Mutual Ins. Co. 29 Conn. 68.

Illinois.—Benes v. Supreme Lodge Knights & Ladies of Honor, 231 Ill. 134, 14 L.R.A.(N.S.) 540 note, 121 Am. St. Rep. 304, 83 N. E. 127.

Mississippi.—Odd Fellows Benefit

has assented to by becoming a member, on the ground that they were not regularly adopted.[3] nor avail himself of any irregularity which affects the company's incorporation.[4] And such member is liable for his proportionate share of the losses which may occur while he is a member: that is, for the time during which his policy runs, and no longer.[5] In North Dakota all persons are members of a mutual fire insurance company organized under the laws of that state and each one has the same proportionate interest that every other member possesses and is liable to the same proportionate extent,[6] but he is not bound by a by-law subsequently passed which is in conflict with the charter and to which he did not assent, unless he has expressly agreed that by-laws may be subsequently enacted;[7] nor is he bound by the business regulations and instructions to agents adopted by the officers of the company,[8] although it is held that as such member, the books of the company or association are evidence against him to show the action of the managers.[9] But before a party becomes such a member he cannot be bound by the acts of the company's agents,[10] nor by its charter and by-laws or articles of association and rules.[11] And one who is induced to become a member by fraud of the company or its authorized agents incurs thereby no obligations toward the company.[12] And one who insures his property in a mutual company in a stated amount

Assoc. v. Smith, 101 Miss. 332, 58 So. 100.

Missouri.—Burchard v. Western Commercial Travelers' Assoc. 139 Mo. App. 606; Smoot v. Banker's Life Asso. 138 Mo. App. 438, 120 S. W. 719 (assessment co.).

Oklahoma.—Home Forum Benefit Order v. Jones, 5 Okla. 598, 50 Pac. 165, 27 Ins. L. J. 8 (member presumed to know rules of order).

Texas.—McWilliams v. Modern Woodmen of America, — Tex. Civ. App. —, 142 S. W. 641.

Virginia.—Bixler v. Modern Woodmen of America, 112 Va. 678, 38 L.R.A.(N.S.) 571 note, 72 S. E. 704.

[3] Pfister v. Gerwig, 122 Ind. 567, 23 N. E. 1041.

[4] Traders' Mut. Fire Ins. Co. v. Stone, 9 Allen (91 Mass.) 483; Nashua Fire Ins. Co. v. Moore, 55 N. H. 48; Sands v. Hill, 42 Barb. (N. Y.) 651.

[5] Manlove v. Naw, 39 Ind. 289; Manlove v. Bender, 39 Ind. 371, 13 Am. Rep. 280; Stockley v. Schwerdfeger, 19 Pa. Super. Ct. 289.

[6] J. P. Lamb & Co. v. Merchants National Mutual Fire Ins. Co. 18 N. Dak. 253, 119 N. W. 1048.

[7] Great Falls Mut. Fire Ins. Co. v. Harney, 45 N. H. 292; Northwestern Benefit & Mutual Aid Assn. v. Wanner, 24 Bradw. (Ill.) 361; New England Mut. Fire Ins. Co. v. Butler, 34 Me. 451. See §§ 377 et seq. herein.

[8] Walsh v. Ætna Life Ins. Co. 30 Iowa, 133, 6 Am. Rep. 664.

[9] Diehl v. Adams County Mutual Ins. Co. 58 Pa. St. 443, 98 Am. Dec. 302.

[10] Columbia Ins. Co. v. Cooper, 50 Pa. St. 331; Cumberland Valley Mutual Protection Co. v. Schell, 29 Pa. St. 31.

[11] Eilenberger v. Protection Ins. Co. 89 Pa. St. 464; Columbia Ins. Co. v. Cooper, 50 Pa. St. 331.

[12] Salmon v. Richardson, 30 Conn. 360, 79 Am. Dec. 255; Brown v. Don-

for a specific premium does not become a member of the company so as to be liable for future assessments.[13] A valid contract with such a company or society is, however, binding on both parties, the insured and the company.[14] In an action for an accounting brought by a member of a fraternal benefit society against the corporation, it was declared by Prentice, J., that: "This membership brought him into a contractual relation as an assured with the order as the insurer. Whatever the evidence of that relation might be, and whether it is to be found, either in whole or in part, in the constitution and by-laws of the order, in a certificate of insurance issued to the plaintiff, or in some other form, there came into existence upon his admission as an insurance member a contract of insurance of some sort, and his rights and liabilities, on the one hand, and those of the order, on the other, were to be thenceforward governed by that contract." Upon demurrer, however, the complaint was held insufficient in that it was silent as to the terms of the contract which of necessity determine the respective obligations and rights of the parties.[15]

§ 318a. Same subject: title to company's property.—The title to the property of a mutual insurance corporation is in the company, but the equitable interests therein are vested in the members, the same as in case of a stock corporation. While the corporation owns the property, the members own the corporation. And for all except corporate purposes, the property of a mutual insurance company, the same as that of any other corporation, belongs to its members, whether they are stockholders in the technical sense or in the broader one which includes policy-holders in such company.[16] So it is held that a policy holder in a mutual life insurance company has a quasi ownership in its assets.[17] the fund raised is practically a trust fund,[18] and each member has the same proportionate interest that every other member possesses.[19]

§ 318b. Property rights of company and members: constitutional law.—The property of a mutual insurance company and the equi-

nell, 49 Me. 421, 77 Am. Dec. 266; Jones v. Dana, 24 Barb. (N. Y.) 395.

[13] Mutual Guaranty Fire Ins. Co. (In re Assignment) v. Barker (Alvord v. Barker) 107 Iowa, 143, 70 Am. St. Rep. 149, 77 N. W. 868.

[14] New England Mut. Fire Ins. Co. v. Butler, 34 Me. 451.

[15] Ryan v. Knights of Columbus, 82 Conn. 91, 72 Atl. 574.

[16] Huber v. Martin, 127 Wis. 412, 3 L.R.A.(N.S.) 653, 115 Am. St. Rep. 1023, 7 Am. & Eng. Ann. Cas. 400, 105 N. W. 1031, 35 Ins. L. J. 334.

[17] Russell v. Pittsburgh Life & Trust Co. 62 Misc. 403, 115 N. Y. Supp. 950.

[18] Blair v. Supreme Council American Legion of Honor, 208 Pa. 262, 101 Am. St. Rep. 934, 57 Atl. 564. See §§ 341, 1273, 1287, 1288, 1455 herein.

[19] J. P. Lamb & Co. v. Merchants National Mutual Fire Ins. Co. 18 N. Dak. 253, 110 N. W. 1048.

table property rights of its members are within the guaranties of a state Constitution as regards the inhibition against laws impairing the obligation of contracts, and the inhibition of the national Constitution as regards the equal protection of the laws and deprivation of property without due process of law.[20]

§ 319. Relations of members of mutual companies: partnership.—The relations of members in companies or associations, the legal status of which is that of insurance companies, is declared in some cases to be that of partners, in others not. In Georgia, it is held that a mutual insurance company is governed by the general law of partnership as to division of profit and loss, so far as its charter does not change the rule, and in dividing profits equity will regard the rights of all those who have contributed premiums without regard to the fact whether they were members when the profits were distributed.[1] So in Pennsylvania it is declared that persons insuring in a mutual insurance company are associated in the nature of limited or special partners.[2] And under a Wisconsin decision policy holders in mutual companies, where neither the charter of the company nor the policy provides otherwise, stand on the basis of a partnership as insurers and as such are entitled to share in profits and are liable for losses.[3] But in New Jersey it is held that the fact an insurance company is mutual does not create a partnership among the insured, so as to make a contract continuing; the insurance is between the corporation and the insured.[4] And under an Iowa decision while the officers or directors of a mutual insurance company may be held individually liable for a wrong done to a person to whom they have issued an illegal and void policy, no liability for such wrong can be enforced against the members of the company as partners.[5] A provision, however, in the charter of a stock life insurance company that, after certain dividends to stockholders, the net profits should be paid, twenty per cent to the stockholders and eighty per cent to the policy holders, was decided not to make the policy holders partners; such share was not profits but simply an equitable adjustment of premiums paid.[6] But the holder of an immatured

[20] Huber v. Martin, 127 Wis. 412, 3 L.R.A.(N.S.) 653, 115 Am. St. Rep. 1023, 7 Am. & Eng. Ann. Cas. 400, 105 N. W. 1031, 35 Ins. L. J. 334.

[1] Carlton v. Southern Mut. Ins. Co. 72 Ga. 371.

[2] Krugh v. Lycoming Fire Ins. Co. 77 Pa. St. 15.

[3] Huber v. Martin, 127 Wis. 412, 3 L.R.A.(N.S.) 653, 115 Am. St. Rep. 1023, 105 N. W. 1031, 7 Am. & Eng. Ann. Cas. 400, 35 Ins. L. J. 334.

[4] Mutual Benefit Life Ins. Co. v. Hillyard, 37 N. J. L. (8 Vroom) 441, 18 Am. Rep. 741.

[5] Mutual Guaranty Fire Ins. Co. (In re Assignment) v. Barker (Alvord v. Barker) 107 Iowa, 143, 70 Am. St. Rep. 149, 77 N. W. 868. See § 683 herein.

[6] People v. Security Life Ins. &

life policy is entitled to share with other creditors in the assets; he is not a partner.[7] So a policy holder is not a partner of the company.[8] There is no trust relation between the policy holder of the mutual company and the company, and an action in equity will not lie on such a theory.[9] In People v. Security Life Insurance and Annuity Company,[10] (the organization was a regular insurance company, incorporated with a capital), the court said: "The argument that they are to be treated as partners is quite ingenious, but I think clearly unsound," and also declared that the stock was contributed by stockholders, and not policy holders, and managed by directors chosen by stockholders, and that the members had no voice in the election of officers unless they were stockholders, and had no voice in the management of the business. In another case, Mutual Benefit Life Insurance Company v. Hillyard,[11] the court says: "The suggestion that this being a mutual company the contract is therefore like a partnership, and dissolved, is disposed of by what Allen, J., said in substance in Cohen v. New York Mutual Life Insurance Company,[12] that the company is a body corporate, capable of contracting as such, and the relation is between insurer, a corporation, and insured; that the members are not partners between themselves. The contract is the contract of a corporation, and whatever incidental advantages appertain to a member, that does not affect the contract in the policy." In Cohen v. Mutual Life Insurance Company,[13] referred to in the last case, the court, Allen, J., says: "But whatever analogies there may be between mutual companies and ordinary partnerships, and the relation of the members of the two organizations, an incorporated company, although organized on the mutual principle, is in no proper or legal sense a partnership. The defendant is a body politic and corporate, capable of contracting and of suing and being sued, and the relation between the plaintiff and the corporation is that of insured and insurer, and the rights and duties of the contracting parties are to be governed and determined by the terms of the policy by which the insurance is effected, as in other cases. Other and incidental rights are secured to the plaintiff as a member of the company, one of the corporators; but this does not make the members partners as between themselves, or affect the express

Annuity Co. 78 N. Y. 114, s. c. 7 Abb. N. C. (N. Y.) 198, 34 Am. Rep. 422.

[7] People v. Security Life Ins. & Annuity Co. 78 N. Y. 114, 7 Abb. N. C. (N. Y.) 198, 34 Am. Rep. 522.

[8] Brown v. Stoerkel, 74 Mich. 269, 276, 3 L.R.A. 530, 41 N. W. 921.

[9] Taylor v. Charter Oak Life Ins. Co. 59 How. Pr. (N. Y.) 468.

[10] 78 N. Y. 114, 34 Am. Rep. 522.

[11] 37 N. J. L. (8 Vroom) 444, 18 Am. Rep. 741.

[12] 50 N. Y. 624, 10 Am. Rep. 522.

[13] 50 N. Y. 624, 10 Am. Rep. 522.

contract of the corporation." In another New York case it is decided that the holder of a policy of insurance in a mutual company is in no sense a partner of the corporation; his relation with the company is one of contract, measured by the terms of the policy.[14] In Brown v. Stoerkel,[15] Morse, J., declares: "This association was in no sense a copartnership. There was no business carried on by it, and nothing involving a loss or profit in a business sense. It was purely a benevolent and social organization, having also in view the protection, benefit, and welfare of its members in their various employments. It must now be considered as well settled that persons as to their membership and rights in such societies and the funds of the same, by the constitution and by-laws of the association which they adopt or subscribe to after adoption. Such an organization may be neither a partnership nor a corporation. The articles of agreement of such an association, whether called a 'constitution,' 'charter,' or 'by-laws,' or any other name, constitute a contract between the members, which the courts will enforce, if not immoral or contrary to the public policy or the law of the land." In Gorman v. Russell,[16] the association was unincorporated, and its purpose was to provide certain benefits to its members in case of sickness or death. The funds, therefore, were to be raised under its constitution by the collection of an initiation fee, weekly dues, fines, etc. Certain persons claiming membership were excluded have a right to enter into such associations, and to bind themselves from the meetings of the organization, and brought a bill for its dissolution, and an accounting of the partnership. Although no American cases are cited in the opinion, the court apparently relying on the English decisions, it was decided that benevolent associations are partnerships; that voluntary organizations of this character for mutual relief in sickness or distress, provided for by funds raised as they were here, are partnerships, and could be dissolved in equity for improperly excluding a member, and be compelled to account. In Atkins v. Hunt,[17] the defendants signed articles of association in trade, under the name of "The Farmers and Mechanics' Store," by which it was provided that any stockholders might withdraw upon giving six months' notice, and that the business of the company should be done pursuant to a major vote of those present. The defendants subscribed a certain sum, and a by-law provided that each member should become a partner, and it was

[14] Uhlman v. New York L. Ins. Co. 109 N. Y. 421, 4 Am. St. Rep. 482, 17 N. E. 363. See also Grobe v. Erie County Mutual Life Ins. Co. 21 Misc. 462, 53 N. Y. Supp. 628.

[15] 74 Mich. 269, 276, 3 L.R.A. 430, 41 N. W. 921.

[16] 14 Cal. 531.

[17] 14 N. H. 205.

held that the defendants were partners in the company. This was not a contract to form a partnership in futuro, but an actual existing association, liable as partners, and the liability rested upon having signed by-laws forming a present company. It is held in New York,[18] in an action to dissolve it, that a voluntary association established for moral, benevolent, and social objects, where there is no power to compel the payment of dues, and where the right of the member ceases on his failure to make such payment, is not a partnership, and the court per Miller, J., says: "Nor are the plaintiffs entitled to the relief claimed upon the ground that the members of the society were copartners. Associations of this description are not usually partnerships. There is no power to compel payment of dues, and the right of the member ceases when he fails to meet his annual subscription. This certainly is not a partnership, and the rights of copartners as such are not fully recognized. The purpose is not business, trade, or profit, but the benefit and protection of its members as provided for in its constitution and by-laws. In accordance with well-established rules no partnership exists under such circumstances." Another important case is that of Ash v. Guie,[19] wherein it was decided that the members of a Masonic lodge are presumptively not partners. The action was assumpsit on a certificate of indebtedness executed by the master and wardens of the lodge, and was directed against a large number of the members. And the court said: "Copartnership has been defined to be a 'combination by two or more persons of capital or labor or skill, for the purpose of business for their common benefit.' . . . It would seem that there must be a community of interest for business purposes. Hence voluntary associations or clubs for social and charitable purposes, and the like, are not proper partnerships, nor have their members the powers and responsibilities of partners. A benevolent and social society has rarely, if ever, been considered a partnership. . . . Here there is no evidence to warrant an inference that when a person joined the lodge he bound himself as a partner in the business of purchasing real estate and erecting buildings, or as a partner, so that other members could borrow money on his credit. The proof fails to show that the officers or a committee, or any number of members, had a right to contract debts for the building of a temple which would be valid against every member from the mere fact that he was a member of the lodge. But those who engaged in the enterprise are liable for the debts they contracted, and all are included in such liability who assented to the undertaking or subsequently ratified it. Those who

[18] Lafond v. Deems, 81 N. Y. 507, 514.

[19] 97 Pa. St. 493, 39 Am. Rep. 818.

participated in the erection of the building, by voting for and advising it, are bound the same as the committee who had it in charge; and so with reference to borrowing money. A member who subsequently approved the erection or borrowing could be held on the ground of ratification of the agent's acts." In an English case [1] it is held that the right to participate in the profits of the company did not constitute the insured a partner with the proprietors of the company. Mr. Parsons' definition of partnership contemplates a division of profits as an element of partnership.[2] A right to receive a share of the profits, however, is held in New Jersey not to be an invariable test.[3] But in Babb v. Reed [4] it is held that an association for purposes of mutual benevolence among its members only is not an association for charitable uses. If not incorporated, its members are regarded in law as partners in relation to third persons.

[1] In re English Assur. Soc. 11 Week. Rep. 681, 8 L. T. N. S. 724.

[2] Parsons on Partnerships (4th ed.) sec. 1. This is also true of the definition under Deering's Annot. Civ. Code of California, sec. 2395.

[3] Seabury & Johnson v. Bolles, 51 N. J. L. (22 Vroom) 103, 11 L.R.A. 136, 16 Atl. 54, and note.

[4] 5 Rawle (Pa.) 151, 28 Am. Dec. 650.

CHAPTER XIV.

PARTIES—THE INSURER.

§ 325. Insurer defined.
§ 326. Stock insurance companies defined.
§ 327. Legislation concerning insurance companies.
§ 328. Same subject: foreign companies.
§ 328a. State regulation: insurance business as franchise.
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§ 329. Foreign company: retaliatory and anti-compact laws: combinations to control rates.
§ 329a. Anti-compact laws: combinations to control rates continued: conspiracy.
§ 330. Foreign companies: what constitutes "doing business," etc.
§ 330a. Same subject.
§ 331. Foreign company estopped to avoid contract by setting up noncompliance with statutes.
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§ 333. When contracts not valid where company has not complied with statutes.
§ 333a. Same subject.
§ 333b. Same subject.
§ 334. Charter: corporate powers: ultra vires.
§ 334a. Same subject: power of corporation to insure life of its president.
§ 335. Forfeiture of charter.

§ 325. Insurer defined.—An insurer is the person who in a certain sense assumes the risk and undertakes to indemnify or pay a certain sum on the happening of the specified contingency.[5] Such

[5] See 1 Phillips on Ins. (3d ed.) sec. 2.

"The insurer is commonly called the underwriter because he subscribes the policy." 17 Earl of Halsbury's Laws of England, p. 336.

"The word 'underwriter' has an accepted and well understood meaning. Borrowed from the early method of obtaining marine insurance, it has now acquired the meaning of any one who insures another, on life or

person may be a corporation or association or individual when not precluded by statute. Formerly, a large proportion of the risks were underwritten by private individuals,[6] but the business of insuring in this country is almost exclusively in the hands of corporations or associations, which are divided into either stock companies and mutual companies or associations. Sometimes a company combines both plans of insurance.[7]

property in a policy of insurance." Childs (ex rel. Smith) v. Firemen's Ins. Co. 66 Minn. 393, 397, 69 N. W. 141, 35 L.R.A. 99.

When the legislature used the term "board of fire underwriters," the presumption is that they meant a board composed exclusively of fire insurance; that is of those engaged in the business of insuring others, on property against loss by fire. Childs (ex rel. Smith) v. Firemen's Ins. Co. 66 Minn. 393, 397, 35 L.R.A. 99, 69 N. W. 141.

[6] See prelim. chap. § IV. a herein; 2 Parsons on Contracts (7th ed.) 351; 10 New International Ency. (1908) p. 685. As to individuals unincorporated associations Lloyds and partnerships, see §§ 335b et seq. herein.

"A policy may be underwritten by individuals or a company." Earl of Halsbury's Laws of England, vol. 17, p. 339.

At common law individuals might contract with another to indemnify him against loss by fire and both in England and in this country the business was carried on by individuals. Barnes v. People, 168 Ill. 425, 429, 48 N. E. 91.

"Insurance, in its early existence, when the nature of the risks assumed were few, and the amount of business small, was done chiefly, if not entirely, by individuals. But in more recent times, it has been extended until it embraces almost every kind of risk, and has grown to such proportions that it enters into every department of business, and affects all classes of people and their property; and has, in consequence, everywhere become the subject of legislative regulation and control. The several states have enacted laws, designed to place the business within their limits on such substantial basis as will afford adequate protection to the citizens, and to their property." State v. Ackerman, 51 Ohio St. 163, 189, 190, 37 N. E. 828, 24 L.R.A. 298, per Williams, J. Quo warranto for unlawfully exercising a public franchise brought against certain persons transacting business under the name of the "Guarantee and Accident Lloyds, New York" held that under the revised statutes of Ohio they should be ousted from transacting the business of insurance within that state.

[7] The Pennsylvania act of February, 1870, provided that it should be unlawful to issue or execute any policy of insurance or guaranty against loss by fire or lightning, except under authority expressly conferred by a charter of incorporation. See Arrott v. Walker, 118 Pa. St. 249, 12 Atl. 280.

Classification of insurance companies important. 5 Earl of Halsbury's Laws of England, 616.

Mixed companies defined. Burt on Life Ins. (1849) p. 52. Mixed companies began to appear about 1848. Subsequent to 1850 the new incorporations were mostly of the mixed class. When the Civil War broke out in 1861 the majority of the companies were mixed companies, but the mutuals were considered sounder institutions. In 1877 there were twenty-four mixed, eleven mutual, three proprietary. Pamphlet on Progress of American Life Ins. (Review Pub. Co. Phila. 1877).

§ 326. Stock insurance companies defined.—A stock insurance company is one which has a capital stock owned by its stockholders, and which capital is the basis of its business, and is liable for losses and expenses. Those insured in such companies pay premiums as the basis of their contract with the company.[8] A share of stock may be defined as a right which its owner has in the management, profits, and ultimate assets of the corporation. A stockholder in an insurance company has the same rights as a stockholder in any other corporation, but he has no legal title to the property or profits of the corporation until a dividend is declared or a division made on the dissolution of the corporation.[9]

§ 327. Legislation concerning insurance companies.—In most, if not all, the states of the Union statutes have been enacted principally for the protection of policy holders, prescribing certain conditions upon which insurance companies, associations, or societies may be permitted to organize or transact business within the state, and these apply to both domestic and foreign insurance corporations, associations, or societies. The statutes will only be briefly

"Prior to 1874 the stantutes of Missouri recognized three kinds of insurance companies,—stock companies, mutual companies, and stock and mutual companies, the general nature of which is well understood, but one purpose of which was to make a profit for the promoters, and one feature of which was the payment of fixed premiums at stated times by the insured, and the payment of a sum certain by the company to the beneficiary named in the policy upon the death of the insured," and prior to the act of 1887 assessment companies were not authorized by the laws of Missouri. Aloe v. Fidelity Mutual Life Assoc. 164 Mo. 675, 55 S. W. 993, 29 Ins. L. J. 679–681, per Marshall, J.

A company falls under the classification of a "mixed company" or association where it possesses some of the features incident to both a "stock company" and a "mutual company," but is neither. State v. Alley, 96 Miss. 720, 51 So. 467, 39 Ins. L. J. 629.

[8] See Anderson's Law Dict. 558. State v. Willett, 171 Ind. 296, 23 L.R.A.(N.S.) 197, 86 N. E. 68; Toomey v. Supreme Lodge Knights of Pythias, 147 Mo. 129, 136, 48 S. W. 936; Rev. Stat. Mo. 1909, sec. 6896 (Rev. Stat. 1899, sec. 7853).

[9] Commercial Fire Ins. Co. v. Board of Revenue, 99 Ala. 1, 42 Am. St. Rep. 17, 14 So. 490, when incorporators become a corporation before stock subscriptions are invited, mere agreement to subscribe, see Van Schaick v. Mackin, 113 N. Y. Supp. 408, 129 App. Div. 335.

New York.—Insurance Law, sec. 110 (Laws 1892, p. 1974, c. 690, p. 1975, sec. 112); N. Y. Stock Corp. (Laws 1892, p. 1835, c. 688, sec. 41). See also for definition of share of stock; three elements in rights of property, Carnagie Trust Co. v. Security Life Ins. Co. of America, 111 Va. 1, 31 L.R.A.(N.S.) 1186 (annotated on validity of agreements to control the voting power of corporate stock) 21 Amer. & Eng. Ann. Cas. 1287, 68 S. E. 412 (case as to voting trust in stock and stockholder's rights; valid trust). Capital stock defined, see Cal. Stat. & Amdts. 1907, p. 166. (New Art. XVI. of Polit. Code Chap. 119, sec. 634a).

noticed, however, in this work. The power of the state to enact such laws is inherent, since corporations and associations within its jurisdiction, like natural persons, are subject to the laws which may, in the proper exercise of its police power and within constitutional limits be enacted for the regulation of the community and the protection of citizens.[10] And statutes of the above character should be liberally construed,[11] but they should not constitute class legislation or discriminate between citizens of equal standing and merit within or without the state.[12] The legislature has also the same power to regulate the conduct of the agents of such corporations as it has to regulate the conduct of the corporations themselves,[13] and it may impose upon such agents a privilege tax or

[10] *United States.*—German Alliance Ins. Co. v. Hale, 219 U. S. 307, 55 L. ed. 229, 31 Sup. Ct. 246; John Hancock Mutual Life Ins. Co. v. Warren, 181 U. S. 73–75, 45 L. ed. 755, 21 Sup. Ct. 535, 30 Ins. L. J. 623, per Mr. Chief Justice Fuller; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. 281, (see this case under § 328 herein); McClain v. Provident Savings Life Assur. Soc. 110 Fed. 80, 49 C. C. A. 31, s. c. 184 U. S. 699, 46 L. ed. 765, 23 Sup. Ct. 938.

Alabama.—Hoadley v. Purifoy, 107 Ala. 276, 30 L.R.A. 351, 18 So. 220.

Idaho.—Continental Life Ins. & Investment Co. v. Hattabaugh, 21 Idaho, 285, 121 Pac. 81.

Illinois.—People v. Hartford Life Ins. Co. 252 Ill. 398, 37 L.R.A.(N.S.) 778, 96 N. E. 1049.

[11] *Kentucky.*—Bell v. Louisville Board of Fire Underwriters, 146 Ky. 841, 143 S. W. 388.

Mississippi. — General Accident, Fire & Life Assur. Co. v. Walker, 99 Miss. 404, 55 So. 51, 40 Ins. L. J. 1504; State v. Alley, 96 Miss. 720, 51 So. 467, 39 Ins. L. J. 629.

Missouri.—State v. Stone, 118 Mo. 388, 25 L.R.A. 243, 40 Am. St. Rep. 388, 24 S. W. 164; State v. Matthews, 44 Mo. 523.

New York.—People v. Formosa, 131 N. Y. 478, 27 Am. St. Rep. 612, 30 N. E. 492; People (ex rel. Moore) v. Holmes, 135 N. Y. Supp. 467, 151 App. Div. 257.

Ohio.—Robbins v. Hennessey, 86 Ohio St. 181, 99 N. E. 319, Ohio Rev. Stat. 1908, as am'd 99 Ohio Laws, p. 131.

Fraternal order subject to state regulation. State v. Arlington, 151 N. Car. 640, 73 S. E. 122; mutual company also so subject. Montgomery v. Harker, 9 N. Dak. 527, 84 N. W. 369.

The business of insurance against loss by fire is a proper subject for the exercise of the police power of the state. Commonwealth v. Vrooman, 164 Pa. St. 306, 25 L.R.A. 250, 30 Atl. 217, 44 Am. St. Rep. 603.

As to police power, see Joyce on Franchises (ed. 1909) sec. 366, and note p. 582; Joyce on Electric Law (2d ed.) sec. 215, and note.

As to standard policy; constitutional law; power of legislature and of commission, see § 176a herein.

On fire insurance as business affected by public interest, see notes in 29 L.R.A.(N.S.) 1195; L.R.A.1915C, 1189. On power of legislature to regulate life insurance rates, see note in 37 L.R.A.(N.S.) 466.

[11] State v. Alley, 96 Miss. 720, 51 So. 467, 39 Ins. L. J. 629.

[12] State v. Stone, 118 Mo. 388, 25 L.R.A. 243, 40 Am. St. Rep. 388, 24 S. W. 164; State (ex rel. Inter-insurance Auxiliary Co.) v. Revelle, 257 Mo. 529, 165 S. W. 1084.

[13] People v. Formosa, 131 N. Y. 478, 27 Am. St. Rep. 612, 30 N. E. 492.

license fee as a condition precedent to transacting business.[14] These laws are numerous; they provide for the possession of a certain capital by insurance companies before commencing business,[15]

[14] Cole Insurance Commr. v. American Surety Co. 90 Miss. 782, 44 So. 871, Miss. Code 1906, sec. 3828, case of agent of surety company.

Legislature may declare void a contract with one who has not paid a privilege tax, and this applies to a premium note given to agent. White v. Post, 91 Miss. 685, 45 So. 366, under Miss. act 1898, pp. 18, 30, c. 5.

Agent of assessment plan company liable for license tax. Mutual Reserve Fund and Life Assoc. v. City Council of Augusta, 109 Ga. 73, 35 S. E. 71, 29 Ins. L. J. 319.

Agent cannot be refused license when all statutory requirements have been complied with, under Oreg. Laws 1911, pp. 376, 377, secs. 1–4; Guy L. Wallace & Co. v. Ferguson, 70 Oreg. 306, 140 Pac. 742.

Agent for domestic company does not require license in Kentucky. Commonwealth v. Gregory, 121 Ky. 256, 89 S. W. 163.

[15] All agents included under N. Y. Consol. act, sec. 523, requiring payment by agent to fire department. Fire Department of city of New York v. Stanton, 51 N. Y. Supp. 242, 28 App. Div. 334.

Arkansas.—As to obtaining loan on note to raise required capital, and use of capital stock in making payment of loan. Dodge v. State National Bank, 96 Ark. 65, 131 S. W. 65 (Kirby's Dig. Laws Ark. sec. 4335).

California. — People (ex rel. Schindler) v. Flint (Cal. 1892), 28 Pac. 495.

Indiana.—As to corporation created by special act, and amendment to charter permitting increase of capital stock in violation of constitution. Marion Trust Co. v. Bennett, 169 Ind. 346, 124 Am. St. Rep. 228, 82 N. E. 782.

Louisiana.—Statute requiring forfeiture of charter where "whole of the capital stock" not paid for in specified time. La. Laws 1898, act 105, sec. 3, as am'd by act 1902, No. 50; State (ex rel. Guion, Atty. Genl.) v. People's Fire Ins. Co. of New Orleans, 126 La. 548, 52 So. 763. See also State (ex rel. People's Fire Ins. Co. of New Orleans) v. Michel, 125 La. 55, 51 So. 66.

Maryland. — Corporation created by special charter requiring as condition precedent that specified amount of capital stock be subscribed for and a certain per cent thereof paid in cash. Effect of acts of insurance department in recognizing corporation as in existence even though conditions precedent not complied with. Munich Re-Ins. Co. v. United Surety Co. 113 Md. 200, 77 Atl. 579.

Massachusetts.—Held that Stat. 1847, Mass. c. 273, sec. 2, and Rev. Stat. c. 37, sec. 42, with regard to payment, etc. of a certain amount of capital before doing business, *did not apply to mutual insurance companies.* Williams v. Cheney, 3 Gray (69 Mass.) 215. See also Atlantic Mutual Fire Ins. Co. v. Concklin, 6 Gray (72 Mass.) 73.

Minnesota.—State v. Critchet, 37 Minn. 13, 32 N. W. 787; State v. Truly, 37 Minn. 97, 33 N. W. 554.

Nebraska.—In re Babcock, 21 Neb. 500, 32 N. W. 641, under Com. Stat. Neb. 1885, c. 16.

New York.—People v. Manhattan Mut. Fire Ins. Co. 34 N. Y. St. Rep. 570, 12 N. Y. Supp. 264, 58 Hun, 605 under N. Y. Laws, 1853, c. 460.

Oregon.—American Life Accident Ins. Co. v. Ferguson, 66 Oreg. 417, 134 Pac. 1029; Union Pacific Life Ins. Co. v. Ferguson, 65 Oreg. 142, 43 L.R.A.(N.S.) 958, 129 Pac. 529, rehearing denied 130 Pac. 978.

Pennsylvania.—As to company

for the deposit of a security fund with the state,[16] for giving bonds,[17] for procuring a certificate or license,[18] for an examination into the

incorporated by special act; charter held subject to constitutional amendment and also to statutes creating insurance department, and governing life insurance and so paid up capital a condition precedent. Union National Life Ins. Co. In re, 58 Pittsburg Leg. J. 2 (opinion of Atty. Genl.). See Pennsylvania Ins. Co. of Pittsburg, In re, 37 Pa. Co. Ct. Rep. 69 (opinion of Atty. Genl.); Provident Life & Trust Co. v. Board of Revision of Taxes, 29 Pa. Co. Ct. Rep. 434.

[16] State (ex rel. Unity Industrial Life Ins. & Sick Ben. Assoc.) v. Michel, 121 La. 350, 46 So. 352, 37 Ins. L. J. 587 (industrial and sick benefit association); act 1906, no. 65, p. 101, act 1898, no. 105, p. 132; Employers Liability Assur. Co. v. Commissioner, 64 Mich. 614, 31 N. W. 542; Mich. Stat. Laws 1884, p. 279, act 237; Attorney General v. North American Life Ins. Co. 82 N. Y. 172, N. Y. Laws 1866, c. 576; People v. Chapman, 5 Hun (N. Y.) 222. As to change in securities and liability of Superintendent of Insurance, see Raymond v. Security Life & Trust Ins. Co. 97 N. Y. Supp. 557, 111 App. Div. 191, rev'g 91 N. Y. Supp. 1041, 101 App. Div. 546, rev'g 89 N. Y. Supp. 753, 44 Misc. 31; Metropolitan Casualty Ins. Co. of N. Y. v. Basford, 31 S. Dak. 149, 139 N. W. 795.

Life insurance companies on co-operative plan excepted. When State Treasurer not entitled to retain deposits made. Illinois Life Ins. Co. v. Tully, 174 Fed. 355, 98 C. C. A. 259.

When *reinsurer a right to withdraw deposits*, see Prewitt, Commr. v. Illinois Life Ins. Co. 29 Ky. L. Rep. 447, 93 S. W. 633, 35 Ins. L. J. 688.

[17] Union Central Life Ins. Co. v. Skipper, 115 Fed. 69, 52 C. C. A. 663, Sand. & H. Ark. Dig. sec. 4124; Kaw Life Assn. v. Lemke, 40 Kan. 661, 20 Pac. 512, under Laws Kan. 1885, c. 131. Construction of bond filed by mutual fire insurance companies; liability of sureties, see Crawford v. Ozark Ins. Co. 97 Ark. 549, 134 S. W. 951, 40 Ins. L. J. 819, Laws Ark. 1905, p. 492. See also United States Fidelity & Guaranty Co. v. Fultz, 76 Ark. 410, 89 S. W. 93.

Bonds may be required from one applicant for license and securities from another. State v. McMaster, 94 S. Car. 379, 382, 77 S. E. 401, 402.

[18] Roane v. Union Pacific Life Ins. Co. 67 Oreg. 264, 135 Pac. 892, Lord's Oreg. Laws, sec. 4609. See Commonwealth Mutual Fire Ins. Co. v. Edwards, 124 N. Car. 116, 32 S. E. 404.

Only one license can be required from fire insurance company under license laws acts 1898, No. 171, State (ex rel. Hartford Fire Ins. Co.) v. Fitzpatrick, 133 La. 115, 62 So. 494; but as am'd by acts 1906, No. 214, certain other companies combining two kinds of business may become liable for a second license. State v. Maryland Casualty Co. 133 La. 146, 62 So. 606. Only one license required from accident and sickness companies. State v. Continental Casualty Co. 134 La. 806, 64 So. 757, act 1902, no. 50, sec. 5.

Auditor no authority to issue certificate to society under *name resembling one in use.* Knights of Maccabees of the World v. Searle, 75 Neb. 285, 106 N. W. 448. Cobbey's Ann. Stat. Neb. 1903, sec. 6502. *Examine* People (ex rel. Traders Fire Ins. Co.) v. Van Cleave, 183 Ill. 330, 47 L.R.A. 795, 55 N. E. 698; Knights of Modern Maccabees v. Martin, 32 Pa. Co. Rep. 58.

License may be refused where all conditions of statute not complied with. State (ex rel. Lumberman's Accident Co.) v. Michel, 124 La. 558,

company's affairs,[19] for furnishing information to the superintendent of insurance by the companies regarding their business and financial condition,[20] for publication of annual statements in daily papers designated by the insurance commissioners,[1] for making reports to the comptroller,[2] for returns to the insurance commissioners,[3] for the payment of a license tax or fee,[4] for the taxation of

50 So. 543, acts La. 1898, no. 105, p. 134, sec. 2, par. 4.

Association to sell contracts to compensate employees out of employment: All companies whose object is to transact business in Nebraska must obtain a license in compliance with the statute, act 1873, Genl. Stat. 1873 c. 33, p. 428, which excepts life insurance. State (ex rel. National Employees Assoc.) v. Barton, 92 Neb. 666, 139 N. W. 225.

[19] Bell v. Louisville Board of Fire Underwriters, 146 Ky. 841, 143 S. W. 388, Ky. Stat. 752; People v. State Ins. Co. 19 Mich. 392; Re World's Ins. Co. 40 Barb. (N. Y.) 499.

[20] State v. Matthews, 44 Mo. 523; Commonwealth v. Hock A. Mut. B. Assn. 10 Phila. (Pa.) 554.

As to filing certificate with county clerk showing financial condition: Liability of president for noncompliance, notwithstanding requirement of another section of the statute as to filing statement with state auditor, see Welch Stave & Mercantile Co. v. Stevenson, 92 Ark. 266, 22 S. W. 1000. Kirby's Dig. of Ark. sec. 848, 859, 4349. See also as to conflict of laws requiring annual statement, Fire Association of Phila. v. Love, 101 Tex. 376, 108 S. W. 810, 158 Tex. Rev. Stat. 1895, art. 3084, subd. 7, Tex. Laws 1907, p. 482, c. 18, sec. 8.

As to failure to make annual report: loans: forgery: false entries: perjury, etc., under N. Y. Laws 1892, p. 1952, c. 690, sec. 44. See People (ex rel. Hegeman) v. Corrigan, 195 N. Y. 1, 87 N. E. 792, rev'g 113 N. Y. Supp. 504, 129 App. Div. 62, aff'g 129 App. Div. 75.

[1] State (ex rel. Cowles) v. Schively, Commr. 63 Wash. 103, 114 Pac. 901, Rem. & Bal. Code (Wash.) sec. 6119.

[2] People v. National Fire Ins. Co. 27 Hun (N. Y.) 188, under N. Y. act June 1, 1880.

[3] Commonwealth v. Germania Life Ins. Co. 11 Phila. (Pa.) 553.

[4] *Alabama.*—Acts 1886, 1887, p. 105, does not apply to domestic corporations. Hoadley v. Purifoy, 107 Ala. 276, 30 L.R.A. 251, 18 So. 220.

Kentucky.—Competent for legislature to classify and subclassify and may delegate power to municipality which may constitutionally impose greater license tax on industrial than on life insurance companies. Metropolitan Life Ins. Co. v. City of Paris, 138 Ky. 801, 129 S. W. 112. See Northwestern Mutual Life Ins. Co. v. James, 138 Ky. 48, 127 S. W. 505, under Ky. Stat. sec. 4226. License tax not in lieu of ad valorem taxes; German National Ins. Co. v. City of Louisville, 21 Ky. L. Rep. 1179, 54 S. W. 732.

Louisiana.—La. act 101, 1886, sec. 7, is constitutional. State v. New England Mut. Ins. Co. 43 La. Ann. 133, 8 So. 888. License tax on insurance companies need not be equal and uniform as to all companies: State v. Liverpool, London & Globe Ins. Co. 40 La. Ann. 463, 4 So. 504. As to division of companies into several classes and graduation according to amount of premium received, see State v. Liverpool, London & Globe Ins. Co. 40 La. Ann. 463, 4 So. 504. New Orleans v. Salamander Co. 25 La. Ann. 650.

Mississippi.—License fees and taxes imposed *cannot be collected from association unlawfully conducting business.* Adams v. Lumber-

corporate property,[5] for taxation to pay expenses of fire rating

man's Indemnity Exchange (1911) — Miss. —, 55 So. 882, 40 Ins. L. J. 1819.

Nebraska.—City of Columbus v. Hartford Ins. Co. 25 Neb. 83, 41 N. W. 140, under Neb. Laws, 1887, c. 66. Payment to auditor illegal when constitution requires payment to State Treasurer. State v. Home Ins. Co. 59 Neb. 524, 81 N. W. 443. When *unconstitutional sections* of chapter invalidates entire act. State (ex rel. Cornell) v. Poynter, 59 Neb. 417, 81 N. W. 431. Sess. Laws 1899, c. 47, secs. 36, 37.

Pennsylvania.—Ætna Fire Ins. Co. v. Reading, 5 Pa. (L. ed.) 570, 11 Cent. Rep. 858, under Pa. act 1873, April 4th, repealed act May 24, 1887.

Virginia.—City may *constitutionally impose license tax* on property which could be reached by ad valorem tax. Scottish Union & National Ins. Co. v. City of Winchester, 110 Va. 451, 66 So. 84.

As to conditions as to license fees etc., see Joyce on Franchises (ed. 1909) secs. 356, 357.

Workmen's compensation act: Industrial insurance law of Washington, which requires certain contributions from employers, to be used not to meet expenses of the government but to recompense employees in certain industries, does not impose a tax under the constitutional meaning of that word, although it is in the nature of a *license tax,* and the act is *not unconstitutional as creating taxation not uniform.* State (ex. rel. Davis-Smith Co.) v. Claussen, 65 Wash. 156, 37 L.R.A.(N.S.) 466, 117 Pac. 1101.

[5] Power of commissioner of insurance to grant license or revoke is *only ministerial,* and not judicial: Hartford Fire Ins. Co. v. Commissioners, 70 Mich. 485, 38 N. W. 474. See § 328 herein and notes.

On constitutionality of compulsory industrial insurance, see note in 37 L.R.A.(N.S.) 466.

[5] *United States.*—Taxation of enforceable *credits* or premiums due on open accounts *does not constitute taking property without due process* of law. Orient Ins. Co. v. Board of Assessors for Parish of Orleans, 221 U. S. 358, 55 L. ed. 769, 31 Sup. Ct. 554; Liverpool, London & Globe Ins. Co. v. Board of Assessors for Parish of Orleans, 221 U. S. 346, 55 L. ed. 762, act 170, La. 1898, sec. 1.

Excise tax upon entire net income over $5,000 *is valid* and within power of Congress even though certain fraternal, etc. societies exempted, and although the source of part of income is non-taxable property. Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. 342, Ann. Cas. 192B, 1312, corporation tax law, act of Congress, Aug. 5, 1909, sec. 38, Stat. at L. 61st Congress, pp. 111, 112, 117, c. 6, U. S. Comp. Stat. Supp. 1909, pp. 659, 844, 849.

Excise tax under act of Congress, Aug. 5, 1909 (36 Stat. 112, c. 6, sec. 38 [Comp. Stat. 1913, secs. 6300, 6301]). Surplus not a "dividend:" "income received:" deductions. See Connecticut General Life Ins. Co. v. Eaton (U. S. D. C.) 218 Fed. 188, 45 Ins. L. J. 258 (case of life, "stock" and "mutual" company); Connecticut Mutual Life Ins. Co. v. Eaton (U. S. D. C.) 218 Fed. 206, 45 Ins. L. J. 281 (case of "mutual" life company without capital stock).

Income tax provided by acts of Congress, June 30, 1864, and July 13, 1866, on premiums, assessments, etc., is not direct tax, but duty or excise: Pacific Ins. Co. v. Soule, 7 Wall. (74 U. S.) 433, 19 L. ed. 95. Capital stock invested in United States bonds *are not exempt* from taxation under laws of N. Y. 1880, c. 542; amended by laws 1881, c. 361; Home Ins. Co. v. New York, 119 U. S. 129, 30 L. ed. 350, 8 Sup. Ct. 1385 (court divided). *Compare* International Life Assur. Co. v. Commissioners, 28 Barb. (N. Y.) 318.

Arkansas. — What constitutes double taxation. But company liable to assessment on capital even though invested in *nontaxable shares of stock in another corporation.* Dallas County v. Home Ins. Co. 97 Ark. 254, 133 S. W. 1113. Kirby's Dig. Ark. sec. 6902.

Georgia.—Payment of occupation or business tax no *exemption* of personal property from taxation. Georgia Fire Ins. Co. v. City of Cedartown, 134 Ga. 87, 19 Am. & Eng. Ann. Cas. 954, 67 So. 410.

Iowa.—When *surplus* designated as unassigned funds not a liability which can be *deducted* from taxable credits. Chicago Life Ins. Co. v. Board of Review, 131 Iowa, 254, 108 N. W. 305, Code Supp. 1902, secs. 1311, 1333b. Amount to which stockholders would be entitled, on distribution of money and credits due them and found reserved, to pay or reinsure policy holders, may be *deducted* from taxable property under Iowa Code, sec. 814: Equitable Life Ins. Co. v. Board of Equalization, 74 Iowa, 178, 37 N. W. 141.

Kentucky.—Exemption of capital stock and accumulated funds under Ky. act May 8, 1886, repealed by Ky. Const. secs. 171, 174. German National Ins. Co. v. City of Louisville, — Ky. —, 54 S. W. 732. What *classes of property* of insurance companies are liable to be taxed under Kentucky Statutes authorizing their taxation by municipal corporations: Kenton Ins. Co. v. City of Covington, 86 Ky. 213, 5 S. W. 461. Liability of company to pay losses may not be *deducted* from assets or property liable to taxation: Kenton Ins. Co. v. City of Covington, 86 Ky. 213, 5 S. W. 461.

Louisiana.—Notes and bills representing money loaned at interest *are "property:"* City of New Orleans v. Mechanics' & Merchants' Mutual Ins. Co. 30 La. Ann. 876, 30 Am. Rep. 232.

Michigan.—Under Michigan acts 200, Pub. acts, 1891, secs. 2, 4, mortgages held by insurance companies upon which they pay taxes are to be *deducted* from net assets: Standard Life & Accident Co. v. Board of Assessors, 91 Mich. 78, 52 N. W. 17, 16 L.R.A. 59n, 95 Mich. 466, 55 N. W. 112.

Mississippi.—Reduction of assessment on account of destruction of property means actual loss and does not apply where destroyed property is fully insured. Kuhn Bros. v. Warren County, 98 Miss. 879, 54 So. 442.

Nebraska.—*Value* of capital stock, how ascertained: when substantial increase of schedule unconstitutional: What is excessive and *double taxation* of property. Bankers' Life Ins. Co. v. Board of Equalization, 89 Neb. 469, 131 S. W. 1034, Laws Neb. 1903c, 73. Earned premiums are taxable as personal property under Comp. Stat. Neb. 1885, c. 77; Stat. 1885, c. 13, sec. 25; Phœnix Ins. Co. v. City of Omaha, 23 Neb. 312, 36 N. W. 522.

New Jersey.—What are *not "liabilities" to be deducted but "liabilities on policies"* subject to taxation. Amounts apportioned to deferred dividend policies. City of Newark v. State Board of Equalization, 81 N. J. L. 416, 79 Atl. 343, N. J. Act May 11, 1906 (Pub. L. p. 418), N. J. L. 1907, c. 71, aff'g 77 Atl. 195. Tax is *property and not a franchise tax,* under N. J. act April 11, 1886, Rev. 1156, 15 et seq.: Merchants' Ins. Co. v. City of Newark, 54 N. J. L. 138, 23 Atl. 395. *Taxation of surplus,* see State v. Parker, 34 N. J. L. 479, 35 N. J. L. 574.

New York.—Franchise tax: *"Gross premiums;" reinsurance.* People (ex rel. Continental Ins. Co.) v. Miller, 177 N. Y. 515, 70 N. E. 10, aff'g and modifying 85 N. Y. Supp. 1142, 90 App. Div. 618. *Reinsurance reserve fund* held part of capital and taxable. People v. Feitner, 65 N. Y. Supp. 523, 31 Misc. 433, N. Y. Laws 1896, c. 908.

Pennsylvania.—State tax upon en-

board,[6] although a requirement for payment of a certain sum for pensions for disabled firemen is unconstitutional and not within the

tire amount of premiums received by company *does not conflict with Federal Constitution:* Insurance Co. of North America v. Commonwealth, 87 Pa. St. 173, 30 Am. Rep. 352. *Trust business and life insurance business conducted by same company:* Value of capital and assets of latter cannot be added to value of capital stock of former. Commonwealth v. Provident Life & Trust Co. 3 Dauph. Co. Rep. 130, 6 Lack. Leg. N. 140, 9 Pa. Dist. R. 479. See also Provident Life & Trust Co. v. Board of Revision of Taxes, 29 Pa. Co. Ct. Rep. 434. Taxes to be *uniform: constitutional law;* basis of *valuation* of capital stock. Commonwealth v. Provident Life & Trust Co. 67 Leg. Intel. 221, Pa. act June 1, 1889, Pub. L. 420, as am'd by act June 8, 1891, Pub. L. 229.

Utah.—Notes and accounts representing parts of unearned premiums are taxable, no *deduction* from credit of future losses by fire or cancelations. Home Fire Ins. Co. v. Lynch, 19 Utah, 189, 56 Pa. 681.

West Virginia.—Whether inequality is produced in singling out for taxation: Franklin Ins. Co. v. State, 5 W. Va. 349. See Cooley on Taxation, 129.

Tax on gross receipts of premiums received by companies or associations engaged in *sick or funeral benefit insurance* is valid. Peninsular Industrial Ins. Co. v. State, 61 Fla. 376, 55 So. 398.

Guaranty or security company liable to tax on franchise under Ky. Stat. 1899, sec. 4077; credits on tax. Fidelity & Casualty Co. of N. Y. v. Coulter, 115 Ky. 805, 74 S. W. 1053.

Mutual insurance companies are liable to taxation on amount of their capital or accumulated premiums the same as other companies: Sun Mut. Ins. Co. v. Mayor, 8 Barb. (N. Y.) 450, 8 N. Y. 241; Sun Mut. Ins. Co. v. New York, 8 N. Y. 241; as to taxation of capital of mutual company, see Coit v. Connecticut Mutual Life Ins. Co. 36 Conn. 512; Mutual Life Ins. Co. v. Jenkins, 16 N. Y. 424. Mutual life insurance company is taxable in town where principal place of business is for stocks, bonds, and other securities in which its funds and earnings have been invested: Rev. Stat. Me. c. 6, sec. 13; City of Portland v. Union Mutual Life Ins. Co. 79 Me. 231, 9 Atl. 613. As to county mutual insurance companies; exemptions and constitutional law; organization for pecuniary profit, see Iowa Mutual Tornado Ins. Assoc. v. Gilbertson, 129 Iowa, 658, 106 N. W. 153, Code secs. 1642, 1765, Code Supp. 1902, sec. 1333d, Rev. Stat. U. S. sec. 1977 (civil rights act) U. S. Comp. Stat. 1901, p. 1259. Under Massachusetts act 1864, c. 208, and Stat. 1865, c. 283, as to whether tax on capital stock of mutual life insurance companies cannot be taxed on unredeemed guarantee capital: Commonwealth v. Berkshire Ins. Co. 98 Mass. 25.

As to taxation of English joint stock insurance companies, see Oliver v. London Ins. Co. 100 Mass. 531; Equitable Life Assur. Soc. v. Bishop [1900] 1 Q. B. Law Rep. 177.

On taxation of corporate franchise, see note in 57 L.R.A. 34; on taxation of capital stock, note in 58 L.R.A. 513; on double taxation, notes in 58 L.R.A. 593, and 15 L.R.A. (N.S.) 952; on corporate taxation as affected by contract clause in Federal Constitution, note in 60 L.R.A. 33; on constitutional equality in relation to corporate taxation, note in 60 L.R.A. 321.

[6] Fireman's Fund Ins. Co. v. Von Rosenberg, Commr. 103 Tex. 571, 132 S. W. 467. See § 328 herein.

police power of the state [7] for a limitation of the amount of new business which may be done and such provision grants no exclusive privilege or immunity, or franchise although it exempts corporations doing a certain amount of industrial insurance [8] for proceedings for the dissolution of insurance companies,[9] for obtaining the appointment of receivers of insolvent companies,[10] for instituting proceedings for an injunction to restrain companies from continuing their business, and for winding up the company's affairs when a continuance of its business would be hazardous to the policy holders or the public.[11] for penalizing insurer connected with tariff association. or such like thing, which fixes rates.[12] And it is held that the state may constitutionally regulate rates and charges of fire insurance companies doing business within its borders.[13] But it is also decided that the state has no power to fix rates to be charged by surety or fidelity companies. as their business is private and is neither of a quasi public character nor a monopoly.[14]

[7] Ætna Fire Ins. Co. v. Jones, 78 S. Car. 445, 13 L.R.A.(N.S.) 1147n, 125 Am. St. Rep. 818, 59 S. E. 148, S. Car. Const. art. III. sec. 32.

On validity of law imposing tax on insurance companies for benefit of foremen, see note in 13 L.R.A.(N.S.) 1147.

[8] Bush v. New York Life Ins. Co. 119 N. Y. Supp. 796, 135 App. Div. 447, N. Y. Ins. Laws, sec. 96, and Laws 1906, p. 794, c. 326, in Consol. Laws, c. 328, not in violation of N. Y. Const. art. 3, sec. 18.

[9] Hurd's Rev. Stat. Ill. 1905, ch. 73, sec. 2, providing for dissolution is *constitutional.* Cullom v. Traders' Ins. Co. 163 Fed. 45, 89 C. C. A. 295. Act of Ill. Feb. 17, 1874, providing for dissolution of insurance companies, is *constitutional:* Chicago Life Ins. Co. v. Auditor, 101 Ill. 82. Court of equity has power to decree dissolution of a mutual benefit society where it violates a statute in the conduct of its affairs; Chicago Mut. Life Assn. v. Hunt, 127 Ill. 257, 2 L.R.A. 549n, 20 N. E. 55.

[10] Attorney-General v. Atlantic Mut. Ins. Co. 77 N. Y. 336; Jermain v. Hendricks (N. Y. 1885), under sec. 7, c. 902, Laws 1869. Under this act the court may direct receivers to continue business: People v. Atlantic Mut. Ins. Co. 15 Hun (N. Y.) 84, 100 N. Y. 279. Appointment of Receiver under New York act 1836, does not dissolve corporation: Receiver of Globe Ins. Co. 6 Paige (N. Y.) 106.

[11] Chicago Life Ins. Co. v. Auditor, 101 Ill. 82, decided under Ill. act Feb. 17, 1874; Fry v. Charter Oak Co. 31 Fed. 197; Republic Life Ins. Co. v. Swigert, 135 Ill. 150, 12 L.R.A. 328, 25 N. E. 680, *decided* under Ill. Rev. Stat. 1889, c. 73, sec. 103, holds that such act *is not in violation* of contract clauses of *Federal Constitution.*

[12] German Alliance Ins. Co. v. Hale, 219 U. S. 307, 31 Sup. Ct. 246, 55 L. ed. 229, 40 Ins. L. J. 333, Ala. Code 1896, secs. 2619, 2620, statute constitutional. See Joyce on Monopolies (ed. 1911) secs. 370, 421. See also § 329 herein.

[13] German Alliance Ins. Co. v. Barnes (U. S. C. C.) 189 Fed. 769, 40 Ins. L. J. 2176, Kan. Laws 1909, c. 152.

[14] American Surety Co. v. Shallenberger (U. S. C. C.) 183 Fed. 636, 40 Ins. L. J. 857, and note, 864, Neb. Laws 1909, c. 27, held unconstitutional.

§ 328. Same subject: foreign companies.—The legislature has power to prescribe the conditions upon which foreign insurance companies shall be permitted to transact business within its territory, and effect will be given such statutes, when not unconstitutional, in all the courts of the United States.[15] So a state may pre-

[15] *United States.*—German Alliance Ins. Co. v. Hale, 219 U. S. 307, 55 L. ed. 229, 31 Sup. Ct. 246; Hunter v. Mutual Reserves Life Assoc. 218 U. S. 573, 54 L. ed. 1155, 31 Sup. Ct. 127, 30 L.R.A. (N.S.) 686, 40 Ins. L. J. 172; Swing v. Western Lumber Co. 205 U. S. 275, 51 L. ed. 799, 27 Sup. Ct. 497; Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. 619; New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. 837 (*cited* in Mutual Benefit Life Ins. Co. v. Robinson, 54 Fed. 585; Wall v. Equitable Life Assur. Soc. 32 Fed. 276); Paul v. Virginia, 8 Wall. (75 U. S.) 168, 19 L. ed. 357; Lafayette Ins. Co. v. French, 18 How. (59 U. S.) 404, 15 L. ed. 451; Merchants' Life Assoc. of U. S. v. Yoakum, 98 Fed. 251, 39 C. C. A. 56; Manchester Fire Ins. Co. v. Harriott (U. S. C. C.) 91 Fed. 711; Ehrmann v. Teutonia Ins. Co. 1 Fed. 471, 477.

Alabama.—Hoadley v. Purifoy, 107 Ala. 276, 30 L.R.A. 351, 18 So. 220; City of Montgomery v. Royal Exchange Assur. Corp. of London, 5 Ala. App. 318, 59 So. 508. But such acts do not prevent transacting business not in the line of insurance. Boulware v. Davis, 90 Ala. 207, 9 L.R.A. 601, 8 So. 84.

Arkansas.—Federal Union Ins. Co. v. Flemister, 95 Ark. 389, 130 S. W. 574 (mutual company).

Connecticut.—State v. Travelers' Ins. Co. 73 Conn. 255, 57 L.R.A. 481, 47 Atl. 299.

Illinois.—Indiana Millers Mutual Fire Ins. Co. v. People, 65 Ill. App. 355.

Indiana.—Swing v. Hill, 165 Ind. 411, 75 N. E. 658. Under Indiana statutes, *District of Columbia is a "state,"* so far as foreign insurance companies are concerned. State v. Briggs, 116 Ind. 55, 18 N. E. 395. Statute of Indiana is constitutional. Blackmer v. Royal Ins. Co. 115 Ind. 291, 17 N. E. 580; Phœnix Ins. Co. v. Burdett, 112 Ind. 204, 13 N. E. 705; Farmers' and Mechanics' Ins. Co. v. Harrah, 47 Ind. 236.

Kansas.—State v. Phipps, 50 Kan. 69, 34 Am. St. Rep. 152, 18 L.R.A. 654, 31 Pac. 1097.

Michigan.—Conditions as to transacting business may be reasonable or unreasonable. Hartford Fire Ins. Co. v. Commissioner of Insurance, 70 Mich. 485.

Missouri.—Cravens v. New York Life Ins. Co. 148 Mo. 583, 53 L.R.A. 305, 71 Am. St. Rep. 628, 50 S. W. 519, aff'd in New York Life Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. 762; Daggs v. Orient Ins. Co. 136 Mo. 382, 35 L.R.A. 227, 58 Am. St. Rep. 368, 38 S. W. 851, aff'd in Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. 281 (see next following note herein).

Nebraska.—State ex rel. Breckenridge v. Fleming, 70 Neb. 523, 97 N. W. 1063.

New Jersey.—Columbian Fire Ins. Co. v. Kinyon, 37 N. J. L. 33.

New York.—People (ex rel. Moore) v. Holmes, 135 N. Y. Supp. 467, 151 App. Div. 257.

Pennsylvania.—List v. Commonwealth, 118 Pa. St. 322, 12 Atl. 277.

South Carolina.—Owen v. Bankers Life Ins. Co. 84 S. Car. 253, 66 S. E. 290; New York Life Ins. Co. v. Bradley, 83 S. Car. 418, 65 S. E. 433.

Wisconsin.—Presbyterian Ministers' Fund v. Thomas, 126 Wis. 281, 110 Am. St. Rep. 919, 105 N. W. 801 (effect given when constitutional);

scribe the liabilities under which corporations created by its laws, and foreign corporations, shall conduct their business within the state in the future. Its power to impose conditions upon foreign corporations is as extensive as the power over domestic corporations, for that which a state may do with corporations of its own creation it may do with foreign corporations admitted into the state.[16] And

Fire Department v. Helfenstein, 16 Wis. 136.

See also 3 Kent's Commentaries, 13th ed. 257, note b; Joyce on Franchises (ed. 1909) secs. 351, 352; note 24 L.R.A. 298, on restrictions on business of foreign insurance companies; art. 13, Law Notes (Sept. 1909) address by Hon. George W. Wickersham.

A state may impose such conditions as it pleases upon the doing of any business by foreign insurance companies within the state. Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. 427 (*cited* in Eastern Building & Loan Assoc. v. Bedford, 88 Fed. 10; Commonwealth v. Nutting, 175 Mass. 154, 155, 78 Am. St. Rep. 483, 55 N. E. 895; Commonwealth Ins. Co. v. Swift, 174 Mass. 226, 229, 54 N. E. 1097; Commonwealth v. Roswell, 173 Mass. 119, 122, 53 N. E. 132). Domestic statutes of general application control foreign companies and their business. Guardian Trust Co. v. Strauss, 123 N. Y. Supp. 852, 139 App. Div. 884. An insurance company doing business in another state is subject as to such business to the laws of that state. New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. 837 (*cited* in Mutual Benefit Life Ins. Co. v. Robinson, 54 Fed. 585; Wall v. Equitable Life Assur. Soc. 32 Fed. 276). Foreign corporation must comply with state law notwithstanding contrary provisions in its contracts. Smoot v. Bankers' Life Assoc. 138 Mo. App. 438, 120 S. W. 719. See §§ 194 (g), (h) herein.

A state legislature may define its *public policy* in respect of life insurance and impose such conditions on the transaction of that business within the state, as is deemed best. John Hancock Mutual Life Ins. Co. v. Warren, 181 U. S. 73, 45 L. ed. 755, 21 Sup. Ct. 535, 30 Ins. L. J. 623, 626, per Mr. Chief Justice Fuller, case affirms 59 Ohio St. 45, 51 N. E. 546.

Right of foreign surety company to do business under Michigan statutes. See Wells v. United States Fidelity & Guaranty Co. of Balt. 160 Mich. 213, 125 N. W. 57, Comp. Laws, Mich. sec. 10,442, and Pub. acts 1901, no. 206, as am'd by Pub. acts 1903, no. 34, and Pub. acts 1907, no. 310.

Fraternal and benevolent corporation created by Congress for business in District of Columbia, cannot do business in state in violation of its statutes. Layden v. Endowment Bank, Knights of Pythias, 128 N. Car. 546, 39 S. E. 47, Pub. Laws N. Car. 1899, c. 62, sec. 1. Providing how foreign corporation could become domestic corporation.

As to authority of *foreign mutual hail companies* to do business in state where one statute prohibits it and a subsequent statute permits it on certain conditions: Conflict of laws. State (ex rel. Farmers' Mutual Hail Ins. Co.) v. Cooper, 18 N. Dak. 583, 120 N. W. 878.

[16] Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. 281, 28 Ins. L. J. 97, aff'g Daggs v. Orient Ins. Co. 136 Mo. 382, 35 L.R.A. 227, 58 Am. St. Rep. 368, 38 S. W. 85, 26 Ins. L. J. 67.

Cited in: *United States.*—Dayton Coal & Iron Co. v. Barton, 183 U. S. 23, 24, 46 L. ed. 64, 22 Sup. Ct. 5; New York Life Ins. Co. v. Cravens, 178 U. S. 389, 396, 44 L. ed. 1122, 20

the state may also prohibit foreign companies from transacting business within its territory and enforce its prohibition by penal enactments.[17] It is held, however, that the power to exclude foreign

Sup. Ct. 962, 29 Ins. L. J. 876; St. Louis, Iron Mountain & St. Paul Ry. Co. v. Paul, 173 U. S. 404, 409, 43 L. ed. 748, 19 Sup. Ct. 419 (right to contract not absolute but may be subjected to the restraints demanded by the safety and welfare of the state); Union Central Life Ins. Co. v. Skipper, 115 Fed. 69, 72, 52 C. C. A. 666; McClain v. Provident Savings Life Assur. Soc. 110 Fed. 80, 92, 49 C. C. A. 44 (s. c. 184 U. S. 699, 46 L. ed. 765, 23 Sup. Ct. 938); Corley v. Travelers' Protective Assoc. 105 Fed. 854, 859, 46 C. C. A. 283.

Arkansas.—Woodson v. State, 69 Ark. 521, 529, 65 S. W. 465.

Massachusetts.—Commonwealth v. Nutting, 175 Mass. 154, 156, 78 Am. St. Rep. 483, 55 N. E. 805.

Missouri.—Cravens v. New York Life Ins. Co. 148 Mo. 583, 604, 53 L.R.A. 305, 71 Am St. Rep. 628, 50 S. W. 519.

Tennessee.—Continental Fire Ins. Co. v. Whitaker, 112 Tenn. 151, 173, 64 L.R.A. 457, 105 Am. St. Rep. 916, 79 S. W. 119; North British & Mercantile Ins. Co. v. Craig, 106 Tenn. 621, 630, 62 S. W. 155; State (ex rel. Actor) v. Schlitz Brewing Co. 104 Tenn. 715, 732, 78 Am. St. Rep. 941, 59 S. W. 1033.

[17] *United States.*—Hunter v. Mutual Reserve Life Ins. Co. 218 U. S. 573, 584, 54 L. ed. 1155, 31 Sup. Ct. 127, 30 L.R.A.(N.S.) 686, N. Car. act, 1899; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. 281, 28 Ins. L. J. 97, aff'g Daggs v. Orient Ins. Co. 136 Mo. 382, 35 L.R.A. 227, 58 Am. St. Rep. 368, 38 S. W. 85, 26 Ins. L. J. 67; Horn Silver Mining Co. v. New York State, 143 U. S. 305, 314, 36 L. ed. 164, 12 Sup. Ct. 403, per Field, J.; Norfolk & Western R. R. v. Pennsylvania, 136 U. S. 114, 118, 34 L. ed. 394, 10 Sup. Ct. 958; Philadelphia Fire Assn. v. New York, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. 108; Doyle v. Continental Fire Ins. Co. 94 U. S. 537, 24 L. ed. 148.

Illinois.—Indiana Millers' Mutual Fire Ins. Co. v. People, 170 Ill. 474, 49 N. E. 364 (penalty may be received); Pierce v. People, 106 Ill. 11, 46 Am. Rep. 683; Cincinnati Mutual Health Ins. Co. v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 626.

Kansas.—State v. Phipps, 50 Kan. 609, 18 L.R.A. 654, 34 Am. St. Rep. 152, 31 Pac. 1097.

Maryland.—Talbot v. Fidelity & Casualty Co. 74 Md. 536, 13 L.R.A. 584 and note, 22 Atl. 395.

Mississippi.—Moses v. State, 65 Miss. 562, 3 So. 140, under Code Miss. 1880, secs. 1073-81.

Missouri.—Cravens v. New York Life Ins. Co. 148 Mo. 583, 53 L.R.A. 305, 71 Am. St. Rep. 628, 50 S. W. 519 (aff'd New York Life Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. 1162, 29 Ins. L. J. 876); State v. New York Life Ins. Co. 81 Mo. 89 (the penalties are visited on resident agent); State v. Charter Oak Life Ins. Co. 9 Mo. App. 364.

New York.—Woodward v. Mutual Reserve Life Ins. Co. 178 N. Y. 485, 71 N. E. 10.

Texas.—Smith v. State, 18 Tex. App. 69.

England.—See Haggin v. Comptoir D'Escompte de Paris, 23 Q. B. Div. 519.

Sufficiency of complaint to recover penalty. See Sandell v. Atlanta Mutual Life Ins. Co. 53 S. Car. 241, 31 S. E. 230.

Statute is in nature of a penalty where it prohibits issuing license to life company where salary of any officer thereof exceeds a certain amount. State (ex rel. Equitable

corporations from doing business within the state, or to exact conditions for allowing it to do business therein is limited only where the corporation is employed by the Federal government or where its business is strictly commerce, interstate or foreign,[18] or where such corporation is created by Congress or engaged in business of a Federal nature.[19]

Corporations engaged in the marine insurance business are within the rule applicable to other insurance companies and may likewise be allowed to enter the state only on performance of specified conditions or they may be entirely excluded therefrom.[20] So the state may impose upon life or health insurance companies as a condition precedent of doing business in the state, the obligation to pay damages and attorneys' fees in case of default in the payment of losses.[1]

It is held that the legislature may restrict the business of such corporations to particular localities, and may require security for

Life Assur. Soc.) v. Vandiver, 222 Mo. 206, 267, 121 S. W. 45, 63.

It is noteworthy that an act passed in 1814 in New York, Laws N. Y. 1814, c. 49 (passed March 13th, 1814), was the first enactment of its kind in that state and was entitled "An act to prevent foreigners from becoming insurers in certain cases in this state." There is a special reference by name to a certain English company or association, and it expressly prohibited all foreign insurances against fire. Chancellor Kent, however, dissented to its passage in the council of revision.

[18] Pembina Consolidated Silver Mining & M. Co. 125 U. S. 181, 8 Sup. Ct. 737, 31 L. ed. 650.

[19] New York Life Ins. Co. v. Bradley, 83 S. Car. 418, 65 So. 438.

[20] Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 15 Sup. Ct. 207.

Cited in: *United States.*—Nutting v. Massachusetts, 183 U. S. 553, 556, 46 L. ed. 324, 326, 22 Sup. Ct. 238; Noble v. Mitchell, 164 U. S. 367, 370, 41 L. ed. 472, 473, 17 Sup. Ct. 110.

Illinois.—Indiana Millers Mutual Fire Ins. Co. v. People, 65 Ill. App. 355, 358.

Massachusetts.—Commonwealth v. Nutting, 175 Mass. 156, 78 Am. St. Rep. 483, 55 N. E. 895.

Minnesota.—Seamans v. Christian Bros. Mill. Co. 66 Minn. 205, 207, 68 N. W. 1065.

Missouri.—Cravens v. New York Life Ins. Co. 148 Mo. 583, 614, 58 L.R.A. 305, 314, 71 Am. St. Rep. 628, 50 S. W. 519.

New Jersey.—Hickman v. State, 62 N. J. L. 499, 504, 41 Atl. 942.

[1] Fidelity Mutual Life Assoc. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. 662.

Cited in: *United States.*—Carrol v. Greenwich Ins. Co. 199 U. S. 401, 409, 50 L. ed. 246, 249, 26 Sup. Ct. Rep. 66.

Illinois.—North American Ins. Co. v. Yates, 214 Ill. 272, 276, 73 N. E. 423.

Kansas.—Alliance Co-op. Ins. Co. v. Carbett, 69 Kan. 564, 571, 77 Pac. 108.

Missouri.—Keller v. Home L. Ins. Co. 198 Mo. 440, 459, 95 S. W. 903.

Tennessee.—Continental F. Ins. Co. v. Whitaker, 112 Tenn. 151, 171, 64 L.R.A. 457, 105 Am. St. Rep. 916, 79 S. W. 119.

On right of burglary and theft insurance companies to do business in foreign states, see note in 46 L.R.A. (N.S.) 563.

the performance of its contracts as shall be deemed for the best interests of its own citizens, since a foreign corporation has no absolute right of recognition in other states;[2] it does business in a state other than that of its incorporation, not by right but by grace, and must conform to its laws.[3] A corporation is a mere creature of local law; it can have no legal existence beyond the limits of the state of its creation, and is entitled to no recognition in other states, except upon the principle of comity. It is not a citizen within those clauses of the Federal Constitution which provide for citizens of each state all the privileges and immunities of citizens in the several states.[4] But an insurance company having capital stock and stockholders for whose benefit it was created may be admitted to transact business on the assessment plan in Ohio, if authorized to transact such business under the laws of the state which created it, although there is no statutory authority given to Ohio stock corporations to do such business.[5]

[2] Bank of Augusta v. Earle, 13 Pet. (38 U. S.) 519, 538, 589, 10 L. ed. 274.

On restrictions on business of foreign insurance companies, see note in 24 L.R.A. 298.

[3] Cravens v. New York Life Ins. Co. 148 Mo. 583, 53 L.R.A. 305, 71 Am. St. Rep. 628, 50 S. W. 519, aff'd in New York Life Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. 762.

[4] Paul v. Virginia, 8 Wall. (75 U. S.) 168, 19 L. ed. 357. See Bank of Augusta v. Earle, 13 Pet. (38 U. S.) 538, 10 L. ed. 274. See 2 Morawetz on Corporations, sec. 973; 1 Thompson on Corporations, sec. 12.

See also Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. 281, 28 Ins. L. J. 97 (corporation not citizen within 14th am'd't U. S. Const.); Equitable Assur. Soc. v. Frommhold, 75 Ill. App. 143 (interstate comity); Commonwealth v. Gregory, 121 Ky. 256, 89 S. W. 168 (not a citizen within U. S. Const. art. 4, sec. 2); Webster v. Columbian National Life Ins. Co. 116 N. Y. Supp. 404, 131 App. Div. 837 (is a citizen of New York so far as litigation is concerned), aff'd (mem.) 196 N. Y. 523, 89 N. E. 1114; Queen City Fire Ins. Co. v. Basford, 27 S. Dak. 164, 130 N. W. 44.

A foreign insurance company does not acquire any vested rights by complying with existing police regulations or comity laws which cannot be affected by subsequent changes in such regulations or laws. State (ex rel. Crow) v. Firemen's Fund Ins. Co. 152 Mo. 1, 52 S. W. 595, 45 L.R.A. 363.

A foreign insurance company doing business in a state, without complying with, and in defiance of, its laws, cannot insist that its courts must, as an exercise of *comity*, give effect to its contracts made with citizens of the state. Commonwealth Mut. Fire Ins. Co. v. Hayden, 60 Neb. 636, 83 Am. St. Rep. 545, 83 N. W. 922.

See also American Automobile Ins. Co. v. Palmer, 174 Mich. 295, 140 N. W. 557, 42 Ins. L. J. 885, where the right of the insurer to issue a so-called liability insurance on automobiles as a matter of comity was denied. *Examine* as to comity the opinion of Walker, J., in United States Fidelity & Guaranty Co. v. Linehan, 73 N. H. 41, 58 Atl. 956, 33 Ins. L. J. 1023.

[5] State (ex rel. National Life As-

Statutes prohibiting foreign insurance companies from carrying on business except on compliance with prescribed conditions, such as obtaining a license therefor, etc., do not conflict with the guaranty under the Federal Constitution of privileges and immunities to citizens in the several states; [6] nor do such statutes conflict with

soc.) v. Matthews, 58 Ohio St. 1, 40 L.R.A. 418, 49 N. E. 1034, under Ohio Rev. Stat. sec. 3630e.

On laws of state of incorporation as limitation on powers of insurance company, see notes in 63 L.R.A. 853, and 52 L.R.A.(N.S.) 278.

[6] Paul v. Virginia, 8 Wall. (75 U. S.) 168, 19 L. ed. 357; Tatem v. Wright, 23 N. J. L. (3 Zab.) 429.

Such statutes are constitutional.

United States.—Orient Ins. Co. v. Board of Assessors for Orleans, 221 U. S. 358, 55 L. ed. 769, 31 Sup. Ct. 554 (case affirms 124 La. 872, 50 So. 778); Liverpool & London & Globe Ins. Co. v. Board of Assessors for Orleans, 221 U. S. 346, 55 L. ed. 762, 31 Sup. Ct. 550, L.R.A.1915C, 903 (case affirms 122 La. 98, 47 So. 415); Fidelity Mutual Life Assoc. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. 662; John Hancock Mutual Life Ins. Co. v. Warren, 181 U. S. 73, 45 L. ed. 955, 21 Sup. Ct. 535, 30 Ins. L. J. 623, case affirms 59 Ohio St. 45, 51 N. E. 546.

Iowa.—Parker v. C. Lamb & Sons, 99 Iowa, 265, 34 L.R.A. 704, 68 N. W. 686.

Kentucky.—Commonwealth v. Ill. Life Ins. Co. 159 Ky. 589, 167 S. W. 909.

Missouri.—Cravens v. New York Life Ins. Co. 148 Mo. 583, 53 L.R.A. 305, 71 Am. St. Rep. 628, 50 S. W. 519, aff'd in New York Life Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. 762.

New York.—Bush v. New York Life Ins. Co. 63 Misc. 89, 116 N. Y. Supp. 1056; Fire Department of City of New York v. Stanton, 51 N. Y. Supp. 243, 28 App. Div. 334.

South Carolina.—Sandall v. Atlanta Mutual Life Ins. Co. 53 S. Car. 241, 31 S. E. 230.

Statutes merely regulating the methods of conducting the business of insurance, foreign and domestic, are but the exercise of the police power of the state in the interests of the public, and are valid and constitutional. Swing v. Munson, 191 Pa. St. 582, 58 L.R.A. 223, 71 Am. St. Rep. 772, 43 Atl. 342. See cases throughout this section.

A law of a state requiring insurance companies of other states or countries to file security, or take out a license, or pay a specific tax or certain fees and percentages, before they can issue policies in the state, is constitutional. Home Ins. Co. v. City Council of Augusta, 93 U. S. 116, 23 L. ed. 825.

Distinguished in State v. Hipp, 38 Ohio St. 226.

Cited in Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692, 695, 38 L. ed. 871, 873, 4 Inters. Com. Rep. 639, 14 Sup. Ct. 1094; Western Union Telegraph Co. v. Charleston, 56 Fed. 421; Bishoff v. State, 43 Fla. 67, 80, 30 So. 808; Badger v. City of New Orleans (State ex rel. Badger v. New Orleans) 49 La. Ann. 804, 843, 37 L.R.A. 555, 21 So. 870.

When unconstitutional: See Atlas Mutual Ins. Co. v. Fisheries Co. 6 Penn. (Del.) 256, 68 Atl. 4; Mutual Reserve Fund Life Assoc. v. City Council of Augusta, 109 Ga. 73, 35 S. E. 71.

Whether constitutional or not, quaere? Katz v. Herrick, 12 Idaho, 1, 86 Pac. 873.

Are mere *police regulations.* State (ex rel. Equitable Life Assur. Soc.) v. Vandiver, 222 Mo. 206, 267, 121 S. W. 45, 63.

As to police power, see Joyce on Franchises (ed. 1909) sec. 366, and

the statutes providing that Congress shall have power to regulate commerce with foreign nations and between the states, since issuing a policy of insurance is not commerce, notwithstanding the domicil of the parties be in different states.[7] Nor is marine insurance commerce, or an instrumentality thereof, but is merely an incident, and the state has power to prescribe and enforce conditions upon which foreign companies may transact business, notwithstanding the constitutional provision as to interstate commerce.[8] There is a

note p. 582; Joyce on Electric Law (2d ed.) sec. 215 and note.

[7] Paul v. Virginia, 8 Wall. (75 U. S.) 168, 19 L. ed. 357.

See also the following cases:

United States.—New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495, 58 L. ed. 332, 34 Sup. Ct. 167, 43 Ins. L. J. 3; Hunter v. Mutual Reserve Fund Life Ins. Co. 218 U. S. 573, 54 L. ed. 1155, 31 Sup. Ct. 127, 30 L.R.A.(N.S.) 686, 40 Ins. L. J. 172; Nutting v. Massachusetts, 183 U. S. 553, 46 L. ed. 634, 22 Sup. Ct. 238, 239; New York Life Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. 762, 29 Ins. L. J. 876, aff'g Cravens v. New York Life Ins. Co. 148 Mo. 583, 71 Am. St. Rep. 628, 53 L.R.A. 305, 50 S. W. 519.

Kansas.—State v. Phipps, 50 Kan. 609, 18 L.R.A. 657, 31 Pac. 1097, 34 Am. St. Rep. 152.

Kentucky. — Commonwealth v. Gregory, 121 Ky. 256, 89 S. W. 168.

Montana.—New York Life Ins. Co. v. Deer Lodge County, 43 Mont. 243, 115 Pac. 911.

Pennsylvania. List v. Commonwealth, 118 Pa. 322, 12 Atl. 277, 279; Insurance Co. of North America v. Commonwealth, 87 Pa. 173, 183, 30 Am. Rep. 352.

Tennessee. D'Arcy v. Connecticut Mutual Life Ins. Co. 108 Tenn. 567, 69 S. W. 768, 769.

Texas.—Queen Ins. Co. v. State, 86 Tex. 250, 22 L.R.A. 483, 24 S. W. 397.

Virginia.—Harris v. Commonwealth, 113 Va. 746, 73 S. E. 561, 38 L.R.A.(N.S.) 458 note.

Exclusion of foreign companies as affecting commerce, see note 24 L.R.A. 312.

[8] Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 15 Sup. Ct. 207, 40 Cent. L. J. 228. The court, per White, J., said: "The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.' The state of California has the right to exclude foreign insurance companies altogether from her territory, whether they were formed for the purpose of doing a fire or marine business. She has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entries shall be made. And, as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as a preliminary to the transaction of business within her confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company. And she has, also, the further right to prohibit a citizen from contracting within her jurisdiction with any foreign company which has not acquired the privilege of engaging in business therein, either in his own behalf or through an agent empowered to that end. The power to exclude embraces the power to regulate and enforce all

distinction, with reference to the power to contract, between the existence of a corporation de facto and de jure. A valid contract cannot be made with a corporation that does not exist as a matter of fact at the time of contracting, and it must be shown that the corporation was in existence de facto at the time of entering into the contract. But a contract can be entered into with a corporation actually in existence at the time, although the legality of its organization may be questioned or its acts forbidden by law. The question of the legal validity of such a contract will be one to be determined by the courts, dependent upon the terms of the prohibition.[9] The principal object of such statutes is the protection of the interests of its own citizens by the state. The legislature may also provide for the supervision of such corporations, as in case of domestic corporations.

legislation, in regard to things done within the territory of the state, which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject always, of course, to the paramount authority of the Constitution of the United States."

[9] This is substantially the rule laid down in the learned treatise of Mr. Morawetz on Private Corporations, 2d vol. 2d ed. secs. 744–46. He also says: "The courts have, in some instances, failed to bear in mind the distinction between the actual existence of a corporate association, and the legality of such an association after it has been actually formed. It seems to have been assumed in some of the cases that a corporate association formed in violation of the general rule of the common law prohibiting such associations must necessarily be treated by the courts as a nullity—as no corporation at all. This doctrine is not only founded on a misconception, but is in most cases unjust in its consequences." Id. sec. 745; and in a prior section he says: "The unauthorized dealings of such associations will, in many instances, be recognized and given effect by the courts, notwithstanding the common-law prohibition." Id. sec. 744. See Jennings v. Dark, 175 Ind. 332, 92 N. E. 778. "(5) Assuming, as defendant contends that the plaintiff's case falls short of the evidence required to establish the creation of a corporation de jure, the record nevertheless discloses evidence amply sufficient to support plaintiff's existence as a de facto corporation, and as such it was entitled to maintain this action." Creditors Union v. Lundy, 16 Cal. App. 567, 117 Pac. 624, 40 Ins. L. J. 1981, 1983. Case of action on a premium note executed to insurance company. Estoppel to deny corporate existence, see Brady v. Delaware Mutual Life Ins. Co. — Del. —, 45 Atl. 345.

An unconstitutional act of the legislature does not constitute a sufficient basis for a corporation de facto. That can exist only where there is a valid law under which the corporation might have been created de jure, and the law that corporate existence cannot be inquired into except by a direct action in the name of the state is not applicable to a pretended but not even a de facto corporation. Huber v. Martin, 127 Wis. 412, 3 L.R.A.(N.S.) 653, 115 Am. St. Rep. 1023, 7 Amer. & Eng. Ann. Cas. 400, 105 N. W. 1031, 1135, 35 Ins. L. J. 334.

These statutes provide that certain acts be done by agents of such companies as prerequisites to making contracts within the state,[10] and prescribe the manner in which the agents of such companies shall be qualified before entering on their duties.[11] The legislature has power also to prohibit foreign insurance companies, their agents or brokers from soliciting business within a state, even though the insurance contract makes the solicitors the agents of

[10] *Florida.*—Requirement of payment from agent constitutes license taxes under acts 1905, c. 5459, sec. 7; acts 1907, c. 5597; Afro-American Industrial & Benefit Assoc. of the United States of America v. State, 61 Fla. 85, 54 So. 383.

Georgia.—License tax payable by agent of association on assessment plan; Mutual Reserve Fund Life Assoc. v. City Council of Augusta, 109 Ga. 73, 35 S. E. 71.

Kentucky.—License required; penalty; co-operative or assessment plan insurance; Skelton v. Commonwealth, 28 Ky. L. Rep. 1351, 92 S. W. 298. One who solicits insurance at request of agent must procure license or become subject to penalty; Commonwealth v. Gaither, 107 Ky. 572, 54 S. W. 956, 30 Ins. L. J. 91.

Louisiana.—When license fees cannot be required from joint agents of two nonresident companies. State v. Philadelphia Underwriters, 112 La. 47, 36 So. 221. Agent for soliciting and placing insurance is not, under La. acts, 1886, no. 101, sec. 7, liable for license fees: State v. Woods, 40 La. Ann. 175, 3 So. 543; State v. New England Mut. Ins. Co. 43 La. Ann. 133, 8 So. 888.

New York.—*Statute valid:* Hauser v. North British & Mercantile Ins. Co. 136 N. Y. Supp. 1015, 152 App. Div. 91, aff'd 206 N. Y. 456, 42 L.R.A.(N.S.) 1139, 100 N. E. 52, N. Y. Ins. Law sec. 50, as am'd by Laws 1912 (but see same case as to police power). Agents of all companies included under N. Y. Consol. act sec. 523, as to liability for support of fire department. Fire Department of City of New York v. Stanton, 51 N. Y. Supp. 242, 28 App. Div. 334.

Oregon.—Certificate or license required. Roane v. Union Pacific Life Ins. Co. 67 Oreg. 264, 135 Pac. 892, Lord's Oreg. Laws, sec. 4609.

Pennsylvania.—Agent must comply with laws or become personally liable. Bartlett v. Rothschild, 214 Pa. 421, 63 Atl. 1030. Agent's license not issuable to corporation. Incorporated Ins. Agent, In Re, 38 Pa. Co. Ct. 104. Insurance Agents Licenses, 67 Leg. Intel. 421. Agents' Licenses issuable only to individuals, not to firms or copartnerships. Pennsylvania Resident Agency Laws, In re, 56 Leg. Intel. 290. 8 Pa. Dist. Rep. 354 (opinion of Atty. Genl.).

South Carolina.—S. Car. Civ. Code sec. 1801, specifies upon what conditions license to agent issuable; discrimination; constitutionality; Travelers' Ins. Co. v. McMasters, 84 S. Car. 495, 66 S. E. 877.

[11] List v. Commonwealth, 118 Pa. St. 322, 12 Atl. 277; Paul v. Virginia, 8 Wall. (75 U. S.) 168, 19 L. ed. 357; Phœnix Ins. Co. v. Burdett, 112 Ind. 204, 13 N. E. 705, under Rev. Stat. Ind. 1881, sec. 3768. Massachusetts Rev. Stat. c. 37, sec. 40, requiring deposit by agent of foreign company of copy of charter, etc., applies to mutual companies. General Mutual Ins. Co. v. Phillips, 13 Gray (79 Mass.) 90. See notes in Jones on Business Corporations, 106 et seq. See also Bulware v. Davis, 90 Ala. 207, 9 L.R.A. 66, 8 So. 84; City of Trenton v. Humel, 134 Mo. App. 595, 114 S. W. 1131 (agent of fraternal benefit association).

the insured in the transaction.[12] Nor is any state or Federal constitutional right abridged by enactments restraining persons from acting as agents of foreign insurance companies.[13] Again, a state can lawfully punish or regulate, by the imposition of civil liability or otherwise, the doing of acts within its territory by agents of a foreign insurance company, which are calculated to neutralize and make ineffective a statute prescribing conditions of the right of such corporation to do business within the state.[14]

Such statutes further provide for a license tax or fee,[15] for taxa-

[12] Commonwealth v. Nutting, 175 Mass. 154, 78 Am. St. Rep. 483, 55 N. E. 895.

[13] Hickman v. State, 62 N. J. L. 499, 41 Atl. 942, aff'd 44 Atl. 1099.

[14] Noble v. Mitchell, 164 U. S. 367, 17 Sup. Ct. 110, 41 L. ed. 472. *Cited* in London, Paris & American Bank v. Aronstein, 117 Fed. 601, 608, 54 C. C. A. 663, 670; Cook v. Howland, 74 Vt. 393, 398, 59 L.R.A. 338, 339, 93 Am. St. Rep. 912, 52 Atl. 973. When indictment against agent bad on demurrer, see Gage v. State, 67 Ark. 308, 55 S. W. 165.

As to actions against agents of foreign insurance companies acting without a license; statutes, see § 713 herein.

[15] *Alabama.*—Acts 1886, 1887, includes foreign companies only. Hoadley v. Purifoy, 107 Ala. 276, 30 L.R.A. 351, 18 So. 220.

Florida.—No express limitation on states power; statute is constitutional; Taxes under Fla. acts 1905 c. 5459, sec. 7; act 1907, c. 5597 *are license taxes;* case of *sick and funeral benefit insurance.* Afro-American Industrial & Benefit Assoc. of the United States of America v. State, 61 Fla. 376, 54 So. 383.

Indiana.—Payment required of a certain amount on premiums received *not a license fee but taxes* under Burns's Ann. Stat. Ind. 1908, sec. 10213. Taxes are *not "debts"* and bear no interest from time due if not paid. State v. Mutual Life Ins. Co. of N. Y. 175 Ind. 59, 42 L.R.A. (N.S.) 256, 93 N. E. 213, 40 Ins. L. J. 216.

Louisiana.—Companies doing a *life accident, and workingmen's collective business liable*, and they are also *liable for* a *second license* if other insurance combined. State v. Maryland Casualty Co. 133 La. 146, 62 So. 606. When company entitled to *reduction* of city license by credit for license tax paid on premiums collected outside such city; City of New Orleans v. London, Liverpool & Globe Ins. Co. 52 La. Ann. 1904, 28 So. 267.

Pennsylvania.—Ætna Fire Ins. Co. v. Reading, 119 Pa. St. 417, 5 Pa. L. ed. 570, 11 Cent. Rep. 858, 13 Atl. 451, under acts Pa. April 4, 1873, Sec. 17 (Pub. L. 20), May 24, 1887 (Pub. L. 204).

South Dakota. — Legislature may *classify*, etc.; *License tax* and *not property tax; is constitutional;* Queen City Fire Ins. Co. v. Basford, 27 S. Dak. 164, 130 N. W. 44.

Texas.—Tax on net receipts *not a license but a tax;* net receipts are personal property; increase of assessment; review. American Bonding Co. v. Williams, — Tex. Civ. App. —, 131 S. W. 652.

Wisconsin.—Accident Company obligated to pay license fee under Wis. Rev. Stat. 1878, sec. 1220, notwithstanding Laws Wis. 1880, c. 105, subjects it to same fees and taxes as fire insurance companies. State (ex rel. Fidelity Casualty Co.) v. Fricke, 102 Wis. 107, 10 Am. & Eng. Corp. Cas. N. S. 584, 78 N. W. 455.

See further as to license and occupation taxes and when corporations

tion,[16] for a deposit with the state, or giving bonds,[17] for procuring

subject thereto notes 129 Am. St. Rep. 288, 24 L.R.A. 299.

Foreign insurance company may be required to pay fees and percentages on all premiums received as a condition of doing business in State Ducat v. Chicago, 10 Wall (77 U. S.) 410, 19 L. ed. 972.

Cited in: *United States.*—Ashley v. Ryan, 153 U. S. 436, 442, 38 L. ed. 773, 777, 14 Sup. Ct. 865, 4 Inters. Com. Rep. 26; Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania, 125 U. S. 181, 186, 31 L. ed. 650, 652, 8 Sup. Ct. 737, 2 Inters. Com. Rep. 26; Barron v. Burnside, 121 U. S. 186, 200, 30 L. ed. 915, 920, 7 Sup. Ct. 931, 1 Inters. Com. Rep. 290.

Arkansas.—Baker v. State, 44 Ark. 138.

Indiana.—State (ex rel. Baldwin) v. Insurance Co. of North America, 115 Ind. 257, 17 N. E. 574; State (ex rel. Carr) v. Woodruff Sleeping & Parlor Coach Co. 114 Ind. 155, 157, 15 N. E. 814, 1 Inters. Com. Rep. 803; Phoenix Ins. Co. v. Burdett, 112 Ind. 204, 205, 13 N. E. 705; Insurance Co. of North America v. Brim, 111 Ind. 281, 288, 12 N. E. 315.

Louisiana.—Parker v. North British & Mercantile Ins. Co. 42 La. Ann. 428, 431, 7 So. 599.

Maine.—State v. Western Union Teleg. Co. 73 Me. 518, 525.

Michigan.—Hartford Fire Ins. Co. v. Raymond, 70 Mich. 485, 502, 38 N. W. 474.

Tennessee.—State v. Phoenix Ins. Co. 92 Tenn. 420, 431, 21 S. W. 893.

Wisconsin.—Stanhilber v. Mutual Mill Ins. Co. 76 Wis. 285, 291, 45 N. W. 221; State v. United States Mutual Accident Assoc. 67 Wis. 624, 630, 21 S. W. 893.

[16] *United States.*—Premiums or *credits* due on open accounts are taxable; state may limit reasonable *time within which action for reduction* of assessments may be brought; Orient Ins. Co. v. Board of Assessors for Orleans, 221 U. S. 358, 55 L. ed. 769, 31 Sup. Ct. 554, aff'g 124 La. 872, 50 So. 778, following as to first point. Liverpool & London & Globe Ins. Co. v. Board of Assessors for Orleans, 221 U. S. 346, 55 L. ed. 762, 31 Sup. Ct. 550, aff'g 122 La. 98, 47 So. 415. See also La. cases cited below in this note. "Policy loans" so called and which are only a withdrawal by the policy holder of a portion of the reserve are not taxable *"credits;"* when *bank deposit* not taxable. Board of Assessors for Orleans v. New York Life Ins. Co. 216 U. S. 517, 54 L. ed. 597, 30 Sup. Ct. 385, aff'g New York Life Ins. Co. v. Board of Assessors for Orleans, 158 Fed. 462. But see Travelers Ins. Co. v. Board of Assessors for Orleans, 122 La. 129, 24 L.R.A. (N.S.) 388, 47 So. 439. See also N. J. case cited below in this note. Tax on premium receipts *a tax on business* and not on property; when *deposits* with state superintendent are taxable. Western Assur. Co. v. Halliday (U. S. C. C.) 127 Fed. 830, s. c. 110 Fed. 259; Rev. Stat. Ohio, secs. 2730, 2731, 2734, 2745, 3660. Tax on gross premiums under Iowa Code, sec. 1333; remedy for nonpayment. Manchester Fire Ins. Co. v. Herriott (U. S. C. C.) 91 Fed. 711.

Alabama.—Tax a *privilege or license tax*, and *not franchise tax; statute constitutional;* tax payable whether premiums *received within or outside of state;* Brown v. Pittsburgh Life & Trust Co. 10 Ala. App. 614, 65 So. 699.

California.—When taxation is a *revenue* and not intended as a condition under Pub. act, Mar. 3, 1885. San Francisco v. Liverpool & London & Globe Ins. Co. 74 Cal. 113, 15 Pac. 380.

Connecticut.—Insurance Commissioner to determine amount of taxes to be *refunded; retaliatory laws;* mandamus; Conn. Genl. Stat. 1902,

secs. 2450, 3606; N. Y. Laws 1901, c. 118, p. 297; N. Y. Laws 1896, p. 864, c. 908, sec. 195; State (ex rel. Metropolitan Life Ins. Co.) v. Upson, 79 Conn. 154, 64 Atl. 2.

Statute constitutional. State v. Travelers' Ins. Co. 73 Conn. 255, 57 L.R.A. 481, 47 Atl. 299.

Georgia.—When tax on gross premiums *not a property tax* so as to apply ad valorem system; ordinance *unconstitutional* for want of *uniformity;* Mutual Reserve Fund Life Assoc. v. City Council of Augusta, 109 Ga. 73, 35 S. E. 71.

Illinois.—Casualty Company's net receipts not taxable under general Revenue Act; is in nature of *special tax;* property taxable, only such as has *situs* in state acts 1869, 1879, 1899. Fidelity & Casualty Co. of N. Y. v. Board of Review, 264 Ill. 11, 105 N. E. 704, 44 Ins. L. J. 322. *Unearned premiums* returned on cancelation of policies not a part of gross premiums taxable; when action against insurance superintendent to *refund* not action against state; equity. German Alliance Ins. Co. v. Van Cleave, 191 Ill. 410, 61 N. E. 94. (See case under Nebraska cited below in this note.) Tax on net receipts is not license but tax; People v. Cosmopolitan Fire Ins. Co. 246 Ill. 442, 92 N. E. 922.

Indiana.—Percentage of receipts on premiums is *not license fee but a tax.* State v. Mutual Life Ins. Co. of N. Y. 175 Ind. 59, 42 L.R.A.(N.S.) 256, 93 N. E. 213, 40 Ins. L. J. 251; Burns's Ann. Stat. 1908, sec. 10,216. Payment to auditor of state *is not payment* into treasury of state under Burns's Ann. Stat. Ind. 1908, secs. 9247, 10,216; Dailey v. State (ex rel. Bigler) 171 Ind. 646, 87 N. E. 4. *Life policies not subject to taxation;* Const. Ind. art. 10, sec. 1; Tax Law 1891, sec. 3 (Rev. Stat. Ind. 1894, sec. 8410) secs. 50, 53; State Board of Tax Commrs. v. Holliday, 150 Ind. 216, 42 L.R.A. 826, 49 N. E. 14, 27 Ins. L. J. 97.

The act Rev. Ind. Stat. Sec. 3773, *is constitutional,* whether such moneys be regarded as *taxes for revenue or as license fees.* State v. Insurance Co. of North America, 115 Ind. 257, 17 N. E. 574, 15 West Rep. 93; Tenn. act, Jan. 29, 1879, secs. 7, 53.

Kentucky.—When *liable after withdrawal* from state for tax on premiums, under Ky. Stat. secs. 4226, 4227–4230a; Statute *constitutional;* Commonwealth v. Illinois Life Ins. Co. 159 Ky. 589, 167 S. W. 909; Commonwealth v. Life Ins. Co. 159 Ky. 581, 167 S. W. 872. Gross premiums included without *deduction* of dividends; *not a property tax;* but license tax; *classification* valid; Ky. Stat. sec. 4226, as am'd by acts 1906, c. 22, art. 13, subd. 2; Northwestern Mutual Life Ins. Co. v. James, 138 Ky. 48, 127 S. W. 505; see Metropolitan Life Ins. Co. v. City of Paris, 138 Ky. 801, 129 S. W. 112; Mutual Benefit Life Ins. Co. v. Commonwealth, 128 Ky. 174, 107 S. W. 802. *Deposits wrongfully withheld* by state treasurer, not taxable; Board of Councilmen of city of Frankfort v. Illinois Life Ins. Co. 129 Ky. 823, 112 S. W. 924.

Louisiana.—Outstanding accounts, *credits* liable to taxation. Standard Marine Ins. Co. Ltd. v. Board of Assessors, 123 La. 717, 29 L.R.A. (N.S.) 59, 49 So. 483. Foreign corporations are not taxable for *premiums uncollected.* Railey v. Board of Assessors, 44 La. Ann. 765, 11 So. 93. See also Liverpool & London & Globe Ins. Co. v. Board of Assessors for Orleans, 51 La. Ann. 1028, 45 L.R.A. 524, 25 So. 970, and U. S. cases above cited in this note.

Massachusetts.—Rate imposed under Mass. Stat. (Rev. Laws c. 14, secs. 24, 28) equal to highest rate imposed by foreign state. Metropolitan Life Ins. Co. v. Commonwealth, 198 Mass. 466, 84 N. E. 863.

Minnesota.—Payment of tax on premiums received *no exemption* from payment of fee on debt secured by mortgage; Minn. Genl. Laws 1907,

c. 328, p. 448, also Id. p. 449, sec. 3; Mutual Benefit Life Ins. Co. v. Martin County, 104 Minn. 179, 116 N. W. 572.

Mississippi.—When Odd Fellows property *not exempt* under Ann. Code Miss. sec. 3744 as to *"charitable society"* etc. Ridgely Lodge No. 28, I. O. O. F. v. Redus, 78 Miss. 352, 29 So. 163.

Montana.—Intrastate tax on excess of premiums does not interfere with interstate *commerce.* New York Life Ins. Co. v. Deer Lodge County, 43 Mont. 243, 115 Pac. 911. Statute applies to *foreign life* insurance corporations. Northwestern Mutual Life Ins. Co. v. Lewis & Clarke County, 28 Mont. 484, 98 Am. St. Rep. 572, 72 Pac. 982.

Nebraska. — *Unearned premiums* returned to insured not taxable; tax on gross receipts not in lieu of all other taxes. When statute not unconstitutional; State ex rel. Breckenridge v. Fleming, 70 Neb. 523, 97 N. W. 1063. See Illinois case *cited* above in this note. When entire statute *unconstitutional.* State v. Poynter, 59 Neb. 417, 81 N. W. 431.

New Jersey. — Average weekly premium deposit by local agent in bank when *not assessable* for yearly taxes: Metropolitan Life Ins. Co. v. City of Newark, 62 N. J. L. 74, 40 Atl. 573. See 216 U. S. 517, *cited* above in this note.

New York.—Foreign corporation is not liable for taxation of *capital invested in United States bonds:* International Life Assur. Co. v. Commissioners, 28 Barb. (N. Y.) 318; Laws N. Y. 1855, c. 37. *Compare* Home Ins. Co. v. New York, 119 U. S. 129, 30 L. ed. 350, 8 Sup. Ct. 1385 (court divided).

Pennsylvania.—*Gross premiums* of every character included under Pa. Pub. L. sec. 1 (June 1895); Northwestern Mutual Life Ins. Co., In re, 36 Pa. Co. Ct. Rep. 100.

South Carolina.—When tax on gross receipts a *property tax:* statute *unconstitutional:* Civ. Code 1902, secs. 302, 1808, 1809; New York Life Ins. Co. v. Bradley, 83 S. Car. 418, 65 S. E. 433.

South Dakota.—Tax on gross premiums is *license tax, not property tax:* statute *constitutional:* Queen City Fire Ins. Co. v. Basford, 27 S. Dak. 164, 130 N. W. 44.

Tennessee.—Amended Laws 1881, c. 85, sec. 18, does not impose a tax upon foreign insurance companies, but on the agents who do business in that state, and is not affected by the revenue acts of 1887, 1889, and 1891, providing for a payment by such companies of a certain per cent in lieu of taxes: City of Memphis v. Carrington, 91 Tenn. 511, 19 S. W. 673.

A foreign corporation has no status as *a citizen* in other states, and cannot object that the tax is not *uniform:* Phœnix Ins. Co. v. Commonwealth, 5 Bush (Ky.) 68, 96 Am. Dec. 331; Ducat v. City of Chicago, 48 Ill. 172, 95 Am. Dec. 529. But see Erie Ry. Co. v. State, 31 N. J. L. (2 Vroom) 531, 86 Am. Dec. 226. *Legislature may discriminate* as to taxation between domestic and foreign corporations when the policy and interest of the state demand it. Ducat v. City of Chicago, 48 Ill. 172, 95 Am. Dec. 529. But see Erie R. Co. v. State, 31 N. J. L. (2 Vroom) 531, 86 Am. Dec. 226. *Compare* Mutual Reserve Fund Life Assoc. v. City Council of Augusta, 109 Ga. 73, 35 S. E. 71.

Exemption of firemen's relief association includes what: Long Branch Firemen's Relief Assoc. (Pros.) v. Johnson (State v. Johnson) 62 N. J. L. 625, 43 Atl. 573.

[17] *United States.*—*When deposit* not required by statute *does not constitute trust* for domestic policy holders. Blake v. Old Colony Life Ins. Co. 209 Fed. 309, 126 C. C. A. 235.

Arkansas.—Guaranty or indemnity bond filed by mutual fire company *covers loss while bond in force although executed after* issuance of policy. Acts Ark. 1905, p. 492, sec.

a certificate of authority or license from the state,[18] for an annual

4; American Fire Ins. Co. v. Haynie, 91 Ark. 43, 120 S. W. 825.

Connecticut.—Such law is *constitutional.* Cooke v. Warner, 56 Conn. 234, 14 Atl. 798.

Illinois.—A foreign company which has made a deposit as large as is required by the Illinois statutes for any kind of insurance business is *not required to make a different deposit for each kind of insurance business* which it carries on, although one domestic corporation could not be organized to carry on the same kinds of business. People (ex rel. Stephens) v. Fidelity & Casualty Co. 153 Ill. 25, 26 L.R.A. 295, 38 N. E. 752. See People (ex rel. Ocean Accident & Guarantee Corp. Ltd.) v. Van Cleave, 187 Ill. 125, 58 N. E. 422.

Kentucky.—As to *amount* of deposits required under Ky. Stat. sec. 687, cl. 2, sec. 693; Ky. Const. sec. 202: See Clay v. Employers Indemnity Co. of Phila. 157 Ky. 232, 162 S. W. 1122. When foreign *reinsurer* of domestic reinsured entitled to *withdraw deposit:* When *reinsurer not required to make deposit:* Under Ky. Stat. 1903, sec. 648, Const. sec. 200. See Prewitt, Ins. Commr. v. Illinois Life Ins. Co. 29 Ky. L. Rep. 447, 93 S. W. 633, 35 Ins. L. J. 688.

North Carolina.—When *policy void* where deposit not made under Code sec. 3062, and Laws 1893, c. 299, sec. 8. Commonwealth Mutual Fire Ins. Co. v. Edwards, 124 N. Car. 116, 32 S. E. 404.

North Dakota.—Deposit required from *Mutual Hail Companies:* State (ex rel. State Farmers' Mutual Hail Ins. Co.) v. Cooper, 18 N. Dak. 583, 120 N. W. 878.

Ohio.—*Assignee* in insolvency *cannot recover securities unless* company no longer liable to policy holders. State (ex rel. Cincinnati Life Assoc.'s Assignee) v. Matthews, 64 Ohio St. 419, 60 N. E. 605. Such law *constitutional.* Fidelity & Casualty Co. v. Hahn, Supt. Ins. (Ohio, 1895) 33 Week. L. Bull. 286.

South Dakota.—*Employer's liability:* Laws 1905, c. 73, sec. 2, as am'd by Laws 1907, c. 110, Laws 1909, c. 243, Laws 1911, c. 176; Metropolitan Casualty Ins. Co. of N. Y. v. Basford, 31 S. Dak. 149, 139 N. W. 795.

Texas. — When *bond inures to* benefit of *policy holders:* Southwestern Surety Ins. Co. v. Anderson, — Tex. —, 155 S. W. 1176, rev'g — Tex. Civ. App. —, 152 S. W. 816. *Only one bond* required under the several provisions of Tex. act of March 20, 1909, secs. 1, 3, and it *must contain* only the statutory conditions. Ætna Ins. Co. v. Hawkins, Commr. 103 Tex. 195, 125 S. W. 313, 39 Ins. L. J. 511. *Retaliatory* statutes: deposit: Rev. Stat. 3066. See Seiders v. Merchants' Life Assoc. of the U. S. 93 Tex. 194, 54 S. W. 753, 29 Ins. L. J. 97, rev'g — Tex. Civ. App. —, 51 S. W. 547.

Washington.—Must comply with statute *even though state of incorporation requires no deposit:* Statute (3 Rem. and Bal. Code, secs. 6059–22, 6050–24) *constitutional.* State v. Fishback, 79 Wash. 290, 140 Pac. 387.

[18] Jones' Business Corporation Laws of New York, 105, 106. See also the following cases:

United States.—Knapp-Stout & Co. v. National Mutual Fire Ins. Co. 30 Fed. 607.

Idaho.—Katz v. Herrick, 12 Idaho, 1, 86 Pac. 873.

Illinois.—Cincinnati Mutual Health Assur. Co. v. Rosenthal, 55 Ill. 90, 8 Am. Rep. 626.

Louisiana.—*Separate license* may be required by every municipality wherein foreign company transacts business. City of Lake Charles v. Equitable Life Assur. Soc. 114 La. 836, 38 So. 578. See State v. Maryland Casualty Co. 133 La. 146, 62 So.

606, noted ante; herein under license fee or tax.

Missouri.—License not a contract but police regulation, a grant of authority: effect of refusal to *renew* license: State may amend or repeal statute: Mo. Laws 1907, p. 315; State (ex rel. Equitable Life Assur. Soc.) v. Vandiver, 222 Mo. 206, 267, 121 S. W. 45, 63. See Joyce on Franchises (ed. 1909) secs. 47, 48.

Minnesota.—In action by *fidelity "guaranty insurance corporation" no presumption that it has not complied* with statute, although the complaint fails to allege a license to do an insurance business. That is a matter of defense. Fidelity & Casualty Co. v. Eickhoff, 63 Minn. 170, 30 L.R.A. 586, 56 Am. St. Rep. 464, 65 N. W. 351.

Mississippi.—Sick benefit and burial insurance association within statute requiring permit, under Laws Miss. 1902, c. 59; Fikes v. State, 87 Miss. 251, 39 So. 783.

Nebraska.—Must obtain license as statute provides as act 1873, Genl. Stat. 1873, c. 33, p. 428, *applies to all except life companies:* State (ex rel. National Employees' Assoc.) v. Barton, 92 Neb. 666, 139 N. W. 225.

Multiform insurance business may be carried on by foreign corporation in state where domestic corporation not authorized to do so, if no positive prohibition by statute: People (ex rel. Stevens) v. Fidelity & Casualty Co. 153 Ill. 25, 26 L.R.A. 295, 38 N. E. 752. Casualty company entitled to license to carry on *several lines* of casualty insurance on compliance with statute: Laws 1899, p. 237 (act of April 21, 1899): People (ex rel. Ocean Accident & Guarantee Corp. Ltd.) v. Van Cleave, 187 Ill. 125, 58 N. E. 422. *Foreign surety company,* empowered by charter to engage in *other kinds of business,* may, in absence of prohibitory statute, be licensed under N. H. Pub. Stat. c. 172, sec. 1; United States Fidelity & Guarantee Co. v. Linehan, 73 N. H. 41, 47 Atl. 611, 33 Ins. L. J. 1023.

Foreign company cannot be denied license by reason of *similarity of its name* to that of domestic corporation, under Ill. act, May 3, 1879, sec. 1, and 1 Starr. & C. Ann. Stat. c. 73, secs. 2, 4. People (ex. rel. Traders' Fire Ins. Co.) v. Van Cleave, 183 Ill. 330, 47 L.R.A. 795, 55 N. E. 698. *Examine* Knights of Modern Maccabees v. Martin, 32 Pa. Co. Rep. 58; Knights of Maccabees of the World v. Searle, 75 Neb. 285, 106 N. W. 448.

Nature of acts and powers of commissioner or superintendent of insurance: Mandamus: Quo warranto. Under *Tenn.* Code, sec. 2575, the action of the commissioner is judicial: State v. Thomas, 88 Tenn. 491, 12 S. W. 1034. So also in *Mississippi* the commissioner acts judicially in issuing a license, and mandamus will not lie to compel him to revoke a license in the absence of evidence dehors the policy. Cole v. State, 91 Miss. 628, 45 So. 11. Contra, Hartford Fire Ins. Co. v. Commissioner of Insurance, 70 Mich. 485, 34 N. W. 474. So the statute is mandatory and duty ministerial and no exercise of discretion is allowed superintendent of insurance where company applying for certificate has fully complied with the law. Mutual Life Ins. Co. v. Boyle (U. S. C. C.) 82 Fed. 705; dismissed, Boyle v. Mutual Life Ins. Co. 89 Fed. 1014, 32 C. C. A. 604. In *Kansas:* That such act is within control of the court, and may be reviewed under Kan. Laws, 1889, c. 159, see Kansas Home Ins. Co. v. Wilder, 43 Kan. 731, 23 Pac. 1061. In Nebraska: Auditor's discretion is broad and legal and not arbitrary in determining whether fraternal beneficiary society shall be licensed. State (ex rel. Bankers' Union of the World) v. Searle, 74 Neb. 486, 105 N. W. 284. Under N. Y. Ins. Law, art. 7, sec. 231, duty of superintendent of insurance is ministerial enforceable by mandamus: incorporat-

statement of the company's financial condition,[19] for the possession of certain assets,[20] for limitation of amount of any one risk unless

ed mutual fraternity: reincorporation: United States Grande Lodge O. B. A. v. Payn, 28 Misc. 275. Under N. Y. Laws, 1881, c. 256, giving certificate to do business is within superintendent's discretion, and not reviewable by mandamus. In Re Hartford Life & Ann. Ins. Co. 63 How. Pr. (N. Y.) 54. The Ohio Rev. Stat. secs. 3631–11, 3631–13, 3631–14, is mandatory upon superintendent of insurance to issue license: State (ex rel. Great Camp Knights of Modern Maccabees) v. Vorys, 69 Ohio St. 56, 68 N. E. 580. His act is ministerial, not judicial, and such a license, although it will protect the company in the transaction of business during its continuance, is not a bar to a proceeding in quo warranto when the company is found to be exercising any of the franchises of the state, without authority of law. State v. Fidelity & Casualty Ins. Co. 49 Ohio St. 440, 16 L.R.A. 611, 34 Am. St. Rep. 573, 31 N. E. 658; State v. Western Mutual Life & Accident Soc. 47 Ohio St. 167, 8 L.R.A. 129, 24 N. E. 392. The statute is held mandatory in Pennsylvania and commissioner has no discretion. Knights of the Modern Maccabees v. Martin, Commr. 32 Pa. Co. Ct. Rep. 58. In *Texas*: Mandamus lies where duty of commissioner is clearly ministerial, but where there is no such duty and the statute vests him with discretionary power mandamus does not lie: Tex. Rev. Stat. 1895, arts. 3048, 3050, 3061, 3062: Metropolitan Life Ins. Co. v. Love, 101 Tex. 444, 108 S. W. 821. In *Vermont*, under a statute requiring insurance commissioners to issue licenses to a foreign insurance company to do business in the state, if satisfied with its statement showing its financial condition and standing, they *have no authority to question the method of computing the reserve* set forth in the statement, or to enter upon an independent valuation of such reserve. Bankers Life Ins. Co. v. Howland, 73 Vt. 1, 57 L.R.A. 374, 48 Atl. 435, 30 Ins. L. J. 193: *first case prescribing* rule for valuation of life policy. Note Id. 208. *Examine* Bankers' Life Ins. Co. v. Fleetwood, 76 Vt. 297, 57 Atl. 239. In *Wisconsin* foreign assessment companies have a right, under Wis. Laws, 1891, c. 418, to a license to do business upon complying with the conditions imposed by that act, of which the insurance commissioner has *no discretion* to deprive them. State (ex rel. Covenant Mutual Ben. Asso.) v. Root, 83 Wis. 667, 19 L.R.A. 271, 54 N. W. 33. *Compare*, as to discretion of commissioner, High Court of Wisconsin Independent Order of Foresters v. Commissioner, 98 Wis. 94, 73 N. W. 326.

[19] American Ins. Co. v. Story, 41 Mich. 385, 1 N. W. 388.

[20] Under Rev. Laws of Vt. sec. 3607, amended act 1884, No. 45, applies also to *mutual or co-operative companies:* Granite State Mut. Aid Assn. v. Porter, 58 Vt. 581, 3 Atl. 545. *In computing the reserve of a life insurance company* under a statute requiring it, in order to be entitled to do business in the state, to have, in addition to its capital, assets equal in amount to its outstanding liabilities, reckoning the premium reserve on its life risks based on the actuaries' tables of mortality, with interest at 4 per cent, as a liability, the expenses of securing the first year's business may be deducted from the amount it receives as premiums for that year by providing that a policy shall be valued as a term policy for one year and a life policy afterwards. Bankers Life Ins. Co. v. Howland, 73 Vt. 1, 48 Atl. 435, 57 L.R.A. 374. *But examine* Bankers' Life Ins. Co. v. Fleetwood, 76 Vt. 297, 57 Atl. 239. As to amount of paid-up capital required, see Clay v.

excess be reinsured in a solvent company in state of enactment of statute,[1] for contributions to fire departments or fire companies of cities, or to exempt firemen's benevolent funds,[2] for the revocation of licenses,[3] for the appointment of some person on whom papers

Employers' Indemnity Co. of Phila. 157 Ky. 232, 162 S. W. 1122, Ky. Stat. sec. 687, cl. 2, sec. 693; Ky. Const. sec. 202. Iowa statute, McClain's Code, sec. 1144, *constitutional.* Parker v. C. Lamb & Sons, 99 Iowa, 265, 34 L.R.A. 704, 68 N. W. 686, 9 Am. & Eng. Corp. Cas N. S. 493.

[1] Glens Falls Ins. Co. v. Hawkins, 103 Tex. 327, 126 S. W. 1114, Tex. Rev. Stat. 1895, art. 3076, as am'd by laws 29th Legislature, c. 80, p. 113.

[2] So under Wis. Rev. Stat. c. 65, Fire Department v. Helfenstein, 16 Wis. 136. The act of March 3, 1885, Stat. 1885, c. 15, providing for such payment, is *unconstitutional* under the constitution of California, art. 11, sec. 12; City and County of San Francisco v. Liverpool, London & Globe Ins. Co. 74 Cal. 113, 15 Pac. 380, s. c. (U. S. C. C.) 88 Fed. 160. The same is true under Neb. Const. sec. 7, art. 9; State v. Wheeler, 33 Neb. 563, 50 N. W. 770. *Examine* Rhinehart v. State, 121 Tenn. 420, 117 S. W. 508. *Legislature has power* to impose such burden: Fireman's Benev. Assn. v. Lounsbury, 21 Ill. 511, 74 Am. Dec. 115. Such act is *not unconstitutional,* as granting an exclusive privilege or as giving money of the state to a private undertaking or as a tax: Trustees of Exempt Firemen's Fund v. Roome, 93 N. Y. 313, 45 Am. Rep. 217. See also Fire Department of City of New York v. Stanton, 159 N. Y. 325, 54 N. E. 28; New York Board of Fire Underwriters v. Higgins, 114 N. Y. Supp. 506, 130 App. Div. 78, aff'd (without opinion) 198 N. Y. 634, 92 N. E. 1043, *considered* under § 326b, herein. Fire Department of Troy v. Bacon, 2 Abb. App. Dec. (N. Y.) 127. *Is unconstitutional:* Exempt Firemen's Assoc. of L. I. City v. Trustees of Exempt Firemen's Benev. Fund of L. I. City, 34 App. Div. 138, 54 N. Y. Supp. 621, Laws N. Y. 1896, c. 141, Const. N. Y. art. 12, sec. 2. See further as to charges for fire department or firemen's fund, note 24 L.R.A. 299.

When city ordinance requiring such payment not inconsistent with state statute, see Kunz v. National Fire Ins. Co. 169 Ill. 577, 48 N. E. 682.

[3] *United States.*—Power of commissioner how far limited in Cal.: discretion must be exercised in good faith: Liverpool & London & Globe Ins. Co. v. Clunie (U. S. C. C.) 88 Fed. 160.

California.—Only the commissioner, under Cal. act March 26, 1869, may require insolvent insurance company to repair its capital stock without revoking its certificate: Palache v. Pacific Ins. Co. 42 Cal. 419. See 88 Fed. 160, above *cited.*

Kentucky.—Revocation where company has "failed to comply with the law," construed, under Ky. Stat. 1903, sec. 753: when commissioner cannot revoke: see Mutual Life Ins. Co. v. Prewitt, 127 Ky. 399, 105 S. W. 463.

Michigan.—Under Mich. Pub. acts, 1887, no. 285, revocation by the commissioner *is ministerial act;* Hartford Fire Ins. Co. v. Raymond, 70 Mich. 485, 38 N. W. 474. Where a company is *doing business against absolute prohibition of law,* license may be revoked, although the *cause is not specified in statute:* National Life Ins. Co. v. Commissioner of Insurance, 25 Mich. 321.

Ohio.—Power to revoke or decline to renew license, because of *refusal to pay taxes,* not suspended by pendency of action for such taxes: State (ex rel. National Life Assoc.) v.

may be served in actions, suits, or proceedings commenced by or against the company.[4]

Matthews, 58 Ohio St. 1, 40 L.R.A. 418, 49 N. E. 1034, 39 Ohio L. J. 241, 39 Wkly. L. Bull. 253, 27 Ins. L. J. 614. Statute requiring *notice of revocation* or discontinuance of license is mandatory. State (ex rel. Grand Fraternity) v. Lemert, 56 Ohio L. Bull. 118. See also 58 Ohio St. 1, last above *cited*.

Wisconsin. — Revocation where accident company *has not paid annual fees,* Rev. Stat. sec. 1955. See State (ex rel. Fidelity & Casualty Co.) v. Fricke, 102 Wis. 107, 77 N. W. 732, 78 N. W. 455; Travelers' Ins. Co. v. Fricke, 99 Wis. 367, 41 L.R.A. 557, 74 N. W. 372, 99 Wis. 377, 78 N. W. 407.

[4] *United States.*—Service good on *medical examiner* as one who "adjusts or settles a loss," under 2 Mo. Rev. Stat. 1899, sec. 7992. Commercial Mutual Accident Co. v. Davis, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. ed. 782. *Foreign insurance companies are not included* under Ark. Stat. April 4, 1887, c. 135, requiring foreign corporations generally to designate agent. St. Louis, Iron Mountain & Southern R. Co. v. Commercial Union Ins. Co. 139 U. S. 223, 11 Sup. Ct. 523, 35 L. ed. 154. Service on *superintendent* of insurance: effect of N. Mex. Const. art. 11, sec. 6. See Mitchell v. National Surety Co. (U. S. D. C.) 206 Fed. 807, N. Mex. L. 1909, c. 48, sec. 4.

What must appear, to bind by service on *superintendent* of insurance under Rev. Stat. Mo. 1899, sec. 7991, Ann. Stat. 1906, p. 3799: Webster v. Iowa State Traveling Men's Assoc. (U. S. C. C.) 165 Fed. 367. Insurance *commissioner's power to bind after withdrawal* of company from state: Acts of Tenn. 1895, p. 322, c. 160; Mutual Reserve Fund Life Assoc. v. Tuckfeld, 159 Fed. 833, — C. C. A. —, 37 Ins. L. J. 536. When *secretary of mutual insurance association* is agent to receive service of process under Rev. Stat. Wis. sec. 2637, subd. 9, and section 1977: Dixon v. Order Railway Conductors of America, 49 Fed. 910. Presumed *that the company has complied with the law,* and judgment will be entered on service on the *commissioner,* although he refuses to accept service: Knapp Stone & Co. v. National Mut. Fire Ins. Co. 30 Fed. 607.

Service on *auditor* is good service: Ehrman v. Teutonia Ins. Co. 1 Fed. 471.

Arkansas.—See 139 U. S. 223, *cited* above in this note.

California.—*When law complied with* as to filing with commissioner agent's name. Polit. Code 1878, sec. 616. Harrigan v. Home Life Ins. Co. 128 Cal. 531, 61 Pac. 99.

Connecticut.—When company becomes resident through its duly authorized agent for service: Crouse v. Phœnix Ins. Co. 56 Conn. 126, 7 Am. St. Rep. 298, 14 Atl. 82.

Idaho.—*Compliance with statute* as to designating agent, *necessary:* Katz v. Herrick, 12 Idaho, 1, 86 Pac. 872.

Indiana.—Service may be made on *state auditors:* Rehm v. German Ins. & Saving Inst. 125 Ind. 135, 25 N. E. 173. Under Ind. Stat. Elliott's Supp. secs. 993, 994, *exempts foreign insurance companies* from provisions of Rev. Stat. Ind. 1881, secs. 316, 3022, 3023, in regard to service on foreign corporations in general. *Mutual insurance companies* are within the Indiana statute requiring designation of agent to receive service of papers: Lamb v. Lamb, 13 Bank. Reg. 17.

Iowa.—When *assent presumed* to continuing *last designated agent* for service after company has *ceased business:* Green v. Equitable Mutual Life & Endowment Assoc. 105 Iowa, 628, 75 N. W. 635.

Statutes of the character of the last are held to apply to actions growing out of the ordinary business of insurance, and not to other

Kentucky.—*Fraternal benefit society* not within statutes: *agent must be designated and so remains* until new agent designated: Service on *commissioner insufficient:* American Patriots v. Kinkead, 144 Ky. 662, 139 S. W. 834. Consent to service upon *commissioner:* effect of company's *withdrawal* from state: Germania Ins. Co. v. Ashby, 112 Ky. 303, 23 Ky. L. Rep. 1564, 99 Am. St. Rep. 295, 65 S. W. 611.

Louisiana.—Agency of *Secretary of State: duration of time* mandate in force: acts 1898, no. 105: The Fair, Ltd. v. American Union Fire Ins. Co. 135 La. 48, 64 So. 977.

Maryland.—The *act of Maryland, 1878, c. 196, is exclusive*, and general corporation act does not apply: Oland v. Agricultural Ins. Co. 69 Md. 248, 14 Atl. 669, 12 Cent. Rep. 881.

Michigan.—*Surety companies:* sec. 5198, Comp. Laws, is not an act affecting general jurisdiction of courts, but *waiver of general provisions as to service:* People, to use of Wipfler v. Fidelity & Deposit Co. 163 Mich. 94, 17 Det. Leg. N. 748, 127 N. W. 765. *Surety companies:* Appointment of *commissioner prerequisite* for service on time to bind company: Comp. Laws, sec. 5196, as am'd Pub. acts 1907, no. 321: Wells v. United States Fidelity & Guaranty Co. 160 Mich. 213, 125 N. W. 57. The Mich. Stat. Comp. L. 1871, sec. 1683, Laws 1873, p. 206, *only applies to courts of record*, and not to justices' courts: Hartford Ins. Co. v. Owen, 30 Mich. 441.

Minnesota.—Statute *constitutional* requiring appointment of *commissioner:* State v. Queen City Fire Ins. Co. 114 Minn. 471, 131 N. W. 628.

Missouri.—Where foreign insurance company has complied with act Mo. 1874, p. 74, sec. 25, which repealed Wagner's Mo. Stat. 770, sec. 25, *delivery of writ to local agent is not sufficient:* Baile v. Equitable Fire Ins. Co. 68 Mo. 617. See 213 U. S. 245, 165 Fed. 367, *cited* above in this note.

New Mexico.—See 206 Fed. 807, *cited* above in this note.

New York.—*Legislature has power* to enact statute: service on *commissioner or on secretary of state:* Woodward v. Mutual Reserve Life Ins. Co. 178 N. Y. 485, 102 Am. St. Rep. 519, 71 N. E. 10. Appointment under N. Y. Laws, 1884, c. 346, of *"superintendent* of insurance or his *successor in office," is valid*, and extends to an incumbent of office and his successors: Lafflin v. Travelers' Ins. Co. 121 N. Y. 713, 31 N. Y. S. R. 900, 24 N. E. 934. Service on designated attorney *gives court jurisdiction:* Gibbs v. Queen Ins. Co. 63 N. Y. 114, 20 Am. Rep. 513. Service on *superintendent gives jurisdiction of city court* of New York: People's Fire Ins. Co. v. New York City Justices, 33 N. Y. 147. *Effect of revocation* see Hunter v. Mutual Reserve Life Ins. Co. 184 N. Y. 136, 30 L.R.A.(N.S.) 677n, 6 Amer. & Eng. Ann. Cas. 291, 76 N. E. 1072, s. c. 99 N. Y. Supp. 888; Klein Bros. & Co. v. German Union Fire Ins. Co. of Balt. 123 N. Y. Supp. 1082, 66 Misc. 538; Tierney v. Helvetia-Swiss Fire Ins. Co. 122 N. Y. Supp. 869, 138 App. Div. 469; Badger v. Helvetia-Swiss Fire Ins. Co. 120 N. Y. Supp. 161, 136 App. Div. 31; Woodward v. Mutual Reserve Life Ins. Co. 82 N. Y. Supp. 908, 84 App. Div. 324.

North Carolina.—*Effect on limitation of action* of statute providing for service on *commissioner.* Green v. Hartford Life Ins. Co. 139 N. Car. 309, 1 L.R.A.(N.S.) 623, 51 S. E. 887.

Oklahoma.—Service on *chief officer of agency,* valid. Comp. Laws 1909, sec. 5609; Continental Ins. Co. v. Hull, 38 Okla. 307, 132 Pac. 657.

actions on contract.[5] They also amount substantially to a consent on the part of foreign insurance companies to be sued in the courts of the state where they are doing business,[6] and some tribunals have held that such acts confer exclusive jurisdiction on the courts of the state.[7] But the United States Supreme Court [8] decides that such a statute, so far as it requires an agreement against the removal of suits into the Federal courts, is repugnant to the Constitution of the United States, and such an agreement would be void. So in an earlier Wisconsin case [9] it was held that such an act did not deprive a foreign insurance corporation of its right to remove into the Federal courts a suit commenced in that state against such company by a citizen thereof, and it is so decided in Massachusetts.[10] Some of the states have, however, enacted laws providing that the license of a foreign insurance company shall be revoked or suspended if such company make an application to remove a suit commenced in the state court to the United States district or circuit court.[11] And such

Pennsylvania.—Service must be made upon company's *registered state agent.* Hall v. Metropolitan Life Ins. Co. 63 Leg. Intell. 104, 15 Dist. Rep. 144, 32 Pa. Co. Ct. Rep. 14. See Southard v. Home Life Ins. Co. 67 Leg. Intell. 428.

South Carolina.—Code Proc. 1902, sec. 155, permitting *service on any agent,* not repealed by act 1910, sec. 17, 26 Stat. at L. 755, requiring appointment of *commissioner.* Montgomery v. United States Fidelity & Guaranty Co. 90 S. Car. 283, 71 S. E. 1084.

Tennessee.—See 159 Fed. 833, *cited* above in this note.

Washington.—*Superintendent* of Insurance *cannot accept or waive* personal service. Laws 1901, p. 360, c. 174, sec. 6; Bennett v. Supreme Tent of Knights of Maccabees of the World, 40 Wash. 431, 2 L.R.A.(N.S.) 389, 82 Pac. 744.

Wisconsin.—See 49 Fed. 910, *cited* above in this note.

See also as to service of papers or process; agent of foreign company; statutes; jurisdiction, etc., see §§ 702, 703, 3497, 3706 herein.

[5] Rehm v. German Ins. & Saving Inst. 125 Ind. 135, 25 N. E. 173. See also § 270 herein.

[6] Ex parte Schollenberger, 96 U. S. 369, 24 L. ed. 853; Railroad Co. v. Harris, 12 Wall. (79 U. S.) 65, 20 L. ed. 354; Lafayette Ins. Co. v. French, 18 How. (59 U. S.) 404, 15 L. ed. 451; Rehm v. German Ins. & Saving Inst. 125 Ind. 135, 25 N. E. 173; Cunningham v. Southern Express Co. 67 N. C. 425. See §§ 3497, 3498 herein.

[7] New York Life Ins. Co. v. Best, 23 Ohio St. 105, under Laws 1872, 69 Ohio Laws, 155, sec. 18; People (ex rel. Glens Falls Ins. Co.) v. Judge of Jackson Circuit, 21 Mich. 577, 4 Am. Rep. 504. This case also holds that a writ of mandamus was not the proper remedy, even if the cause could be transferred. Morse v. Home Ins. Co. 30 Wis. 496, 11 Am. Rep. 580, under Wis. Stat. Laws 1870, c. 56, sec. 22. Overruled, see next note.

[8] Insurance Co. v. Morse, 20 Wall. (87 U. S.) 445, 22 L. ed. 365 (Morse v. Home Ins. Co.) (U. S. Sup. Ct.) 13 Am. Rep. 297, overruling same case, 30 Wis. 496, 11 Am. Rep. 580.

[9] Knorr v. Home Ins. Co. 25 Wis. 143, 3 Am. Rep. 26.

[10] Morton v. Mutual Life Ins. Co. 105 Mass. 141, 7 Am. Rep. 505, and note 507.

[11] Statutes as to foreign companies; removal of causes, see § 3498 herein.

a statute is not unconstitutional, where it does not require an agreement against the removal of suits into the Federal courts.[12]

§ 328a. State regulation: insurance business as franchise.—The state has the right to regard the business of insurance as one dependent upon the exercise of a franchise,[13] a franchise subject to regulation by the state.[14] So in Ohio the authority required to enable a foreign corporation to carry on business in a state other than that of its incorporation, emanates from the state and the privilege granted is a franchise and any company or corporation carrying on its business in the domestic state without authority is unlawfully exercising a franchise.[15]

§ 328b. State regulation: quasi public character of insurance business.—It is determined that although insurance companies are not classed as public but as private corporations and though they are not even styled quasi public corporations, still a large insurance company is a public institution.[16] But it is also declared that a business, such as that of insurance, private in its inception may become affected with a public interest. To the eye of the law and in the interest of the public, it is one and the same thing whether a corporation is created to subserve the public interest or whether it achieves success of such a nature that the duty of regarding the interest of the public is thrust upon it.[17] Again, in a Federal case, the court, per Pollock, D. J., in discussing the question of the con-

[12] Security Mutual Life Ins. Co. (Travelers Ins. Co.) v. Prewitt, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. 619, *following* Doyle v. Continental Ins. Co. 94 U. S. 535, 24 L. ed. 148, which is held not overruled by Barron v. Burnside, 121 U. S. 186, 30 L. ed. 915, 7 Sup. Ct. 931, nor by any other decision of said court. See also Prewitt v. Security Mutual Life Ins. Co. 119 Ky. 321, 1 L.R.A.(N.S.) 1019 and note, 115 Am. St. Rep. 264, 83 S. W. 611.

On revocation of license of foreign company on account of removal of action to Federal court, see notes in 1 L.R.A.(N.S.) 1019, and L.R.A. 1915F, 1187.

[13] People v. Loew, 44 N. Y. Supp. 42, 43, 19 Misc. 248. See Joyce on Franchises (ed. 1909) sec. 18, see also § 328 herein.

[14] Boston Ice Co. v. Boston & Maine Rd. Co. 77 N. H. 6, 45 L.R.A. (N.S.) 835, 86 Atl. 356.

[15] State v. Ackerman, 51 Ohio St. 163, 194, 24 L.R.A. 298, 37 N. E. 828, per Williams, J., *quoting* from Spelling on Extraordinary Relief, secs. 1807, 1808, and *cited* in John Hancock Mutual Life Ins. Co. v. Warren, 181 U. S. 73, 74, 75, 45 L. ed. 755, 21 Sup. Ct. 535, 30 Ins. L. J. 623, as ruling that foreign insurance companies *whether incorporated or not* are required as a condition precedent to doing business in the state to obtain a certificate of authority so to do, and that the privilege so conferred is a franchise. See Joyce on Franchises (ed. 1909) sec. 13.

[16] Watson v. National Life & Trust Co. 189 Fed. 872, — C. C. A. —, 40 Ins. L. J. 2065.

[17] State (ex rel. McCarter) v. Fireman's Ins. Co. 74 N. J. Eq. 372, 29 L.R.A.(N.S.) 1194 note, 135 Am. St. Rep. 708, 73 Atl. 80, 18 Amer. & Eng. Ann. Cas. 1048, case reverses 70

stitutionality of a statute regulating fire insurance rates and charges, and the police powers of the state, says that "It is not entirely clear at this late day" that "the business of fire insurance, although in its nature a private business will in future continue to be regarded as entirely unaffected with a public use." [18] It is also decided that the business of fire insurance is of an extensive and peculiar character, and its management concerns a large number of people, especially those desiring to protect their property by insurance; and therefore, the state may, in the exercise of its police power, by appropriate legislation, regulate such business within constitutional limits.[19] So under a Mississippi decision insurance contracts are not matters of purely private concern. The public is interested in them to such and extent that they may be said to be contracts of a quasi public character, to a greater or less extent affected with a public interest.[20] And fire insurance is further held to be of such a quasi public character and matter of public concern as to be subject to state regulation,[1] and this applies to the regulation of rates, and a statute so regulating rates is not unconstitutional.[2]

A fire insurance patrol is a private association and not a public corporation or a public charity where its object is to save life and property, minimize losses and promote the financial interests of its members who are fire insurance companies, said patrol being supported by assessments.[3]

N. J. Eq. 291, 61 Atl. 705, *cited* in Blanchard v. Prudential Ins. Co. 78 N. J. Eq. 471, 477, 79 Atl. 533.

[18] German Alliance Ins. Co. v. Barnes, (U. S. C. C.) 189 Fed. 769, 40 Ins. L. J. 2176, 2187; Kan. Stat. 1909, c. 152, see third next following note herein construing same statute.

[19] German Alliance Ins. Co. v. Hale, 219 U. S. 307, 55 L. ed. 229, 31 Sup. Ct. 216, a case of combination to fix insurance rates, penalty and constitutionality of a statute.

On fire insurance as a business affected by a public interest, see notes in 29 L.R.A.(N.S.) 1195, and L.R.A. 1915C, 1189.

[20] Fidelity Mutual Life Ins. Co. v. Miazza, 93 Miss. 18, 136 Am. St. Rep. 534, 48 So. 1017.

[1] Citizens Ins. Co. v. Clay (U. S. D. C.) 197 Fed. 435. See also People v. Aachen & Munich Fire Ins. Co. 126 Ill. App. 636; Boston Ice Co. v. Boston & Maine Rd. Co. 77 N. H. 6, 45 L.R.A.(N.S.) 835, 86 Atl. 356, 42 Ins. L. J. 831. Southwestern Mutual Life Ins. Co. v. Lewis & Clarke County, 28 Mont. 484, 72 Pac. 982. See note last above.

[2] German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. 612, 43 Ins. L. J. 739, Kan. Stat. 1909, c. 152. The Chief Justice and two justices dissenting.

[3] Coleman v. Fire Insurance Patrol of New Orleans, 122 La. 626, 21 L.R.A.(N.S.) 810, 48 So. 130. Organized under La. act 1902, no. 115, p. 186.

Police Relief Association a private, and not a public or quasi public corporation. De Runtz v. St. Louis Police Relief Assoc. 180 Mo. App. 1, 162 S. W. 1053, Rev. Stat. 1909, sec. 3458.

§ 329. Foreign company: retaliatory and anti-compact laws: combinations to control rates.—A majority of the states have enacted what are known as retaliatory laws. By these laws one state imposes the same or like restrictions and conditions upon insurance corporations of other states doing business within its territory, as such other states impose upon its insurance corporations doing business therein.[4] Such acts have been held unconstitutional in Alabama, as not within the principle of uniformity of taxation, and as an unwarranted delegation of the legislative power of such state to other states.[5] So the retaliatory tax law of Kentucky is unconstitutional.[6] But in Georgia an act [7] has been held to be constitutional and not repealed by subsequently enacted general tax laws;[8] and the retaliatory law of Indiana [9] is declared in that state to be constitutional, and not open to the objection that it is an attempt to levy different fees for the same privilege from different members of the same class. It is also held not to be an enactment of the statutes of one state into those of another, nor unconstitutional on the ground of uncertainty.[10] So in New York such statute is held not unconstitutional, although the amount required for taxes may be greater than that required by other laws of the same state.[11]

If a foreign corporation has complied with the Minnesota laws,[12] it should not be excluded from doing business there where it is doubtful whether the laws of the state of incorporation of such company would prevent corporations of Minnesota from doing business there, and a judgment of ouster against such corporation will be refused in such a case.[13]

[4] Conn. Gen. Stat. 1902, secs. 2450, 3606, imposing taxes by reason of like taxes being imposed under laws N. Y. 1901, p. 297, c. 118. See also Conn. act 1905, as to refunding taxes. State (ex rel. Life Ins. Co.) v. Upson, 79 Conn. 154, 64 Atl. 2. Retaliatory statutes, see note 24 L.R.A. 303.

[5] Clark v. Mobile, 66 Ala. 217, 10 Ins. L. J. 3.

[6] Western & Southern Life Ins. Co. v. Commonwealth, 133 Ky. 292, 117 S. W. 376; Ky. Stat. 1909, sec. 637; Russell's Stat. sec. 4284, Const. Ky. secs. 60, 171, 180.

[7] Act 1869. See Laws 1887, p. 124, sec. 12.

[8] Goldsmith v. Home Ins. Co. 62 Ga. 379.

[9] Rev. Stat. Ind. 1883, sec. 3773. See acts 1889, c. 769, sec. 2.

[10] State v. Insurance Co. of North America, 115 Ind. 257, 17 N. E. 575; Blackmer v. Royal Ins. Co. 115 Ind. 291, 17 N. E. 580.

[11] People v. Fire Assn. 92 N. Y. 311, 44 Am. Rep. 380. See 3 R. S. 8th ed. p. 1617; Laws 1892, c. 690, sec. 38.

[12] Gen. Stat. 1878, c. 34, sec. 269. See Stat. 1891, vol. 1, sec. 2907.

[13] State Attorney General v. Fidelity & Casualty Ins. Co. 39 Minn. 538, 41 N. W. 108. See Stat. 1891, vol. 1, sec. 2907. For construction of Connecticut statutes, see Croke v. Warner, 56 Conn. 234, 14 Atl. 798. See also first note under this section. The rule requiring an order, etc., to with-

In State v. Moore[14] it is held that the insurance commissioners could not be compelled by mandamus to issue a certificate to a company organized in a state where Ohio companies were not permitted to carry on business on the same basis substantially as in Ohio.

A state statute imposing on insurance companies of another state or nation the same obligations and prohibitions that are imposed in such other state or nation upon corporations of the former state is retaliatory in character, and must be confined to cases fairly within its letter; and to make a case for the retaliatory provision of the statute of Ohio[15] as to insurance companies of a state which imposes prohibitions upon Ohio companies "doing business in such state," it must appear at least that an Ohio company has been formed to do substantially the same kinds and lines of insurance as the foreign company wishes to do in Ohio.[16] Again inasmuch as Michigan statutes allow policies of life insurance to be issued only when they specify the sum payable at a fixed amount, and do not permit endowment policies by assessment companies, while assessment companies in Ohio are not allowed to guarantee any fixed sum further than what might be realized from assessments, unless they have complied with the statutes relating to regular mutual life insurance companies, and in that case are allowed to issue endowment policies at a fixed sum, Ohio companies are not permitted to do business in Michigan on substantially the same basis and limitations as they are in Ohio, and therefore, under the proviso of Ohio Statute, Michigan insurance corporations are not entitled to a license to do business in Ohio.[17] In an Illinois case it

draw securities under Wagner's Mo. Stat. p. 769, sec. 20, is not affected by the fact that the state of incorporation of the foreign company does not require such order for such purpose. State v. Gates, 67 Mo. 496. See Rev. Stat. 1889, sec. 5932. As to taxation, see State v. Reinmund, 45 Ohio St. 214, 13 N. E. 30, under Rev. Stat. Ohio, secs. 282, 2745. See Rev. Stat. 1890, sec. 282. As to deposits from insurance companies, see Seiders v. Merchants Life Assoc. 93 Tex. 194, 54 S. W. 753, rev'g — Tex. Civ. App. —, 51 S. W. 547, Rev. Stat. Art. 3063. Deposit with state treasurer, see Gen. Stat. 1888, secs. 2835, 2913, and Pub. Laws, 1889, c. 95; Wis. acts of 1879, c. 171, requiring insurance commissioner to revoke license of foreign company upon persistent violation of law regulating such corporations; and Wis. Rev. Stat. sec. 1974, providing that such company shall not issue any new policy after sixty days from rendition of final judgment against it, do not apply to appeal taken in good faith from final judgment. State v. Spooner, 47 Wis. 438, 2 N. W. 555. See Sanb. & B. Annot. Stat. 1889, vol. 1, sec. 1221.

[14] 39 Ohio St. 486, under 80 Ohio Laws, 180, sec. 3630e. See Rev. Stat. 1890, sec. 282.

[15] Rev. Stat. sec. 282 note.

[16] State (ex rel. Atty. Genl.) v. Fidelity & Casualty Ins. Co. 49 Ohio St. 440, 16 L.R.A. 611, 34 Am. St. Rep. 440, 31 N. E. 658.

[17] State (ex rel. Atty. Genl.) v. Western Union Mutual Life & Ac-

is decided that retaliatory legislation, which provides against future like legislation on the part of other states, does not become operative until the enactment by such other state of the laws so provided against.[18] It is also held in that state that retaliatory statutes will not be enforced against a foreign insurance corporation on the ground of alleged restrictions in the statutes of the state which created it, unless it is clearly proved that those statutes would have the restrictive effect which is claimed.[19] Under a Maryland decision a statute providing that whenever the laws of any other state impose upon Maryland insurance companies seeking to do business within its borders greater obligations or prohibitions than are prescribed for foreign companies seeking to do business in Maryland, the same obligations and prohibitions shall be imposed on companies of such state which shall seek Maryland business, makes such foreign law the rule which Maryland will apply to companies of the foreign state asking permission to do business within its territory; and if a Maryland company is refused a license in the foreign state merely on the ground of discretion, the latter's companies may be refused license in Maryland on the same ground, although the Maryland statutes do not in terms authorize it.[20]

Some of the states [1] provide substantially that the license of any insurance company not organized under the laws of the state, but doing business therein, may be revoked if it shall enter into any compact or combination with other insurance companies, for the

cident Soc. 47 Ohio St. 167, 8 L.R.A. 129, 24 N. E. 392; Ohio Rev. Stat. sec 3638E.

[18] Germania Ins. Co. v. Swigert, 128 Ill. 237, 4 L.R.A. 473, 21 N. E. 530, under Stat. Ill. 1874, c. 73, sec. 29. See Cothian's Rev. Stat. 1891, p. 830, sec. 29; p. 833, sec. 55; p. 840g, sec. 63w. See Union Central Life Ins. Co. v. Durfee, 164 Ill. 186, 45 N. E. 441, Ill. Laws 1869, p. 234, sec. 20a. Like statute as that in the last above *cited* case.

[19] People (ex rel. Stephens) v. Fidelity & Casualty Co. 153 Ill. 25, 26 L.R.A. 295, 38 N. E. 752.

[20] Talbott v. Fidelity & Casualty Co. 74 Md. 536, 13 L.R.A. 584, 22 Atl. 395.

[1] *Arkansas.*—Acts May 6, 1899; act 1905, p. 1, as am'd by acts 1907, p. 430.

Georgia.—Code 1895, sec. 2085, Ga. Laws 1890–91, vol. 1, p. 206.

Iowa.—Ann. Code 1897, sec. 1754, Supp. 1907, sec. 1754.

Kansas.—Gen. Stat. 1889, vol. 1, sec. 2499.

Louisiana.—Act 1900, No. 110.

Michigan.—Howell's Stat. Supp. 1883–89, sec. 4340e; Comp. Laws 1897, sec. 5124.

Nebraska.—Laws 1897, c. 81.

New Hampshire.—Laws 1885, c. 93.

Ohio.—Rev. Stat. 1892, sec. 3659, Bates Ann. Stat. 1906, sec. 3650.

South Carolina.—Civ. Code sec. 1819, 1 Code Laws, 1902, p. 695.

South Dakota.—Laws 1903, c. 158, p. 183.

Tennessee.—Acts 1905, c. 479, p. 1019.

Washington.—Ball. Codes & Stat. p. 725, sec. 2841B; Pub. Stat. 1901, c. 169, sec. 10.

purpose of governing or controlling the rates charged for fire insurance on property within the state, and such an act is held constitutional in Michigan.[2] But an insurance company is not precluded from bringing a suit to enjoin revoking its certificate and canceling its bonds even though it is a member of an illegal combination to raise insurance rates.[3]

§ 329a. Anti-compact laws: combinations to control rates continued: conspiracy.—The state has the power to legislate against combinations, agreements, pools, trusts, etc., to fix prices, and subject to penalties any foreign insurance corporation and preclude its doing business in the state while a member of such combination, etc.[4] But a foreign company which enters into an agreement with other insurance companies outside the state in which it is doing business, for the purpose of fixing rates of insurance in foreign countries, not intended to affect, and which does not affect, persons, property, or prices of insurance in the state does not subject itself to a penalty imposed by statute upon any corporation transacting any kind of business in the state, which becomes a party to any pool or combination to fix or limit rates of insurance.[5] And a state statute fixing a penalty, to be recovered by the insured, of a certain per cent in excess of the policy amount, where the insurer is connected with a tariff association is not unconstitutional under the Fourteenth Amendment and is a valid exercise of the police power of the state.[6] The Iowa statute [7] prohibiting combinations or agreements of such companies as to rates, commissions and manner of transacting business, is not unconstitutional, its only object being to insure competition.[8]

[2] Hartford Fire Ins. Co. v. Raymond, 70 Mich. 485, 38 N. W. 474, under Pub. acts Mich. 1887, no. 285. See Howell's Stat. Supp. 1883–89, sec. 4340c. But see Niagara Fire Ins. Co. v. Cornell (U. S. C. C.) 110 Fed. 816. See § 329a herein.

[3] Liverpool & London & Globe Ins. Co. v. Clunie (U. S. C. C.) 88 Fed. 160.

[4] Hartford Fire Ins. Co. v. State, 76 Ark. 303, 89 S. W. 42, Ark. act Jan'y 23, 1905, sec. 1. See Hartford Fire Ins. Co. v. Perkins (U. S. C. C.) 125 Fed. 502.

[5] State v. Lancashire Fire Ins. Co. 66 Ark. 466, 45 L.R.A. 348, 51 S. W. 632, Ark. act May 6, 1899.

[6] German Alliance Ins. Co. v. Hale, 219 U. S. 307, 55 L. ed. 229, 31 Sup. Ct. 216, Ala. Code 1896, secs. 2619, 2620, as am'd by Code 1907, secs. 4954, 4955; Firemen's Fund Ins. Co. v. Hellner, 159 Ala. 447, 49 So. 297, Code 1907, sec. 4594, Code 1896, sec. 2619. See Joyce on Monopolies (ed. 1911) sec. 370.

[7] Code 1897, secs. 1754, 1755.

[8] Carroll v. Greenwich Ins. Co. 199 U. S. 401, 50 L. ed. 246, 26 Sup. Ct. 66, rev'g Greenwich Ins. Co. v. Carroll (U. S. C. C.) 125 Fed. 121. The court per Mr. Justice Holmes, said: "Whatever may be thought of the policy of such attempts it cannot be denied in this court, unless some of its decisions are to be overruled, that statutes prohibiting combinations between possible rivals in trade may be constitutional. The decisions concern

Insurance companies might legally combine at common law to establish uniform rates of insurance and of commissions to agents;[9] and although a combination to maintain rates may be a void contract, still it was not an indictable offense at common law.[10] But an ultra vires contract in restraint of trade, to restrict competition, to fix rates, etc., may be restrained in equity at the suit of the attorney general, where it violates public policy and works a public injury.[11] And a combination of foreign insurers to increase rates of insurance may with their agents become liable to prosecution under a statute prohibiting unlawful trusts and combinations "in restraint of trade and products."[12]

§ 330. Foreign companies: what constitutes "doing business," etc.—As has been stated, the object of legislation regarding foreign insurance companies seems to be the protection of the interests of the citizens of the legislating state, and certain of the statutory provisions above referred to are substantially conditions precedent to

not only statutes of the United States . . . but also state laws of similar import." See also State v. Smiley, 65 Kan. 240, 67 L.R.A. 903, 69 Pac. 199; State (ex rel. Crow) v. Firemen's Fund Ins. Co. 152 Mo. 1, 45 L.R.A. 363, 52 S. W. 595. *Compare* Niagara Fire Ins. Co. v. Cornell (U. S. C. C.) 110 Fed. 816.

[9] Queen Ins. Co. v. State, 86 Tex. 250, 22 L.R.A. 483, 24 S. W. 397.

On legality of combination among insurance underwriters, see notes in 24 L.R.A.(N.S.) 153, and 38 L.R.A. (N.S.) 459.

[10] Aetna Ins. Co. v. Commonwealth, 106 Ky. 864, 45 L.R.A. 355, 51 S. W. 624; Harris v. Commonwealth, 113 Va. 746, 38 L.R.A.(N.S.) 458, 73 S. E. 561, 41 Ins. L. J. 883.

[11] State (ex rel. McCarter) v. Firemen's Ins. Co. 74 N. J. Eq. 37, 29 L.R.A.(N.S.) 1194, 135 Am. St. Rep. 708, 18 Amer. & Eng. Ann. Cas. 1048, 73 Atl. 80, case reverses 70 N. J. Eq. 291, 61 Atl. 705.

[12] State v. Phipps, 50 Kan. 609, 18 L.R.A. 657, 31 Pac. 1007, under Kan. Laws 1889, c. 257.

Insurance is *not* "*trade*" nor an "*article of commerce*" or a "*commodity*" and these words are not applicable to a combination to fix uniform rates of insurance and of agents' commissions. Queen Ins. Co. v. State, 86 Tex. 250, 22 L.R.A. 483, 24 S. W. 397, under Tex. act of March 30, 1899. *Contra* as to *commodity* under McClain's Iowa Code, sec. 5454; Beechley v. Mulville, 102 Iowa, 602, 63 Am. St. Rep. 479, 70 N. W. 107, 71 N. W. 428. See Joyce on Monopolies (ed. 1911) sec. 421. The words "*trade and business*" under the Nebraska Statute, Laws 1897, c. 79, includes the regulation of insurance contracts in restraint of competition. The laws of 1897, c. 81, prohibited combinations to fix rates and commissions by fire insurance companies and provided penalties therefor. State v. American Surety Co. 91 Neb. 22, 135 N. W. 365, 41 Ins. L. J. 1380, rev'g 90 Neb. 154, 13 N. W. 235, 41 Ins. L. J. 185, but aff'g the point that "*trade and commerce*" does not include insurance business. Insurance is *not* an article of *merchandise* or manufacture or one of the "necessaries of life" or of prime necessity within the letter or spirit of laws of Virginia against engrossing. It is not a subject of trade or barter. Harris v. Commonwealth, 113 Va. 746, 38 L.R.A.(N.S.) 458, 73 S. E. 561.

doing insurance business by such companies in states other than the one of incorporation. Therefore, the question of what constitutes doing an insurance business or making contracts becomes important. It is held that taking an application for a policy, and forwarding it to the home office of the company in another state, is not doing insurance business.[13] And the insurance by correspondence through the mail of property in a state, belonging to a resident therein, by a foreign company is not "doing business," there being no proof that the company ever issued other fire policies covering property in that state.[14] Nor is it doing business in one state where the contract for renewal is applied for and consummated, through the mail, in another state;[15] nor receiving by mail at the home office renewal premiums on policies in force after withdrawal

[13] Hacheny v. Leary, 12 Or. 40, 7 Pac. 329. "Not only the intent of the statute must be given effect, but the sweeping character of its penalty must be considered. This penalty extends to every contract. It applies to one transaction with as much force as it does to a hundred, and it reaches the case of a corporation that has no particular locality for transacting corporate business here, as well as the case of one that has such a place of business, but is unwilling to comply with the terms of the statute. No foreign corporation, therefore, can rely upon enforcing any contract here made by it in the courts of this state, unless it obeys the statute." Jones' Business and Corporation Law, 111, 112.

[14] Hazeltine v. Mississippi Valley Fire Ins. Co. (U. S. C. C.) 55 Fed. 743. The Court, per Hammond, J. cites "as showing how the elastic phrase 'carrying on business' or 'doing business' seems to give trouble everywhere," the following English cases chronologically: Wilson v. Railroad Co. 5 Exch. 822; Carron Iron Co. v. Maclaren, 5 H. of L. Cas. 416, 458; Ingate v. Lloyd Austria Co. 4 C. B. N. S. 704; Shields v. Great Northwestern Railroad Co. 7 Jur. N. S. 631; Newby v. Von Oppen, L. R. 7 Q. B. 293; Mackereth v. Glasgow & Southwestern Ry. Co. L. R. 8 Exch. 149; Jones v. Ins. Co. 17 Q. B. Div. 421; Lhoneux v. Banking Corp. 33 Ch. Div. 446; Watkins v. Insurance Co. 23 Q. B. Div. 285; Haggin v. Comptoir d' Escompte de Paris, 23 Q. B. Div. 519; Palmer v. Railroad Co. [1892] 1 Q. B. 823.

"*Business*" *defined* in Flint v. Stone Tracy Co. 220 U. S. 108, 171, 55 L. ed. 389, 31 Sup. Ct. 357, Ann. Cas. 1912B, 1312, *quoted* in Sargent Land Co. v. Von Baumbach (U. S. D. C.) 207 Fed. 423, 426, 427. Tax on privilege of doing business.

What is not "doing business" under Corp. Tax. Law, Aug. 5, 1909, c. 6, 36 Stat. 112–117 (U. S. Comp. Stat. Supp. 1911, pp. 946, 951); United States v. Nipissing Mines Co. 206 Fed. 431, 124 C. C. A. 313, *relying* upon McCoach v. Minehill & Schuylkill Haven Rd. Co. 228 U. S. 295, 57 L. ed. 842, 33 Sup. Ct. 419, which is *distinguished* in Sargent Land v. Von Baumbach (U. S. D. C.) 207 Fed. 423, 427.

On insurance contract made by mail by unauthorized foreign company, see note in 24 L.R.A. 296; on effect of location of insured property within the state to prevent an action by a foreign insurance company on contract made in another state, see note in 9 L.R.A.(N.S.) 417.

[15] Huntington v. Sheehan, 206 N. Y. 486, 100 N. E. 41, 42 Ins. L. J. 267.

of insurer from the foreign state, premiums being payable at such office under the policy;[16] nor preliminary telegraphic negotiations, the policy being executed in and sent by mail from another state;[17] nor does doing business include such preliminary conditions as the appointment of agents, but contemplates only the business of insurance,[18] nor is the sale of stock and taking notes therefor doing business.[19]

Again, an agent who keeps his office and carries on his business in another state is not required to take out a license in Alabama, because he issues policies on houses there, nor does the single act of examining one house there, with a view to effect insurance thereon, bring the agent within the statute of that state in relation to foreign companies;[20] and it is well settled that a single isolated fact is not doing business [1] nor is effecting insurance on a single item of property doing business,[2] nor the transaction of such business as is necessary under policies outstanding at the time of withdrawal from the state of the company's agencies and the surrender of its license.[3] And "doing business," under a statute exempting assessment corporations from being subject to the general insurance laws of the state, refers to issuing policies and not to paying policies which have been issued in the past.[4] And a few separate and disconnected transactions, such as merely recognizing existing insurance policies and receiving premiums thereon at its office in another state, together with four isolated acts extending over a period of

[16] State v. Connecticut Mutual Life Ins. Co. 106 Tenn. 282, 61 S. W. 75.

[17] Hammond v. International Ry. Co. 116 N. Y. Supp. 854, 63 Misc. 437, aff'd (mem.) 119 N. Y. Supp. 1127, 134 App. Div. 995.

[18] Rehm v. German Insurance & Savings Inst. 125 Ind. 135, 25 N. E. 173.

[19] Hughes v. Four States Life Ins. Co. (1914) — Tex. Civ. App. —, 164 S. W. 898.

[20] Jackson v. State, 50 Ala. 141, under Sess. acts 1868, p. 330, sec. 107. But see State v. Beazley, 60 Mo. 220. See § 330a herein.

[1] Frawley, Bundy & Wilcox v. Pennsylvania Casualty Co. (U. S. C. C.) 124 Fed. 259, 264. But see § 330a herein.

The mere execution of a mortgage and recording the same does not constitute "doing business" under a statute requiring a foreign corporation to file its charter as a condition precedent. Shannon's Code Tenn. secs. 2546, 2547; Tennessee River Coal Co. In re (U. S. D. C.) 206 Fed. 802.

On single or isolated transaction by foreign corporation as doing business within the state, see note in 10 L.R.A.(N.S.) 693.

[2] Richman Cedar Works v. Buckner (U. S. C. C.) 181 Fed. 424.

[3] State v. Columbian Natural Life Ins. Co. 141 Wis. 557, 124 N. W. 502, under Stat. 1898, sec. 1954, as am'd by Laws 1907, c. 597, requiring annual statements.

[4] Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. 108, *cited* in Hunter v. Mutual Reserve Life Ins. Co. 184 N. Y. 136, 144, 30 L.R.A.(N.S.) 677 note; 6 Amer. & Eng. Ann. Cas. 291, 76 N. E. 1072.

three years, consisting in rewriting an existing policy, sending a check in payment of a policy, to be delivered upon receipt of certain unpaid assessments, and two adjustments within the state of claims which have accrued, do not constitute doing business within the state after the company's asserted withdrawal therefrom in good faith, so as to preclude it from revoking its designation of the insurance commissioner as its agent to receive service of process, as such acts do not operate to continue in force such designation.[5] Doing business within the meaning of the General Corporation Law of New York relates to the ordinary business which the corporation is organized to do, and has no relation to the incidental contract of a foreign corporation with a domestic corporation such as insuring its property, and a foreign corporation is not doing business in New York by taking out a policy in said state, where the property insured was in a foreign state in which it transacted its general business, where it did no business in New York when the insurance was taken out, and whatever books it had within New York state were sent to the foreign state prior to entering into said contract.[6] And in that state an agreement by A. to pay B., a trousers' manufacturer, for services in case of damage by fire to material furnished B. to manufacture said garments for A. does not constitute engaging "in the business of insurance," for no risk is run.[7] Nor does issuing a policy by a corporation of one state on property in another state

[5] Hunter v. Mutual Reserve Life Ins. Co. 184 N. Y. 136, 30 L.R.A. (N.S.) 677 note, 6 Amer. & Eng. Ann. Cas. 291, 76 N. E. 1072, 51 Misc. 26, 99 N. Y. Supp. 888, 97 App. Div. 222, 89 N. Y. Supp. 849, 43 Misc. 251, 87 N. Y. Supp. 438. See Birch v. Mutual Reserve Life Ins. Co. 91 App. Div. 384, 86 N. Y. Supp. 872, aff'd in Hunter v. Mutual Reserve Life Ins. Co. 218 U. S. 573, 54 L. ed. 1155, 31 Sup. Ct. 127, 30 L.R.A.(N.S.) 686, 40 Ins. L. J. 172. *Considering* and *distinguishing:* Commercial Mutual Accident Co. v. Davis, 213 U. S. 245, 53 L. ed. 782, 29 Sup. Ct. 445; Mutual Reserve Ins. Co. v. Birch, 200 U. S. 612, 50 L. ed. 620, 26 Sup. Ct. 752; Mutual Reserve Fund Life Assoc. v. Phelps, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. 707; Connecticut Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. 308. The court, per Mr. Justice McKenna, in the principal case, says: "The contention of plaintiff, so far as based on the instances adduced, encounters a great difficulty. They were not new business. They related to old transactions and were intended only to fulfil their obligations. This was the plain duty of defendant, a duty which it could not evade nor could the state even prevent it. Bedford v. Eastern Building & Loan Assoc. 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. 597. Between doing business for such purposes and doing business generally there is quite a difference. If not, the consequences are somewhat serious. The Craig act, as we have seen, imposes a penalty," etc. Id. 584.

[6] Kline Brothers & Co. v. German Union Fire Ins. Co. 132 N. Y. Supp. 181, 147 App. Div. 790, aff'd (mem.) 210 N. Y. 535.

[7] Stern v. Rosenthal, 128 N. Y. Supp. 711, 71 Misc. 422, Consol. Laws N. Y. 1909, c. 280, sec. 54.

constitute carrying on business in the latter state;[8] nor insuring property in one state, where the application is received at, and the policy issued from, the home office in another state;[9] nor bringing an action in a state other than that of the insurer's home office, to recover an assessment adjudged due by a court in the latter state under a policy issued there, upon an application made in a third state, to a resident of the state where the suit was brought and the property insured was located.[10] Nor is adjusting a loss by an uncertified agent of a foreign insurance company "transacting the business" of insurance.[11]

§ 330a. Same subject.—Doing or transacting "business" may be limited to certain kinds of business and preclude doing only such a particular kind or class as a corporation, notwithstanding its charter powers, may carry on upon compliance with statutes prescribing conditions precedent to transacting certain specified business.[12] A single transaction indicating a purpose to transact a substantial part of insurers dealings in the state constitutes doing business.[13] So it is held that taking a note for an instalment of premium and transmitting it to the company is "doing insurance business."[14] So where the policy is applied for, received and the premium paid in the state the insurer is within a statute as to taking risks and transacting business.[15] So an agent who has received premiums for insurance, taken his commissions, advertised himself as agent, for-

[8] Marine Ins. Co. v. St. Louis Iron Mountain & Southern R. Co. 41 Fed. 643; New Orleans v. Virginia Fire & Marine Ins. Co. 33 La. Ann. 10.

[9] Swing v. Taylor & Crate, 68 W. Va. 621, 70 S. E. 373.

[10] Swing v. Brister & Co. 87 Miss. 516, 40 So. 146, 35 Ins. L. J. 223. *Citing* and *relying*, as to the right to insure property in a foreign state and to enforce the contract there where insured resides, etc., upon:

United States.—Allgeyer v. Louisiana, 165 U. S. 578, 590, 591, 41 L. ed. 832, 17 Sup. Ct. 427.

Alabama.—Christian v. American Freehold Land & Mortg. Co. 89 Ala. 198, 7 So. 427.

Arkansas.—Railway Co. v. Fire Assoc. 55 Ark. 163, 174, 18 S. W. 43.

Indiana.—Swing v. Hill, 165 Ind. 411, 75 N. E. 658.

Missouri.—Lumberman's Mutual Ins. Co. v. Kansas City, Ft. S. & M. R. Co. 149 Mo. 165, 50 S. W. 281.

New Jersey.—Columbia Fire Ins. Co. v. Kinyon, 37 N. J. L. 33.

Pennsylvania.—Commonwealth v. Biddle, 139 Pa. 605, 11 L.R.A. 561, 21 Atl. 147.

[11] People (ex rel. McCall) v. Gilbert, 44 Hun (51 N. Y. Sup. Ct.) 522.

[12] Metropolitan Casualty Ins. Co. of N. Y. v. Basford, 31 S. Dak. 149, 139 N. W. 795, Laws 1905, c. 73, sec. 2; Laws 1907, c. 110; Laws 1909, c. 243; Laws 1911, c. 176.

[13] Deere Plow Co. v. Wyland, 69 Kan. 255, 76 Pac. 863, Gen. Stat. 1901, sec. 1283, *cited* in Tomson v. Iowa State Traveling Men's Assoc. 88 Neb. 399, 129 N. W. 529, 40 Ins. L. J. 591, 594, see § 330 herein.

[14] Hacheny v. Leary, 12 Or. 40, 7 Pac. 329. Thayer, J., dissenting.

[15] Stevens v. Rasin Fertilizer Co. 87 Md. 679, 41 Atl. 116, Code Pub. Gen. Laws, art. 23, secs. 118, 119, 124.

warded premiums to the insurance company, and received policies for delivery to the insured, is an agent of the company and a person aiding in the transaction of insurance business, under the Wisconsin statute, sufficiently so at least to give the court jurisdiction by the service of process upon him.[16] And although a foreign company makes a voluntary assignment of its property, it will be considered as "doing business" within the intent of the statute where such company has been transacting business in the state, although it ceases to take new risks;[17] a company is doing business sufficient for the service of process upon a local agent where it has outstanding policies in the state and the right to investigate losses thereunder, to have an examination of deceased's body in proper cases and to do whatever is necessary within the state to adjust and pay losses.[18] Other instances of what constitutes doing business are: Issuing insurance to residents upon property located in the state by an unlicensed company without an office in the state;[19] where a company, with an office in a state foreign to that of its incorporation there insures property in other states, even though it does not insure property in the state where such office is located;[20] actively soliciting membership by a foreign fraternal accident association and receiving large sums of money for assessments;[1] collecting premiums on policies in force after withdrawal of agents from the state;[2] collecting premiums and paying losses on policies outstanding after insurers withdrawal from the state;[3] and the statute may provide that collecting premiums from a citizen of the state shall constitute doing business therein.[4]

§ 331. Foreign company estopped to avoid contract by setting up noncompliance with statutes.—A foreign insurance company cannot avail itself of its own turpitude in not complying with the

[16] State v. United States Mut. Acc. Assn. 67 Wis. 624, 31 N. W. 229, under Rev. Stat. Wis. sec. 1977.

[17] Williams v. Commercial Ins. Co. 75 Mo. 388; Relfe v. Commercial Ins. Co. 5 Mo. App. 173, under Wagner's Mo. Stat. 772.

[18] Commercial Mutual Accident Ins. Co. v. Davis, 213 U. S. 245, 53 L. ed. 782, 29 Sup. Ct. 445, 38 Ins. L. J. 655.

[19] McCord v. Illinois National Fire Ins. Co. 47 Ind. App. 602, 94 N. E. 1053, 40 Ins. L. J. 1428, Act March 11, 1901, Burns' Ann. Stat. 1908, sec. 4798, as to service of process. See Swing v. Munson, 191 Pa. 582, 58 L.R.A. 223, 43 Atl. 342.

[20] State v. Amazon Ins. Co. 24 Ohio Cir. Ct. Rep. 387.

[1] Tomson v. Iowa State Traveling Men's Assoc. 88 Neb. 399, 129 N. W. 529, 40 Ins. L. J. 591.

[2] Commonwealth v. Providence Savings Life Assur. Soc. 155 Ky. 197, 159 S. W. 698, Ky. Stat. sec. 4226. See § 330 herein.

[3] Connecticut Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. 313, s. c. 99 Tenn. 322, 42 S. W. 145, 44 L.R.A. 442, statute as to service of process.

[4] Owen v. Bankers Life Ins. Co. 84 S. Car. 253, 137 Am. St. Rep. 845, 66 S. E. 290.

statutes regarding insurance, to defeat an action against it on a policy. It is estopped, or at least prohibited, by the prohibition of the common law against unauthorized corporate action, from denying its authority to transact business as against innocent persons.[5] It is estopped from setting up that the contract was made in violation of the statute, in order to avoid liability on the policy where insured participated in the transaction without knowledge, actual or constructive, of the fact of noncompliance with the law by insurer,[6] and the rule as to estoppel precludes pleading disability of the corporation to contract by one who is sued upon such contract.[7]

§ 332. When contracts valid although company has not complied with statutes.[8]—But preliminary contracts authorized to be entered into by an insurance company become valid on completing the organization as required by statute,[9] and the presumption attaches that a company has been duly incorporated where a question arises between the receiver of a corporation and persons who have contracted with it as such,[10] nor is compliance with the statute as to transacting business necessary to enable a foreign insurance company to take securities in the state of Wisconsin for debts due them

[5] *United States.*—Berry v. Knights Templars' & Masons' Life Indemnity Co. (U. S. C. C.) 46 Fed. 439.

Illinois.—Watertown Fire Ins. Co. v. Rust, 141 Ill. 85, 30 N. E. 772, under Rev. Stat. 1887, c. 73, sec. 124.

Michigan.—Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co. 31 Mich. 346.

Minnesota.—Ganser v. Fireman's Fire Ins. Co. 34 Minn. 372, 25 N. W. 943.

Pennsylvania.—Hoge v. Dwelling House Ins. Co. 138 Pa. 66, 20 Atl. 939; Watertown Fire Ins. Co. v. Simons, 96 Pa. St. 520; Swan v. Watertown Fire Ins. Co. 96 Pa. St. 37.

See next section. See, also, as to general rule, 2 Morawetz on Private Corporations, 2d ed. sec. 752. As to estoppel of corporation to plead that contract is ultra vires, see note 13 Am. Dec. 108. For cases where insurance company may set up ultra vires, see Hambro v. Hull & London Fire Ins. Co. 3 Hurl. & N. 789; Webster v. Buffalo Ins. Co. 2 McCrary (C. C.) 348, 7 Fed. 399. When it is estopped, see Gray v. National Benefit Assn. 111 Ind. 531, 11 N. E. 477. And see generally, 5 Thompson on Corporations, (ed. 1894) sec. 6015, et seq.; 2 Id. (2d ed.) secs. 1945–1994, and § 334 herein. As to estoppel to deny corporate existence, see Farmers' Mutual v. Reser, 43 Ind. App. 634, 738, 88 N. E. 353.

On right of foreign corporation to set up noncompliance with conditions of doing business in order to defeat recovery against it, see note in 25 L.R.A. 569.

[6] Corbett v. Physicians Casualty Assoc. 135 Wis. 505, 16 L.R.A.(N.S.) 177, 115 N. W. 365.

[7] Johnson v. Mason Lodge, No. 38, 106 Ky. 868, 51 S. W. 620.

[8] See § 1452 herein.

[9] Williams v. Babcock, 25 Barb. (N. Y.) 109. See Daly v. National Life Ins. Co. 64 Ind. 1; National Mut. Fire Ins. Co. v. Pursell, 10 Allen (92 Mass.) 231; Skillern v. Continental Ins. Co. — Tenn. Ch. —, 42 S. W. 180, acts 1895, c. 119.

[10] White v. Coventry, 29 Barb. (N. Y.) 305.

from residents thereof,[11] nor does such noncompliance invalidate the bond of an insurance agent,[12] and where the statute does not declare the transactions of the company void, in case of noncompliance with its provisions, a mortgage made by a foreign company will be upheld;[13] nor does it invalidate subscriptions to the stock of such corporations, or notes given in payment therefor. Such contracts are not "taking risks" nor "transacting any business of insurance."[14] So it has been held[15] that a statute requiring a certified copy of articles of association to be filed with the county clerk did not affect the validity of contracts, as it was intended merely to furnish proof of corporate existence.[16]

In Massachusetts, it is held that a foreign company may make a valid contract of insurance there.[17] In Arkansas, a failure to comply with the statutes relating to foreign insurance companies doing business in that state does not affect the validity of the policies issued by such company, but only renders the agents and brokers of such corporation liable to the penalties imposed by the statute.[18] So in Indiana, a policy is held not to be void for noncompliance with such statute.[19] Nor is the policy void in Ohio under such circumstances, nor is the policyholder excused from payment of premiums under his contract.[20] And a claim for premiums may be enforced by a corporation which has not complied with the statutory prerequisites even though such unauthorized company is guilty of a misdemeanor and subject to a penalty by reason of the insurance;[1] and there are numerous cases which hold such policies

[11] Charter Oak Life Ins. Co. v. Sawyer, 44 Wis. 387.

[12] United States Life Ins. Co. v. Adams, 7 Biss. (U. S. C. C.) 30, Fed. Cas. 16,792.

[13] Northwestern Mut. Life Ins. Co. v. Overholt, 4 Dill. (U. S. C. C.) 287, Fed. Cas. No. 10,338.

[14] Bartlett v. Choutcau Ins. Co. 18 Kan. 369.

[15] Jhous v. People, 25 Mich. 499, under Mich. Sess. Laws 1859. p. 1083, sec. 9.

[16] Jhous v. People, 25 Mich. 499. See, also, American Ins. Co. v. Butler, 70 Ind. 1.

[17] Kennebec Co. v. Augusta Ins. Co. 6 Gray (72 Mass.) 204.

On effect on insurance of noncompliance with statutory requirements, see note in 20 L.R.A. 405.

[18] Ehrmann v. Teutonia Ins. Co. 1 McCrary (U. S. C. C.) 123, 1 Fed. 471.

[19] Behler v. German Mut. Fire Ins. Co. 68 Ind. 347. But see § 332 herein.

[20] Union Mut. Life Ins. Co. v. McMillen, 24 Ohio St. 67. See also State Mutual Fire Ins. Co. v. Brinkley Stave & Heading Co. 61 Ark. 1, 29 L.R.A. 712, 54 Am. St. Rep. 191, 31 S. W. 157. *Compare* § 333 herein.

[1] State Mutual Fire Ins. Co. v. Brinkley Stave & Heading Co. 61 Ark. 1, 29 L.R.A. 712, 31 S. W. 157, 54 Am. St. Rep. 191. *Compare* American Ins. Co. v. Wellman, 69 Ind. 413; Seamans v. Christian Brothers Mill Co. 66 Minn. 205, 68 N. W. 1065. *Compare* § 333 herein.

[2] Hartford Live Stock Ins. Co. v. Matthews, 102 Mass. 221; Connecticut River Mut. Fire Ins. Co. v. Whip-

valid and the premium or premium notes collectable.[2] Again, under a statute providing that suits may be brought against foreign companies upon any contract made and delivered in the state, an action may be maintained on a policy delivered by an agent of the company within the state.[3] And a foreign company may sue upon its contracts as they are not invalidated by noncompliance with statutory conditions precedent to doing business, where by such noncompliance the officers and stockholders are rendered individually liable under the statute.[4] The insurance of one's own property in an unauthorized foreign company is not criminal under the Pennsylvania statute,[5] prohibiting such companies from doing business and making it an offense for "any person . . . paying or receiving or forwarding any premiums, applications for insurance, or in any manner securing, helping, or aiding in the placing of any insurance or effecting any contracts of insurance" with such companies.[6]

§ 332a. Same subject.—If a statute permits a resident of one state to procure insurance at the home office of a foreign company unauthorized to do business, a policy consummated by mail in the foreign company's state is valid.[7] And a policy issued by a foreign company on property in a state without compliance with its laws prohibiting, under a penalty issuing such policies without complying with said laws, is valid as to insured and binds the insurer where no duty or prohibition in that respect is imposed on insured by said laws.[8] So a resident of a state may safely deal with a company, which, although unauthorized, holds itself out as qualified to do business with him, in the absence of knowledge, actual or constructive, to the contrary. And his right to presume that said company is qualified to do business is not impaired by the fact that it uses the mail in negotiating its contract with him.[9] If a com-

ple, 61 N. H. 61; Provincial Ins. Co. v. Lapsley, 15 Gray (81 Mass.) 262; Behler v. German Ins. Co. 68 Ind. 347, overruling Sun Ins. Co. v. Slaughter, 20 Ind. 520; Clark v. Middleton, 19 Mo. 53. *Compare* § 333 herein.

[3] Burns v. Provincial Ins. Co. 35 Barb. (N. Y.) 525.

[4] Helvetia Swiss Fire Ins. Co. v. Edward P. Allis Co. 11 Colo. App. 264, 53 Pac. 242.

[5] Act 1887, note.

[6] Commonwealth v. Biddle, 139 Pa. 605, 11 L.R.A. 561, 21 Atl. 134.

[7] Baker v. Spaulding, 71 Vt. 169, 42 Atl. 982, Vt. Stat. secs. 4181, 4182.

On insurance contract made by mail by unauthorized foreign company, see note in 24 L.R.A. 296.

[8] Pennypacker v. Capital Ins. Co. 80 Iowa, 86, 8 L.R.A. 236, 20 Am. St. Rep. 395, 45 N. W. 408; Phœnix Ins. Co. v. Pennsylvania Ins. Co. 134 Ind. 215, 20 L.R.A. 405n, 33 N. E. 970; Strampe v. Farmers' Mutual Ins. Co. 109 Minn. 364, 26 L.R.A. (N.S.) 99n, 123 N. W. 1083. See § 331 herein.

[9] Corbett v. Physicians Casualty Assoc. 135 Wis. 505, 16 L.R.A.

pany has complied with conditions precedent and obtains a license under one statute but has not complied with a former law on the subject, such law is repealed by implication and the company is lawfully in the state and may enforce its contracts there, and a subsequently enacted statute as to certain requirements will not render such licensed company's contracts void and unenforceable.[10]

A fraternal beneficiary association's liability is unaffected by the fact that it has received a certificate to do business as such, where it has issued a certificate payable to a beneficiary not within the class permitted by statute.[11]

§ 332b. Same subject: insurance in foreign state of property in another state.—In Michigan the statute does not apply to contracts made abroad upon property within the state, but only to operations therein.[12] And a contract of insurance effected and issued in a foreign state on property situate in another state whose laws render it void if made there is valid and enforceable by either party.[13] And a renewal policy covering property in one state belonging to a resident thereof, and which is consummated through the mail in another state is a lawful contract in the former state even though insurer had no license to do business there.[14] And a party can procure insurance by a contract made without the state even though the

(N.S.) 177, 115 N. W. 365. See also Watertown Fire Ins. Co. v. Rust, 141 Ill. 85, 30 N. E. 772.

[10] Continental Ins. Co. v. Riggen, 31 Oreg. 336, 48 Pac. 476, 26 Ins. L. J. 490.

[11] Ordelheide v. Modern Brotherhood of America, 158 Mo. App. 677, 139 S. W. 269, 40 Ins. L. J. 1845.

[12] Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co. 31 Mich. 346, under Mich. Stat. Comp. L. 1871, sec. 1683.

[13] Columbia Fire Ins. Co. v. Kinyon, 37 N. J. L. 33, 36. See also Swing v. Hill, 165 Ind. 411, 75 N. E. 658; Hammond v. International Ry. Co. 116 N. Y. Supp. 854, 63 Misc. 437, aff'd (mem.) 119 N. Y. Supp. 1127, 134 App. Div. 995; Seamens v. Knapp-Stout & Co. 89 Wis. 171, 27 L.R.A. 362, 46 Am. St. Rep. 425, 61 N. W. 757. See §§ 226, 231a, 231e, 231f, 333–333b herein.

Examine the following cases:

Iowa.—Seamans v. Zimmerman, 91 Iowa, 362, 59 N. W. 290.

Maine.—Corbin v. Houlehan, 100 Me. 246, 70 L.R.A. 568, 61 Atl. 131.

Massachusetts. — Commonwealth Mutual Fire Ins. Co. v. Fairbank Canning Co. 173 Mass. 161, 53 N. E. 373.

Michigan.—Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co. 31 Mich. 346.

Missouri. — Lumbermen's Mutual Ins. Co. v. Kansas City, Ft. S. & M. R. Co. 149 Mo. 165, 50 S. W. 281.

Nebraska.—Commonwealth Mutual Fire Ins. Co. v. Hayden, 60 Neb. 636, 83 Am. St. Rep. 545, 83 N. W. 922.

New Hampshire. — Connecticut River Mutual Fire Ins. Co. v. Way, 62 N. H. 622.

New Jersey.—Northampton Mutual Live Stock Ins. Co. v. Tuttle, 40 N. J. L. 476.

New York.—Western v. Genesee Mutual Ins. Co. 12 N. Y. 258.

Washington.—Ward v. Tucker, 7 Wash. 399, 35 Pac. 1086.

[14] Huntington v. Sheehan, 206 N.

statute prohibits procuring insurance from an unauthorized company making it a misdemeanor to do so,[15] or making such contracts void,[16] as the legislature has no power to prohibit making such contracts,[17] for a law of one state which interferes with the constitutional right of an insurance company of another state to make them would be void,[18] at least a statute prohibiting making them would to that extent be unconstitutional.[19]

§ 333. When contracts not valid where company has not complied with statutes.—Notwithstanding some of the cases in the last section hold that a noncompliance with statutes regulating the business of insurance companies does not invalidate the contract, there are numerous decisions which hold, that where the contracts are made within the state a strict compliance with such statutes is necessary to the validity of the contract. And it would seem reasonable, in view of what has been stated in the preceding sections herein, that it would necessarily follow that a contract made in violation of or noncompliance with such laws could not be valid, or at least should be voidable on principle.[20] The decisions, however, are not unanimous, and it is extremely difficult to state any positive governing rule. In Illinois, it is held that a foreign corporation cannot enforce such a contract, nor recover on a note given for stock and premiums, notwithstanding the law imposes a penalty for doing business in the state in violation of the statutory provisions relating thereto.[1] In Massachusetts, the statute prohibits the "making of any contract of insurance within the state," unless certain statutory conditions have been complied with, and it has been decided in that state that a noncompliance with such requirements prevents recovery on a premium note given a mutual company.[2] And in

Y. 486, 100 N. E. 41, 42 Ins. L. J. 267.

[15] Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 15 Sup. Ct. 207, 5 Inters. Com. Rep. 610, Cal. Pen. Code, sec. 649. See also Atlas Mutual Ins. Co. v. Fisheries Co. 6 Penn. (Del.) 256, 68 Atl. 4, 37 Ins. L. J. 285.

[16] Western Massachusetts Mutual Fire Ins. Co. v. Hilton, 58 N. Y. Supp. 996, 42 App. Div. 52.

[17] Swing v. Hill, 165 Ind. 411, 75 N. E. 658.

[18] Hammond v. International Ins. Co. 116 N. Y. Supp. 854, 63 Misc. 437, aff'd (mem.) 119 N. Y. Supp. 1127, 134 App. Div. 995; Western Massachusetts Mutual Fire Ins. Co. v. Hilton, 58 N. Y. Supp. 996, 42 App. Div. 52.

[19] Atlas Mutual Ins. Co. v. Fisheries Co. 6 Penn. (Del.) 256, 68 Atl. 4, 37 Ins. L. J. 285.

[20] Williams v. Cheney, 3 Gray (69 Mass.) 215, and following cases in this section.

[1] Cincinnati Mut. Health Assn. v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 626. *Compare* § 332 herein.

[2] Washington Mut. Ins. Co. v. Hastings, 2 Allen (84 Mass.) 398; Jones v. Smith, 3 Gray (69 Mass.) 500. But see National Mutual Fire Ins. Co. v. Pursell, 10 Allen (92 Mass.) 232. In this case it appeared that statute provided that the contract should be valid, though pro-

Nebraska a premium note given to a foreign insurance company, which has not acquired the right to do business in the state, is not enforceable.[3] And it has also been decided in Indiana that a premium note cannot be enforced in the state where no certificate has been issued to the agent of a foreign company, as required by the statute, to enable him to transact business.[4] So, in that state, there are cases which hold such contracts void, both as to the foreign company and its agents, and the insured may sustain an action to recover back his premium, and may do this independent of the doctrine of recovering back the consideration upon the rescission of a contract.[5] And the insured may recover back premiums paid on a policy issued by an unlicensed company, where the agreement was to procure insurance from a licensed company.[6] In a case in Illinois it appeared that after publishing notice and filing an intention to organize an insurance company, the persons so intending secured an application for insurance and a premium note payable to the company, which they presented to the state auditor, and on the day of the loss made the oath required by statute, and it was held that as at the time of the contract the corporation had no legal existence, it could not be bound thereby.[7]

§ 333a. Same subject.—No recovery can be had in Minnesota of a premium for insurance on property there by either a foreign corporation or a foreign unincorporated mutual association which has not complied with the statutes.[8] And in Mississippi noncompliance with the statutory requirements precludes recovery of premiums due for insurance on property there whether the policy was issued in or out of the state.[9] So under an Ohio decision, an unlicensed company cannot maintain an action in that state for premiums on policies covering property located there but it can be brought in the state where the policy was issued where jurisdiction over the policyholder may be had.[10] Under a Michigan decision a foreign insurance corporation, prohibited by statute from issuing

visions of statutes were not complied with. Leonard v. Washburn, 100 Mass. 251.

[3] Barbor v. Boehm, 21 Neb. 450.

[4] Hoffman v. Banks, 41 Ind. 1.

[5] Union Central Life Ins. Co. v. Thomas, 46 Ind. 44. See Farmers' & Merchants' Ins. Co. v. Harrah, 47 Ind. 236; Charter Oak Life Ins. Co. v. Sawyer, 44 Wis. 387. But see preceding section.

[6] Barrett v. Elliott, 24 Canadian Law Times, 344. See § 1402 herein.

[7] Gent v. Manufacturers' & Merchants' Mut. Ins. Co. 107 Ill. 652, s. c. 13 Ill. App. 308. See American Ins. Co. v. Stoy, 41 Mich. 385, 388.

[8] Seamans v. Christian Bros. Mill Co. 66 Minn. 205, 68 N. W. 1065.

[9] Cowan v. London Assur. Corp. 73 Miss. 321, 55 Am. St. Rep. 535, 19 So. 298.

[10] Bankers Casualty Co. v. Richland County Banking Co. 55 Ohio Law Bull. 428. See Parker v. Lamb & Sons, 99 Iowa, 265, 34 L.R.A. 704, 68 N. W. 686.

policies on property within the state without express authority, and from doing business or maintaining actions therein without compliance with certain regulations and conditions, cannot, without complying with such requirements, maintain an action in that state for an assessment on a contract of insurance made through the mail on property situated therein as such a contract is in contravention of the policy of the state, even if it evades the statute.[11] And under an Illinois decision assessments are not recoverable where the statute has not been complied with;[12] nor can assessments be recovered in Pennsylvania by a foreign corporation which has not complied with its laws.[13] If the statute declares that the contract shall be deemed to have been made in the state within which the application is taken this applies to a foreign insurance company and makes its contract void if its application is taken in a state with the laws of which it has not complied and precludes recovery there of assessments on its contract.[14]

Again, a contract made by mail for the insurance of property within the state by a foreign company which is prohibited from transacting insurance business within the state, directly or indirectly, will not sustain an action by a receiver of the company against the policy holder to recover an assessment.[15]

§ 333b. Same subject.—A foreign company can maintain no action on a contract made before compliance with a statute requiring the company to file a statement of its condition.[16] It is also held that the failure to comply with the requirements of a statute prescribing the terms upon which foreign insurance companies may do business in a state, such companies and their agents and brokers render themselves liable to the penalties denounced by the act, but such failure does not affect the validity of the policies issued by them, or in any manner operate to the prejudice of the policy holder.[17] So it is held in Vermont that an insurance contract is

[11] Seamans v. Temple Co. 105 Mich. 400, 28 L.R.A. 430, 55 Am. St. Rep. 457, 63 N. W. 408. See also Swing v. Cameron, 145 Mich. 175, 9 L.R.A. (N.S.) 417n, 108 N. W. 506, 35 Ins. L. J. 736.

On effect of location of insured property within the state to prevent an action by a foreign insurance company on contract made in another state, see note in 9 L.R.A.(N.S.) 417.

[12] Buell v. Breese Mill & Grain Co. 65 Ill. App. 271.

[13] Western Massachusetts Mutual Fire Ins. Co. v. Girard Point Storage Co. 6 Pa. Dist. R. 54, 19 Pa. Co. Ct. 113.

[14] Commonwealth Mutual Fire Ins. Co. v. Edwards, 124 N. Car. 116, 32 S. E. 404.

[15] Rose v. Kimberly & Clark Co. 89 Wis. 544, 27 L.R.A. 556, 45 Am. St. Rep. 855, 62 N. W. 526.

[16] Ætna Ins. Co. v. Harvey, 11 Wis. 394.

[17] Ehrmann v. Tentonia Ins. Co. 1 McCrary (U. S. C. C.) 123, 1 Fed. 471, citing Union Mut. Ins. Co. v. McMillen, 24 Ohio St. 67. See Hooper v. California, 155 U. S. 648, 39 L.

void when made by a foreign company before it has complied with the statute, obtained a license, and filed a copy of its by-laws with the secretary of state, and become responsible for the acts and neglects of its agents.[18] If the laws of a state declare that all insurance effected by foreign corporations which have not complied with such laws is unlawful, void, and of no effect whatever, a policy issued in violation of this rule is void not only in that state, but in every other, and hence no recovery can be had thereon in the state in which such corporation was organized.[19] And it is decided that a contract of insurance made with a foreign insurance company, and valid where made, cannot be enforced in another state, when in conflict with its statutes and the declared policy of its laws.[20] Under the Tennessee statute a foreign company unauthorized to transact business there cannot make a lawful insurance contract there through an agent not a licensed broker therefor, and any agent soliciting such insurance without complying with the law is guilty of a misdemeanor, and personally liable upon his unlawfully made contracts with unauthorized companies.[1] And a corporation in one state in sending a policy to an agent in another state, where it is not authorized to do business has been held chargeable with knowledge that it is participating in an unlawful act.[2] Nor can an unlicensed company in Illinois maintain an office there and solicit and write insurance upon property in other states.[3] In Pennsylvania, a foreign insurance company cannot recover from the bondsman of a subagent for his default, he not having been commissioned by the insurance commissioner as required by the statute of that state.[4]

The want of authority to do business is a matter of special defense, if it be a valid one, to an action on a premium note.[5] So it

ed. 297, 15 Sup. Ct. 207, under Cal. Pen. Code, sec. 649; Lamb v. Bowser, 7 Biss. (U. S. C. C.) 315, Fed. Cas. No. 8,008, s. c. Id. 372, Fed. Cas. No. 8009; Hartford Live Stock Ins. Co. v. Matthews, 102 Mass. 221; Clay Fire & Marine Ins. Co. v. Huron Salt Mfg. Co. 31 Mich. 346; Columbus Ins. Co. v. Walsh, 18 Mo. 229. See §§ 713, 714 herein.

[18] Lycoming Fire Ins. Co. v. Wright, 55 Vt. 526.

[19] Wood v. Cascade Fire & Marine Ins. Co. 8 Wash. 427, 40 Am. St. Rep. 917, 36 Pac. 267.

[20] Swing v. Munson, 191 Pa. St. 582, 71 Am. St. Rep. 772, 58 L.R.A. 223, 43 Atl. 342.

[1] Woolvine v. Mason, 128 Tenn. 35, 157 S. W. 682; Shannon's Code, secs. 3274–3369.

[2] Millers' Mutual Fire Ins. Co. v. People, 65 Ill. App. 355. See § 515 herein.

[3] North American Ins. Co. v. Yates, 116 Ill. App. 217, 37 Chic. Leg. N. 59.

[4] Mutual Benefit Life Ins. Co. v. Bates, 92 Pa. St. 352. See further what policy is void and note uncollectable, Franklin Ins. Co. v. Louisville Packet Co. 9 Bush (Ky.) 590.

[5] Creditors Union v. Lundy, 16 Cal. App. 567, 117 Pac. 624, 40 Ins. L. J. 1981. See Swing v. Cameron, 145 Mich. 175, 9 L.R.A.(N.S.) 417n, 108 N. W. 506, 35 Ins. L. J. 736.

is decided that proof of authority to do business in a state is required to maintain an action there on a contract relating to insurance.[6]

§ 334. Charter: corporate powers: ultra vires.—The charter of a corporation is the measure of its powers, and the enumeration of certain powers implies the exclusion of all others.[7] This rule, however, does not prohibit a corporation from exercising such powers as are requisite to carry on its business in a manner usual and necessary, for this it has authority to do;[8] but the rule does operate to restrain a corporation from engaging in transactions which are not calculated to effect the particular purpose for which it was in-

[6] Gilbert v. State Ins. Co. 3 Kan. App. 1, 44 Pac. 442. See Delaware Ins. Co. v. Security Co. — Tex. Civ. App. —, 54 S. W. 916, case rev'd Security Co. v. Panhandle Nat. Bank, 93 Tex. 575, 51 S. W. 22.

[7] State v. Atchison & Northern R. Co. 24 Neb. 143, 38 N. W. 43; German Ins. Co. v. Commonwealth, 141 Ky. 606, 133 S. W. 798.

If a statute specifies the provisions which must be contained in the charters of insurance companies, the statute must be complied with. State (ex rel. Lumberman's Accident Co.) v. Michel, 124 La. 558, 50 So. 543, Acts 1898, No. 105, p. 134, sec. 2. But see Shoun v. Armstrong, — Tenn. Ch. —, 59 S. W. 790.

Insurance companies have the same rights as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy or statutory provisions. Dumas v. Northwestern National Ins. Co. 12 App. D. C. 245, 40 L.R.A. 358.

Laws of states of incorporation as limitation upon powers of insurance companies, see notes in 63 L.R.A. 653, and 52 L.R.A.(N.S.) 278.

As to power to alter or amend charter: reserved power, see:

United States.—Polk v. Mutual Reserve Fund Life Assoc. 207 U. S. 310, 52 L. ed. 222, 28 Sup. Ct. 65.

Illinois.—Yates v. People (ex rel. Anderson) 207 Ill. 316, 69 N. E. 775; German Ins. Co. v. Commonwealth, 141 Ky. 606, 133 S. W. 798.

New York.—Lord v. Equitable Life Assur. Soc. 194 N. Y. 212, 22 L.R.A. (N.S.) 420, 87 N. E. 443, 38 Ins. L. J. 435, 108 N. Y. Supp. 67, 96 N. Y. Supp. 10, 109 App. Div. 252; Bush v. New York Life Ins. Co. 119 N. Y. Supp. 796, 135 App. Div. 447.

Pennsylvania. — Union National Life Ins. Co., In re, 58 Pitts. L. J. 2.

Wisconsin.—Huber v. Martin, 127 Wis. 412, 115 Am. St. Rep. 1027, 105 N. W. 1031, 3 L.R.A.(N.S.) 653.

Charter or franchise as a contract: Impairment of obligation of contract: vested rights. See Joyce on Franchises (ed. 1909) secs. 311 et seq. Reservation of power to alter, amend or repeal grant of franchise or charter, see Id. secs. 317 et seq.

[8] See Whitewater Valley Canal Co. v. Vallette, 21 How. (62 U. S.) 414, 424, 16 L. ed. 154; Ohio Life & Trust Ins. Co. v. Merchants' Ins. Co. 11 Humph. (30 Tenn.) 22, 53 Am. Dec. 742; Allison v. Fidelity Mutual Fire Ins. Co. 81 Neb. 494, 129 Am. St. Rep. 694, 116 N. W. 274.

Corporations are creatures of the legislative department of the government. They can exercise no powers which are not expressly granted them or are necessarily implied from the express powers given. Knapp v. Supreme Commandery United Order of the Golden Cross of the World, 121 Tenn. 212, 118 S. W. 390.

corporated.[9] And where a corporation has become a corporate entity for obtaining subscriptions by receiving a certificate of incorporation it cannot be held to have acted unlawfully in issuing a check before it is licensed to do business, as against a bona fide holder for value, even though the statute declares it unlawful to do any kind of business before being licensed.[10] But entering into an agreement by two companies to form an unincorporated association which is in fact a partnership is ultra vires where the charter of neither company authorizes a joint or partnership contract.[11] And a life insurance company is not empowered to transfer its policy holders without their consent to another company.[12] So it is ultra vires a fire insurance company to enter into a contract in restraint of trade, to restrict competition, to limit its business within certain territory, and to regulate and fix prices therein.[13]

An insurance company has no authority to invest its capital stock in another corporation under a statutory power to invest its money in "real or personal property, stocks, or choses in action." [14] But whether an investment by an insurance corporation in the stock of a bank is authorized or not affects the state only.[15] And a contract whereby a guaranty life association undertakes to pay losses which may accrue against another and similar association is an attempt

[9] See Penobscot Corp. v. Lamson, 16 Me. 224, 33 Am. Dec. 656; Beatty v. Knowles, 4 Pet. (29 U. S.) 152, 162, 7 L. ed. 813. People v. Utica Ins. Co. 15 Johns. (N. Y.) 358, 8 Am. Dec. 243. This rule with its qualifications is fully considered in Morawetz on Private Corporations (ed. 1882) secs. 189, 209. See also in index thereto "Ultra Vires," "Construction of Charter," and "Validity of Corporate Acts." See also Angell & Ames on Corporations, (9th ed.) sec. 111.

[10] Reynolds v. Gerdelman, — Mo. App. —, 170 S. W. 1153.

[11] Philadelphia Underwriters, In re, 54 Leg. Intell. 469, 6 Pa. Dist. R. 699.

[12] Watson v. National Life & Trust Co. 189 Fed. 872, 111 C. C. A. 134, 40 Ins. L. J. 2065. The options of which they may avail themselves in case an attempt is made to so transfer them are stated in this case. See Timberlake v. Supreme Commandery United Order of the Golden Cross of the World, 208 Mass. 411, 36 L.R.A. (N.S.) 597, 94 N. E. 685. See §§ 350r et seq. herein.

On liability of insurance company on contracts of another company which it has absorbed or attempted to absorb, see note in 36 L.R.A. (N.S.) 597.

[13] State (ex rel. McCarter) v. Firemen's Ins. Co. 74 N. J. Eq. 37, 29 L.R.A.(N.S.) 1194, 135 Am. St. Rep. 708, 18 Amer. & Eng. Ann. Cas. 1048, 73 Atl. 80, rev'g 70 N. J. Eq. 291, 61 Atl. 705. See § 329a herein.

[14] Commercial Fire Ins. Co. v. Board of Revenue, 99 Ala. 1, 14 So. 490, 42 Am. St. Rep. 17. *Compare* Hyde v. Equitable Life Assur. Soc. 116 N. Y. Supp. 219, 61 Misc. 518.

[15] Hyde v. Equitable Life Assur. Soc. 116 N. Y. Supp. 219, 61 Misc. 518.

to divert the funds to objects not authorized by its charter, and is therefore ultra vires and void.[16]

An insurance company can borrow money to pay a loss or give a note to raise the money for that purpose,[17] and it can borrow money to preserve its assets, and it may agree to indemnify the guarantors if they are required to pay the debt. The power to borrow money to protect its assets is an incidental power of every corporation, and its choice of a means for the execution of such power presents no question for judicial interference where the means is neither prohibited nor corrupt.[18] It is also within the power of a life insurance company, and is not ultra vires to make a loan under an agreement fully executed before insured's death,[19] and in making a loan it may lawfully require the borrower to insure the property with the company and to pay the premium in addition to the legal rate of interest.[20]

A corporation may also hold real estate, acquired in good faith for such purpose, for a necessary and proper future use in carrying on its business, especially where it is so authorized by special charter, although there is a constitutional and statutory limitation as to time in such case.[1] So the purchase by a life insurance company of real estate upon which to maintain a hospital to care for and treat such of its employees as are afflicted with tuberculosis, is a valid exercise of its power within a statute permitting the acquisition of such real estate as shall be requisite for its convenient accommodation in the transaction of its business.[2]

Under the Kansas statute a local camp of Modern Woodmen is limited as to its right to hold real estate to such as may be necessary for the transaction of its business and holding meetings, although such necessary buildings may be partly used for other purposes.[3]

[16] Twiss v. Guaranty Life Assn. 87 Iowa, 733, 55 N. W. 8, 43 Am. St. Rep. 418.

[17] Furniss v. Gilchrist, 1 Sand. (N. Y.) 53; Ohio Life Insurance & Trust Co. v. Merchants' Insurance & Trust Co. 11 Humph. (Tenn.) 1, 53 Am. Dec. 742.

[18] Hyde v. Equitable Life Assur. Soc. 116 N. Y. Supp. 219, 61 Misc. 518.

[19] Freese v. Mutual Life Ins. Co. of N. Y. 11 Cal. App. 385, 105 Pac. 265. See § 350 herein.

[20] New York Fire Ins. Co. v. Donaldson, 3 Edw. (N. Y.) 199.

[1] German Ins. Co. v. Commonwealth, 141 Ky. 606, 133 S. W. 793; Ky. Const. sec. 192, Ky. Stat. sec. 567, Russell's Stat. sec. 2152. It was claimed that a subsequent constitutional enactment or legislation could not impair charter rights.

[2] People (ex rel. Metropolitan Life Ins. Co.) v. Hotchkiss. 120 N. Y. Supp. 649, 136 App. Div. 150, 39 Ins. L. J. 314, Ins. L. Consol. Laws, c. 28, sec. 20, subdiv. 2.

[3] Kennett v. Kidd, 87 Kan. 652, 125 Pac. 36, 44 L.R.A.(N.S.) 544n, 89 Kan. 4, 44 L.R.A.(N.S.) 549, 130 Pac. 691, case of right to take personal property or devise of farm lands under Kan. Gen. Stat. 1909, secs. 1832–1834.

Where the charter provided that an insurance company might issue policies on lives and grant annuities, and authorized the setting apart of a portion of its capital as security for the payment of annuities, it was held that the company might insure lives and grant annuities before making such appropriation of the fund.[4] Where the charter of a company authorized it to insure property "against loss or damage by fire, lightning, and inland navigation and transportation," a contract made by it, insuring horses against death by accident or disease, is void.[5] But a company authorized to issue policies against accidents to persons or property may issue policies against accidents to live stock although the statute does not expressly refer to the latter; an authority, however, under the statute to insure the lives of horses, cattle, and other live stock does not empower a company organized thereunder to issue accident policies.[6] So a company authorized to insure against losses by storms and hurricanes on hay, grain, and other agricultural products in barns, stacks or otherwise has power to insure growing crops, and is liable for loss to such crops caused by a hailstorm.[7] But it is held in Colorado that a fire insurance company could not avail itself of the defense of ultra vires when it had insured plaintiff's crop against loss from hail, and had received the premium therefor, even though the contract were ultra vires.[8] And a corporation cannot set up its lack of power to contract after the other party has performed the contract and it does not contravene any statute or public policy.[9] And a similar ruling has been made in Iowa, where it was held that a religious society insuring lives could not defend against a suit on one of its policies, upon the plea of ultra vires, when it had received assessments on the policy.[10]

An employers' liability insurance company has no authority to issue an automobile policy covering liability imposed by law by reason of bodily injuries including death accidentally sustained by reason of maintenance, use, etc., of automobiles, nor is such a policy authorized by a provision permitting insurance of health of persons

[4] Verplanck v. Mercantile Ins. Co. 1 Edw. Ch. (N. Y.) 84.

[5] Rochester Ins. Co. v. Martin, 13 Minn. 59. See Burgess & Stock's Case, 31 L. J. Ch. 749; 2 J. & H. 441; Natusch v. Irving, in Gow. on Partnership, app. ii.

[6] Pennsylvania Casualty Co., Re, 36 Pa. Co. Ct. Rep. 635, act May 1, 1876, P. L. 53, as am'd by act July 9, 1897, P. L. 239.

[7] Mutual Fire Ins. Co. v. DeHaven, 18 Wkly. Notes Cas. (Pa.) 125, 5 Atl. 65.

[8] Denver Fire Ins. Co. v. McClelland, 9 Col. 11, 9 Pac. 771, 59 Am. Rep. 134.

[9] State Life Ins. Co. v. Nelson, 46 Ind. App. 137, 92 N. E. 2.

[10] Matt v. Roman Catholic Mut. Soc. 70 Iowa, 455, 30 N. W. 799.

and against accidents, injuries, etc., resulting from traveling or general accidents by land or water.[11]

A company also has power to reject an application, and is not bound by a contract by its agent in retaining the premium note while endeavoring to induce it to reconsider its action.[12] But it has no power to purchase upon credit the mortgage obligation of one insured by the company and entitled to indemnity for a loss, for the purpose of setting off such mortgage against the policy,[13] nor can such company treat as profits, subject to be divided, premiums received upon unexpired risks, when it has a fund sufficient, independent thereof, to meet all liabilities that might accrue on the pending risks, and dividends thus paid may be reclaimed by the corporation.[14]

If a corporation has received the benefits and retains the advantages of a contract it cannot escape its obligations upon a plea of ultra vires.[15]

§ 334a. Same subject: power of corporation to insure life of its president.—A corporation has no implied power to insure the life of its president for its benefit and carry the policy after he has retired from office, and a stockholder who has not consented to or acquiesced in a threatened ultra vires act of the company may enjoin it. In such a case the question of insurable interest, and of assignment to one without such interest arises although not very clearly involved here.[16]

§ 335. Forfeiture of charter.—Where the legislature repeals a statute under which an insurance company is organized, and declares its charter forfeited except it comply with certain requirements, outstanding policies of the company are not canceled by such repealing act, notwithstanding the company fails to comply with the provision of such act,[17] and an insurance company does not forfeit its charter because of nonuser, by refusing to insure against extrahazardous risks.[18] But it forfeits its franchise by de-

[11] American Fidelity Co. v. Bleakley, 157 Iowa, 442, 138 N. W. 508.

[12] Otterbein v. Iowa St. Ins. Co. 57 Iowa, 274, 10 N. W. 667.

[13] Kansas Ins. Co. v. Craft, 18 Kan. 283.

[14] Lexington Life, Fire & Marine Ins. Co. v. Page & Richardson, 17 B. Mon. (Ky.) 412.

[15] Hyde v. Equitable Life Assur. Soc. 116 N. Y. Supp. 219, 61 Misc. 518; Knott v. Security Mutual Ins. Co. 161 Mo. App. 579, 144 S. W. 178, 41 Ins. L. J. 843. See § 331 herein.

[16] Victor v. Louise Cotton Mills, 148 N. Car. 107, 16 L.R.A.(N.S.) 1020n, 16 Amer. & Eng. Annot. Cas. 291, 61 S. E. 648. See §§ 888, 914–919, 935b herein.

On right of corporation to insure life of officer for benefit of corporation, see notes in 16 L.R.A.(N.S.) 1020, and L.R.A. 1915F, 979.

[17] Manlove v. Commercial Mut. Fire Ins. Co. 47 Kan. 309, 27 Pac. 979.

[18] State ex rel. Corwin v. Urbana & C. Mut. Ins. Co. 14 Ohio 6.

liberately exceeding the amount for which it is allowed by law to issue policies on any one life, thus intentionally attempting to evade the insurance law in one of its most important provisions.[19] And where the making of prohibited insurance contracts is the only business the company is transacting it constitutes a ground for forfeiture of its charter even though it has authority to validly do other things.[20] So a company may be ousted of all rights, privileges and franchises, because of the violation of the state laws by their agents through whom they do business.[21]

[19] International Fraternal Alliance v. State, 86 Md. 550, 40 L.R.A. 187, 39 Atl. 512.

[20] State (ex rel. Fishback) v. Globe Casket & Undertaking Co. 82 Wash. 124, L.R.A. 1915B, 976, 143 Pac. 878.

[21] State (ex rel. Crow) v. Firemen's Fund Ins. Co. 152 Mo. 1, 45 L.R.A. 363.

CHAPTER XV.

INDIVIDUALS, UNINCORPORATED ASSOCIATIONS, LLOYDS, PARTNERSHIPS.

§ 335a. English and American Lloyds systems compared.
§ 335b. Individuals, unincorporated associations, Lloyds: Alabama.
§ 335c. Same subject: Florida.
§ 335d. Same subject: Georgia.
§ 335e. Same subject: Illinois.
§ 335f. Same subject: Kentucky.
§ 335g. Same subject: Massachusetts.
§ 335h. Same subject: Minnesota.
§ 335i. Same subject: Mississippi.
§ 335j. Same subject: Missouri.
§ 335k. Same subject: New Jersey.
§ 335l. Same subject: New York.
§ 335m. Same subject: Ohio.
§ 335n. Same subject: Pennsylvania.
§ 335o. Same subject: decisions inferentially bearing thereon.
§ 335p. Partnerships as insurers.

§ 335a. English and American Lloyds systems compared.[1]—Many of the American Lloyd's policies or agreements are very intricate in their provisions and it is difficult to determine, from those which have been before the courts, to what extent they differ from the English Lloyds policies. Certain differences, however, exist between the two systems, such as the form of underwriting and mode of execution of the policy or contract; the power and authority of the agent or manager, and the nature of the agency; the parties to an action to recover the loss; and the nature and extent of their liability. The exact status of the American Lloyds is necessarily dependent upon the terms of their agreement as construed by the courts, although it is somewhat in the nature of a limited liability partnership.[2] So in a New York case it is stated that the present

[1] See §§ IVa, IVc, herein.

[2] As to *plan* see:

United States.—Richmond Cedar Works v. Buckner, 181 Fed. (U. S. C. C. 1910) 424 (composed of underwriters residing for the most part in Canada: known as New York Commercial Underwriters): Sumner v.

use of the term "American Lloyds" has no other signification than to designate a partnership or an organized association of individual underwriters.[3] In Alabama, however, it is declared that the policy is the contract of a "company" or "association" which is not a partnership in a legal sense and in no sense a corporation.[4] It is declared in a New Jersey case that a Lloyds insurance originally was an insurance based upon a fund made up of deposits by each one of the members from which when a loss was adjusted, the agent took the means of payment. In this country, in adopting the Lloyd's system of insurance, money representing the entire insurance was not deposited. In lieu of such a deposit the members each contributed a certain sum to make up a fund, and each contracted with agents, who were the representatives of the association, to pay in from time to time so much as should be needed to pay losses. Under the Lloyd's system of insurance, after the loss was adjusted or ascertained by action against the agents, the insured received from the fund so provided the amount of loss. The fund deposited was in the strictest sense a trust fund for the benefit of persons holding policies. Under the Lloyd's system, as adopted in

Piza (U. S. D. C. 1899) 91 Fed. 677 (composed of thirty persons called South & North American Lloyds. Policy signed in behalf of the thirty by attorneys).

Alabama. — Hoadley v. Purifoy (1894) 107 Ala. 276, 30 L.R.A. 351, 18 So. 220 (business was carried on in manner of ancient Lloyds).

Florida.—State (ex rel. Hoadley) v. Board of Ins. Commissioners (1896) 37 Fla. 564, 33 L.R.A. 288, 20 So. 772 (South & North American Lloyds. See 91 Fed. ante; this note).

Georgia.—Fort v. State (1893) 92 Ga. 8, 23 L.R.A. 86, 18 S. E. 14 (guarantee and accident, Lloyds, a voluntary unincorporated association consisting of one hundred natural persons).

Illinois. — Warfield-Pratt-Howell Co. v. Williamson (1908) 233 Ill. 487, 84 N. E. 706; Clark v. Spafford (1892) 47 Ill. App. 160.

Missouri.—State v. Stone, 118 Mo. 388 (1892) 25 L.R.A. 243, 40 Am. St. Rep. 388, 24 S. W. 164.

New Jersey.—Durbrow v. Eppens, (1900) 65 N. J. L. 10, 46 Atl. 582.

New York.—Imperial Shale Brick Co. v. Jewett (1901) 169 N. Y. 143, 62 N. E. 167, 31 Ins. L. J. 376; Thompson v. Colonial Ins. Co. (1900) 68 N. Y. Supp. 143, 33 Misc. 37, case aff'd 70 N. Y. Supp. 85, 60 App. Div. 325; New York Board of Fire Underwriters v. Whipple & Co. (1898) 55 N. Y. Supp. 188, 36 App. Div. 49; Gough v. Sutterlee, 52 N. Y. Supp. 492, 32 App. Div. 33 (Provisions declared very complicated and their meaning obscure and doubtful, per Cullen, J., *Id.* 36).

Ohio.—State (ex rel. Richards) v. Ackerman, 51 Ohio St. 163, 24 L.R.A. 298, 37 N. E. 828 (plan stated in note, § 335j herein).

[3] Fire Department of City of N. Y. v. Stanton, 159 N. Y. 225, 232, 54 N. E. 28, per Gray, J., case affirms 57 N. Y. Supp. 1138, 38 App. Div. 640, which affirms 28 App. Div. 334, 51 N. Y. Supp. 242, on opinion there. See also Balli v. White, *considered* in next following note herein.

[4] Hoadley v. Purifoy, 107 Ala. 276, 30 L.R.A. 351, 18 So. 220.

this country, the trust in favor of the insured consists of the amount deposited by each member and the covenant on the part of each member to pay in money enough to answer the amount due from him upon such loss.[5]

§ 335b. Individuals, unincorporated associations, Lloyds: Alabama.—In Alabama incorporation has been held not a prerequisite to engaging in the business of fire insurance in that state; there being no statute law, nor any principle of public policy precluding citizens of the state acting as individuals, associations, partnerships, or companies from engaging in such business without being first incorporated, and it was also held that under the Federal Constitution the citizens of each of the United States are entitled to "like privileges and immunities, and that citizens of other states, not incorporated were not required to have a license to engage in the fire insurance business in said state" being entitled to the same privileges and immunities as unincorporated citizens of that state.[6]

[5] Durbrow v. Eppens (1900) 65 N. J. L. 10, 19, 46 Atl. 582, 585, per Depue, C. J.

It is said in a New York case that, "The modern methods of these associations merit notice. Instead of passing the proposed policy of the applicant among the members, that each may underwrite for such portion of the required amount as he wishes to become liable for, according to the early practice at Lloyds, the underwriters at the metropolitan Lloyds (in common with those of other associations in this state) organized for business by executing a formal instrument declaring their purpose, and authorizing attorneys in fact to issue policies in their names, binding each underwriter severally to an equal amount. These attorneys determined what risks the underwriters should assume, and the premiums to be paid therefor, and, in effect, become the chief executors and managing agents of the enterprise, having almost unlimited power in that regard. . . . These associations are anomolous institutions, not corporations, or joint stock companies, though in some respects resembling both, but a combination of individuals acting concretely as insurers. The members are not partners for they do not bind themselves jointly, but severally, in a specified amount, until the sum insured for is made up. In England, where these institutions originated, they have been alternately called 'clubs,' 'societies,' 'associations,' and 'individual underwriters.' There the contract has been held legal where the members bound themselves severally for specified amounts, but void, as contrary to the insurance laws of that country, when the underwriters undertook a joint liability on joint capital. Lees v. Smith, 7 Term. R. 338; Strong v. Harvey, 3 Bing. 304, 11 Moore, 73; Harrison v. Millar, 2 Esp. 513, 7 Term. R. 340, note; Bromley v. Williams, 32 Beav. 177, 32 Law J. Ch. 716. While the extent of liability of each underwriter is specially limited to his individual share of the loss, the rules of law applicable to insurers generally must in other respects determine when a liability under the policy arises." Balli v. White (1897) 47 N. Y. Supp. 197, 203, 21 Misc. 285, 292, per McAdam, J.

[6] Hoadley v. Purifoy, 107 Ala. 276, 30 L.R.A. 351, 18 So. 220. In this case the business was carried in the manner of ancient Lloyds. It was

§ 335c. Same subject: Florida.—Under a Florida decision unincorporated associations or individuals are authorized to obtain a certificate of authority to engage in the business of insurance in that state upon compliance with certain statutory requirements. The Federal constitution places citizens of each state upon the same footing as citizens of other states so far as the advantages from citizenship in those states are concerned. The privileges and immunities thus secured to citizens of each state in the several states are those which are common to the citizens of other states under their constitution and laws by virtue of their status as citizens.[7]

§ 335d. Same subject: Georgia.—In Georgia a Lloyds voluntary association, consisting of natural persons merely, and unincorporated, could not be licensed to transact business in that state [8] under the Act of 1887,[9] as that enactment only included chartered companies. The legislature, however in 1893 [10] passed an act which provided that "all laws regulating the business of insurance in this state by companies are applicable to individuals, associations, and corporations in like business," so that a license became necessary in such cases.[11] And the Code of 1911 in one section recognizes individuals,[12] although another section, which provides that

also held that only chartered insurance companies are included within Ala. Acts 1886-87, p. 85, requiring all insurance companies doing business in the state, "whether chartered by the state or admitted from other states," to have an actual capital of not less than $100,000.

"The term 'insurance company,' as used in this article, includes every company, corporation, association or partnership organized for the purpose of transacting the business of insurance." Art. II. c. V., Tit. 12 Ala. Code secs. 1205, 1206, 1207, regulating the subject of fire and marine insurance within that state by foreign companies construed in Noble v. Mitchell (1896) 164 U. S. 367, 41 L. ed. 472, 17 Sup. Ct. 110, following the state court decision in Noble v. Mitchell, 100 Ala. 519, 25 L.R.A. 238 (annotated on restrictions on insurance by unincorporated associations or individuals; Lloyds associations) 14 So. 581.

[7] State (ex rel. Hoadley) v. Board of Ins. Commissioners, 37 Fla. 564, 33 L.R.A. 288, 20 So. 772; Revenue act of 1895, c. 4380, sec. 3, Fed. Const. Art. 4, sec. 2. See also Peninsular Industrial Ins. Co. v. State, 61 Fla. 376, 55 So. 398. As to requirements as to associations, firms and individuals transacting insurance. See Fla. Genl. Stat. 1906, pp. 1078 et seq. secs. 2757 et seq. Laws 1909, p. 32, c. 5887 (No. 18).

[8] Fort v. State (1893) 92 Ga. 8, 23 L.R.A. 86, 18 S. E. 14.

[9] Acts 1887, p. 114, embodied in sec. 2032, Civ. Code 1895.

[10] Acts 1893, p. 81, Civ. Code 1895, sec. 2071.

[11] Jalonick v. Green County Oil Co. 7 Ga. App. 309, 66 S. E. 615, per Hill, C. J.

[12] "The contract of fire insurance is one whereby an individual or company, in consideration of a premium paid, agrees to indemnify the assured against loss by fire to the property described in the policy, according to the terms and stipulations thereof. Such contract, to be binding must be in writing; but delivery is not necessary if, in other respects, the con-

insurance companies must be licensed, covers only chartered domestic or foreign insurance companies.[13]

§ 335e. Same subject: Illinois.—Under an Illinois decision, where there is nothing in the statutes of a state prohibiting citizens thereof from transacting insurance business, and nothing abridging or restricting such privilege, and when not precluded by public policy an individual has the right to engage in said business. And a foreign citizen has the same right as an individual to engage in the insurance business as has a citizen of the state. Underwriters residing without the state cannot be discriminated against. If citizens of a state can without restriction, enter into contracts of insurance, the same right is guaranteed under the Federal constitution to citizens of other states. It was also held in the same case that an agent acting for citizens of another state or individuals not incorporated nor acting as partners was not liable for a penalty for acting for a foreign insurance company without complying with the requirements of the statute governing insurance companies doing business in Illinois.[14] In another case in that state the question was whether any association or number of persons was acting in the state as a corporation without being legally incorporated, and it was held that they were so acting as a corporation in limiting their liability to the amount of money contributed by each, and in assuming to give perpetuity to the business by making membership certificates transferable by the assignment of the member or his personal representatives and the fact that such individuals can be held legally liable upon the policies issued by them does not make them any the less a corporation and a judgment quo warranto will be granted. It was declared that even if individuals could insure property against loss by fire they must act either openly upon their responsibility as individuals, or must become incorporated.[15] In an earlier case a Lloyds certificate was issued for membership in a proposed mutual fire insurance company acting as individuals to indemnify each other. A like certificate was issued by an attorney in fact, except as to date, amount, and premium. The company had filed its declaration and charter, etc., and when licensed and organized and the application for membership became operative, the above agreement was to become ended provided the company then delivered a standard form of policy to applicant. The agreement was provisional and temporary only until the corporation was licensed. It was held

tract is consummated." Ga. Code 1911, p. 650, sec. 2470 (sec. 2089). See also Clark v. Spofford, 47 Ill. App. 160. See also §§ 713, 714 herein.

[13] Ga. Code 1911, p. 627, sec. 244 (sec. 2032).

[14] Barnes v. People, 168 Ill. 425, 513, 37 N. E. 842.

[15] Greene v. People (1894) 150 Ill. 91 N. E. 91.

that at common law any number of people could enter into mutual covenants to indemnify each other and unless restricted by statute such agreements would be valid. It was also decided that the enforcement of a proportionate contribution from the numerous parties to the agreement for mutual indemnity, and ascertainment and assessment of proportionate shares for such parties were proper subjects for a court of equity.[16]

§ 335f. Same subject: Kentucky.—It is declared in a Kentucky case that an insurance company exercises no special or exclusive privilege not allowed by law to natural persons, and that the statutes of that state recognize the common law right of individuals to make contracts of insurance.[17]

§ 335g. Same subject: Massachusetts.—The Massachusetts statute of 1907 [18] includes all corporations, associations, or individuals, in its declaration of what shall be deemed to be life insurance companies.[19]

§ 335h. Same subject: Minnesota.—Under a Minnesota decision all corporations, associations and partnerships or individuals must comply with the law requiring a license to do business as they are enumerated in the statute.[20]

§ 335i. Same subject: Mississippi.—In Mississippi one section of the Code specifies the concerns subject to the insurance laws, which are: all companies, corporations, partnerships, associations, individuals and fraternal orders, whether domestic or foreign, thereby clearly including every possible character of association or organization doing an insurance business of any kind whatsoever, and this purpose of the legislature is further expressed by other sections of said Code which prohibit any foreign insurance company from doing business in that state until it has complied with certain conditions precedent and which define the word "company" to mean: all corporations, associations, partnerships or individuals, etc.[1]

§ 335j. Same subject: Missouri.—In Missouri a statute providing that "no company" shall transact an insurance business within the

[16] Clark v. Spofford (1892) 47 Ill. App. 160.

[17] Aetna Life Ins. Co. v. Coulter, 25 Ky. L. Rep. 193, 197, 74 S. W. 1050, a case of assessment of foreign company for franchise tax.

[18] Rev. L. 1907, c. 118, sec. 65.

[19] This statute is construed in Curtis v. New York Life Ins. Co. 217 Mass. 47, 104 N. E. 553, 43 Ins. L. J. 551, fully considered under § 336f herein.

[20] State v. Beardsley, 88 Minn. 20, 92 N. W. 72. Gen. Laws 1895, c. 175, § 101. See Seamans v. Christian Bros. Mill. Co. 66 Minn. 205, 68 N. W. 1065.

[1] Code Miss. 1906, p. 766, c. 69, secs. 2559, 2562, 2563, 2606. See Laws 1910, amd'g c. 69, also Id. sec. 2559, covering Lloyds. Said sections are construed in State v. Alley, 96 Miss. 720, 51 So. 467, 39 Ins. L. J. 629.

state without having received proper license to do so from the state insurance superintendent, includes individuals or associations of individuals, as well as incorporated companies. A state also has the right to prescribe reasonable conditions upon which insurance business may be carried on within its limits by individuals as well as by corporations, provided that it does not discriminate between citizens of equal standing and merit within or without the state.[2]

§ 335k. Same subject: New Jersey.—Under a New Jersey decision it is held that a fire Lloyds association is not prohibited from making contracts of insurance there by the laws of 1896.[3] And in an earlier case in that state it is declared that an action founded upon what is familiarly known as a Lloyds contract or policy of insurance where insurers are such as individuals and not a corporate insurance company and where liability for loss is several and not joint that the validity of such insurance in the absence of a statute prohibiting the same is well established.[4]

§ 335l. Same subject: New York.—It is declared in New York that an American Lloyds is not a corporation under the laws of that state.[5] But it is also decided in that state that attorneys in fact

[2] State v. Stone, 118 Mo. 388, 25 L.R.A. 243, 40 Am. St. Rep. 388, 24 S. W. 164. Agent here was charged with a violation of Rev. Stat. Mo. 1889, sec. 5916, by representing as agent certain individuals in writing for them a policy agreeing to indemnify against accident, before said individuals had procured a license to do business in Missouri. See also State (ex rel. Inter-Insurance Auxiliary Co.) v. Revelle, 257 Mo. 529, 165 S. W. 1084, Laws 1911, p. 301.

Individuals are not debarred from acting as insurers under the laws of Missouri; they are only required to conform to the statutory regulations on the subject. State v. Phelan, 66 Mo. App. 548, 558, *citing* State v. Stone, 118 Mo. 388, 25 L.R.A. 243, R. Stat. 1889, c. 89.

[3] Sun Ins. Office v. Merz (1900) 64 N. J. L. 301, 52 L.R.A. 330, 45 Atl. 785, 29 Ins. L. J. 344, an insurable interest case. N. J. Pub. L. 1896, p. 156, Pub. acts March 26, 1896, amd'g act March 25, 1895.

[4] Enterprise Lumber Co. v. Mundy (1899) 62 N. J. L. 16, 55 L.R.A. 193, 42 Atl. 1063, Id. 21, per Lippincott J.

Citing Alabama.—Noble v. Mitchell, 100 Ala. 517, 25 L.R.A. 238, 14 So. 581.

Florida.—State (ex rel. Hoadley) v. Board of Ins. Commissioners, 37 Fla. 564, 33 L.R.A. 288, 20 So. 772.

Georgia.—Fort v. State, 92 Ga. 8, 23 L.R.A. 86, 18 S. E. 14.

Michigan.—Clay F. I. Co. v. Huron Salt Lake Co. 31 Mich. 346.

Missouri.—State v. Stone, 118 Mo. 388, 25 L.R.A. 243, 40 Am. St. Rep. 388, 24 S. W. 164.

New Hampshire.—Union Ins. Co. v. Smart, 60 N. H. 458.

Pennsylvania.—Commonwealth v. Vrooman, 164 Pa. St. 306, 44 Am. St. Rep. 603, 25 L.R.A. 250, 30 Atl. 217; Arrott v. Walker, 118 Pa. 249, 12 Atl. 280; Commonwealth v. Reinhold, 3 Pa. Dist. Rep. 287.

[5] Fire Department of City of N. Y. v. Stanton, 159 N. Y. 225, 232, 54 N. E. 28, per Gray, J. a case of special tax, payable to city fire department, upon agents of associations of individual fire underwriters not incorpo-

of an unincorporated Lloyds association who insure in New York City, vessels, freight, cargo and automobiles against fire are engaged in business so as to become obligated for their share of assessments for the benefit of a fire patrol.[6] And under the New York laws of 1892,[7] all persons, partnerships or associations were required to do certain acts as conditions precedent to doing business there, but it was thereafter provided by the laws of 1894,[8] that said provision should not apply to individuals, partnerships, or associations of underwriters known as "Lloyds" or as individual underwriters which were theretofore on a date specified[9] lawfully engaged in business there, and not required to report to the superintendent of insurance or the insurance department.[10] It was thereafter made unlawful for any such association or copartnership, or individual underwriters to engage in or transact the business of insurance after a specified date[11] unless it had complied with certain conditions precedent.[12]

§ 335m. Same subject: Ohio.—In Ohio an unincorporated guaranty and accident Lloyds association of another state, which issues policies in that name and has a board of managers with powers like those of corporate directors, to whom each member gives a power of attorney for management of the business, and the members of which contract for several liability to a limited amount, with the right to transfer their membership, must be held, when conducting business in Ohio without compliance with the conditions of the statutes, to be exercising a franchise and acting as a corporation so as to be subject to quo warranto proceedings.[13]

rated by laws of New York, and of application of statute § 523, N. Y. City Consol. Act, Laws 1882, c. 410, case affirms 57 N. Y. Supp. 1138, 38 App. Div. 640, which aff'd 51 N. Y. Supp. 242, 28 App. Div. 334, on opinion there.

[6] New York Board of Fire Underwriters v. Higgins (1909) 114 N. Y. Supp. 506, 130 App. Div. 78, aff'd (1910 without opinion) 198 N. Y. 634, 92 N. E. 1093, under N. Y. Laws, 1867, p. 2113, c. 846, organizing a fire patrol corporation, etc. See also New York Board of Fire Underwriters v. Whipple, 55 N. Y. Supp. 188, 36 App. Div. 49, under same statute.

[7] N. Y. Laws 1892, c. 690.

[8] N. Y. Laws 1894, c. 684, amd'g sec. 57.

[9] On Oct. 1, 1892.

[10] Statutes construed in People v. Loew, 23 Misc. 574, 52 N. Y. Supp. 799, where a Lloyds association was held to be unlawfully engaged in business, as they were transferees of certain Lloyds which had not organized in good faith but only for purposes of sale and so were not within the exception noted in the above text. See People v. Loew, 44 N. Y. Supp. 42, 19 Misc. 248.

[11] Sept. 1, 1902.

[12] Laws 1902, c. 297, Laws 1903, c. 471. See Parkers N. Y. Ins. Law (1914) p. 79.

[13] State (ex rel. Richards) v. Ackerman, 51 Ohio St. 163, 24 L.R.A. 298, 37 N. E. 828. The court, per Williams, J. said: "It is claimed, however, that the laws of Ohio do not apply to the defendants, because they

§ 335n. Same subject: Pennsylvania.—In Pennsylvania the Act of 1870 [14] prohibited any person, partnership or association, to issue, sign or seal, or in any manner execute any policy of insurance, contract or guaranty, against loss by fire or lightning, without authority expressly conferred by a charter of incorporation, and making such policy so executed etc. void. The act was entitled "An Act to prevent the issue of unauthorized policies of insurance." In a case

are not an organized corporation, company or association, or acting as such, but that, in making contracts of insurance, each individual acts for himself. A careful consideration of their plan of business, as shown by the articles of agreement and powers of attorney executed by the defendants, has brought us to a different conclusion. They have associated themselves together in a business undertaking, under a company name, in which, viz: 'Guarantee and Accident Lloyds, New York,' all of their policies are issued. Each subscriber to the articles has contributed an equal amount to the capital stock of the concern, which is placed in the control of a board of managers, called an advisory committee, to meet losses arising on the policies. This board of managers is chosen by the subscribers, like directors of a corporation, and invested with powers quite as plenary. All the subscribers have executed powers of attorney to the same individuals, investing them with the business management of the insurance, under the supervision of the advisory board. The powers conferred on the attorneys in fact are analogous to those of the executive officers of a corporation. They execute the policies, keep accounts of the business and expenses, which are open to the inspection of the advisory board adjust all losses, and prosecute and defend all suits growing out of the business. Each member of the association stipulates with the others that no policy shall be issued unless it is executed in behalf of all, and yet, that his liability shall be several only, and limited to the amount contributed to the fund, or authorized by him; so that, if some of the members become insolvent, and their contribution is exhausted by losses, or otherwise, the policy shall be enforceable against the others only for an aliquot part equal to the proportion of the solvent to the insolvent members. The liability of a stockholder of a corporation is not more restricted. Then, the interest of each member in the concern is made transferable; a member who wishes to withdraw being authorized to procure another to take his place, and the representative of a deceased member may transfer the latter's share in like manner, and, in that way, the organization may be made as enduring as it is possible for any corporation to be. The association has the appearance, and some of the characteristics of a corporation formed for the purpose of doing a general insurance business in its line, and its form of policies and mode of conducting its business are calculated to impress one who does not make a critical examination, with the belief that it is a corporation, conforming to the usages of such companies." State v. Ackerman (1894) 51 Ohio St. 163, 195, 196, 37 N. E. 828, 24 L.R.A. 298, per Williams, J. This decision is cited as ruling that foreign insurance companies, whether incorporated or not were required, as a condition precedent to doing business in the State, to obtain a certificate of authority so to do and that the privilege so conferred was a franchise. John Hancock Mutual Life Ins. Co. v. Warren, 181 U. S. 73, 74, 75, 45 L. ed. 755, 21 Sup. Ct. 535.

[14] Act Feb. 4, 1870, P. L. 14.

of indictment for issuing a policy of insurance in violation of the above, it appeared that defendant acting for himself and five others had issued a policy of insurance and contract of guaranty against loss by fire. It was held that the statute was a valid exercise of the police power of the state; that it did not prohibit but merely regulated the business of insurance; that it did not strike at the privilege of citizenship nor discriminate between citizens of that state and those of other states; that it did not deny but merely regulated the right to acquire, possess and protect private property, and did not violate either the Federal or state constitution.[15] And the above reasons as to the police power are declared applicable to life insurance, although the statutes other than the above Act of 1870 are said not to directly prohibit issuing a life policy and that an individual's right at common law to make a contract of any kind of insurance seems to be admitted.[16] Again, the words "insurance companies," in the Pennsylvania statutes of 1876, and 1873, have reference only to incorporate insurance companies and not to unincorporated insurance companies of individual underwriters, such as Lloyds, and therefore an agent of individual underwriters of another state is not liable to the penalty under the statute of 1876 imposed upon insurance agents for issuing policies of insurance without a license.[17] So a contract of insurance or guaranty against fire made by a private person, whose incompetency to make it both parties are bound to know, is void under the Pennsylvania statute of 1870 providing

[15] Commonwealth v. Vrooman, (1894) 164 Pa. 306, 25 L.R.A. 250, 44 Am. St. Rep. 603, 30 Atl. 250 (Three justices dissented) said to be pioneer case in that state on question of constitutionality of statute denying right of unincorporated persons to do insurance business. In the court below there was a discussion of the right of individuals to insure others against loss by fire. See also opinions of Sterrett, C. J., Dean, J. and Green, J.

[16] Unincorporated Insurance Business (Atty. Genl. 1906) 32 Pa. Co. Ct. R. 35. See Act April 4, 1873, sec. 9, 12, Pub. L. 20, am'd by Act June 23, 1885, Pub. L. 134. License of individual underwriters, partnerships and unincorporated life associations should in absence of judicial determination be refused. Id. See also Life Insurance (Atty. Genls. opinion 1906) 63 Leg. Intell. 79, 15 Dist. Rep. 126, as to police power, see Joyce on Franchises (ed. 1909) sec. 366, note p. 582; Joyce on Electric Law (2d ed.) sec. 215, note p. 392.

In an opinion by the attorney general of Pennsylvania, the Act of May 8, 1899, it was declared that in construing the laws relating to licensing insurance agents, firms or copartnerships were not to be recognized in any way, and non-resident individuals could under no circumstances transact business in the state, but licenses were to be issued to agents individually, and that said licensed agents were required to sign all policies in their individual names. Opinion of Atty. Genl. 8 Pa. Dist. Rep. 354, 56 Leg. Int. 290. See License in Pennsylvania, In re, 3 Pa. Dist. Rep. 822.

[17] Commonwealth v. Reinoehl (1894) 163 Pa. 287, 25 L.R.A. 247, 20 Atl. 896.

that a contract of insurance or guaranty against loss by fire or lightning could not be issued by any person, partnership or association without authority expressly conferred by a charter of incorporation given according to law.[18]

§ 335o. Same subject: decisions inferentially bearing thereon.—In addition to the preceding decisions there are numerous cases inferentially bearing in a greater or less degree, upon the right of these associations or individual underwriters to insure. Certain of these decisions are noted here, but they are hereinafter more fully considered. They determine the nature and extent of liability of such associations, actions to enforce the same, parties thereto, rights and remedies, proofs of loss, etc.[19]

[18] Arrott v. Walker, 118 Pa. 249, 12 Atl. 280.

[19] *United States.*—Richmond Cedar Works v. Buckner (U. S. C. C. 1910) (right to sue in Federal Courts; noncompliance with state laws; agreement to jointly and severally insure; pleadings). Sumner v. Piza (U. S. D. C. 1899) 91 Fed. 677 (liable for proportionate share of entire amount; assured may proceed against anyone of associates, and hold each for whole amount until satisfaction had, but cannot sue jointly). McAllister v. Hoadley (U. S. D. C. 1876) 76 Fed. 1000 (several liability to assured for whole subscription; contribution).

Alabama.—Hoadley v. Purifoy (1894) 107 Ala. 276, 30 L.R.A. 351, 18 So. 220 (mandamus to compel issue of license; each underwriter liable for fixed amount, but not for whole or any part of another's liability).

Illinois.—Warfield - Pratt - Howell Co. v. Williamson (1908) 233 Ill. 487, 84 N. E. 706 (need not sue each separate member; all members need not be made parties; when association liable for loss); Barnes v. People (1897) 168 Ill. 425, 48 N. E. 91 (same decision as to liability as 107 Ala. above cited); Blair v. National Shirt & Overalls Co. (1907) 137 Ill. App. 413 (each liable for amount fixed; agent no authority to stipulate as to number of suits and jurisdiction.)

New Jersey.—Enterprise Lumber Co. v. Mundy (1899) 62 N. J. L. 16, 55 L.R.A. 193, 42 Atl. 1063 (condition valid that action must be brought only against attorney in fact).

New York.—Imperial Shale Brick Co. v. Jewett (1901) 169 N. Y. 143, 62 N. E. 167, 31 Ins. L. J. 376 (underwriters jointly liable, except one who had revoked his power of attorney etc.), modifying 60 N. Y. Supp. 35, 42 App. Div. 588; Unterberg v. Elder (1911) 72 Misc. 363, 130 N. Y. Supp. 166 (policy must be issued in compliance with joint powers of attorney); Kriegman v. Dunphy (1910) 66 Misc. 221, 122 N. Y. Supp. 1116 (supplementary proceedings); McLean v. Tobin (1908) (action lies against attorneys in fact); Burke v. Rhoades, 79 N. Y. Supp. 407, 39 Misc. 208, aff'd 81 N. Y. Supp. 1045, 82 App. Div. 325 (not liable when limited fund exhausted, unless, etc.) Cook v. Loew, 69 N. Y. Supp. 614, 34 Misc. 276 (when not liable for entire subscriptions); Ketchum v. Belding, 68 N. Y. Supp. 1099, 58 App. Div. 295 (conditions precedent to suing individual underwriters, valid); Thompson v. Colonial Assur. Co. (1900) 68 N. Y. Supp. 143, 33 Misc. 37, aff'd 70 N. Y. Supp. 85, 60 App. Div. 325 (case of associate's individual right to sue reinsurers); Conant v. Jones (1900) 64 N. Y. Supp. 189, 50 App. Div. 336 (action on judgment against general manager and attorney in fact); American Lucol Co. v. Lowe,

§ 335p. Partnerships as insurers.—The citizens of a state are entitled to carry on insurance business as partnerships or companies, in the absence of any prohibitory statute and this includes citizens of foreign states.[20] But under a South Carolina decision articles of agreement that the members of an insurance company should each bear his proportion of the losses, without any negative words that they should not be liable for more in case of insolvency of some of the parties, is an ordinary copartnership; the members are bound in solido, each for the whole; not only as to strangers, but as to members of the company, who have procured insurance.[1] And in Penn-

58 N. Y. Supp. 687, 41 App. Div. 500 (right to sue underwriters; condition precedent; misjoinder of parties); New York Board of Fire Underwriters v. Whipple (1898) 55 N. Y. Supp. 188, 36 App. Div. 49 (who may be made party defendant; here held jointly and severally liable on assessment for fire patrol); Gough v. Satterlee (1898) 52 N. Y. Supp. 492, 32 App. Div. 33 (extent of liability of attorney as trustee of trust funds in his hands; when action lies.) Strauss v. Hoadley (1897) 48 N. Y. Supp. 239, 23 App. Div. 360 (liable severally not jointly); Lawrence v. Schaefer, 46 N. Y. Supp. 719, 20 App. Div. 80, 42 N. Y. Supp. 992, 19 Misc. 239 (separate action cannot be first brought against each underwriter but only against attorney of all; condition valid); Walker v. Beecher, 36 N. Y. Supp. 470, 71 N. Y. St. Rep. 458, 15 Misc. 149 (when stipulation complied with as to service of notice and proofs of loss upon attorneys in fact. See § 3312 herein).

Ohio.—State (ex rel. Richards) v. Ackerman, 51 Ohio St. 163, 24 L.R.A. 298, 37 N. E. 828 (liable to extent of subscription; cannot restrict liability); Perrysburg & Toledo Transp. Co. v. Gilchrist (1902) 24 Ohio Cir. Ct. Rep. 165 (when individual member may be sued; clause valid which provides as to party defendant).

[20] Hoadley v. Purifoy, 107 Ala. 276, 30 L.R.A. 351, 18 So. 220 (noted under § 335B herein); as to requirements as to firms, see Fla. Genl. Stat. 1906, pp. 1078 et seq. secs. 2757 et seq. Laws 1909, p. 32, c. 5887 (No. 18).

[1] Shubrick v. Fisher (1802) 2 Des. Eq. 148. In this case the company formed was called "The South Carolina Insurance Company" for the purpose of insuring vessels and cargoes. Several persons formed the company and signed by their agents the policies of insurance. Losses were agreed to be borne by each and every of the several subscribers or members in average or proportion to the sums of money by them subscribed. Each party severally, not jointly, and not one for the other, covenanted that the company should be called the South Carolina Insurance Company; that there should be a president, vice president, director, treasurer, and clerk; that any one of the directors signing a policy on behalf of the company made it binding on all the other members in average and proportion to the sums by them subscribed and that the treasurer should give security for faithful discharge of duties of his office. In case any loss should happen over and above the sums subscribed and deposited as capital, such loss was to be borne by each and every of the subscribers in average and proportion to the sum by him subscribed. The policy in suit was issued in 1777, was signed for said company by one of the members acting for himself and for others as their said agent for such purposes specially constituted.

sylvania, a policy of insurance issued by a partnership without authority expressly conferred by act of incorporation as required by the statute of 1870 is held to be void in its inception.[2] It is also declared in that state that two or more insurance companies may lawfully issue a policy where it distinctly appears that each receives a certain and definite proportion of the premium and assumes only a certain and definite proportion of the liability, although where such company acts only for itself and not for the other no two corporations can engage in a business where, by any possibility, there is such a community of interests as to constitute a partnership. In other words corporations generally have no authority to enter into partnership with individuals or other corporations, and cannot enter into agreements which may create partnerships, and since no authority is given to insurance companies to combine in issuing policies in Pennsylvania such a proceeding is prohibited[3] under a Georgia decision where a policy was issued in the name of the "Underwriters Agency," consisting of four companies, signed by a person acting as agent for all and not of each company, although under the contract each was liable separately to pay his share and each received his share separately of the common premium, still a joint action lay against them for a loss, the contract being a joint one like a partnership with a firm name, but the jury might, it was held under the Code, make their verdict conform to the contract, by finding one-fourth of the loss against each separately.[4] In Minnesota partnerships must comply with the law requiring a license to do business as they are among those enumerated in the statute.[5] And the Mississippi code includes partnerships.[6] So also does the Massachusetts statute of 1907.[7] Under a New Hampshire decision the parties plaintiff suing on a premium note for an insurance contract were held not a corporation, but a partnership or association and so prohibited from doing business in the state until they complied with its statutes but it also held that an insurance contract made in

[2] Weed v. Cumming, 198 Pa. 442, 48 Atl. 409; Act. Feby. 4, 1870, P. L. 14. See also Philadelphia Underwriters, In re (1897) 54 Leg. Intell. 465, 6 Pa. Dist. R. 699 (opinion Atty. Genl.). See § 335k herein. *Examine* Weed v. Cumming, 8 Pa. Dist. R. 320, 56 Leg. Intell. 268, 23 Pa. Co. Ct. 27.

[3] Insurance Policies by Underwriters Agencies, In re (1897) 55 Leg. Intell. 6, 7 Pa. Dist. R. 17 (By Atty. Genl.)

[4] Sutherlin v. Underwriters Agency (1874) 53 Ga. 442. See Sergeant v. Goldsmith Dry Goods Co. (1913) — Tex. Civ. App. —, 159 S. W. 1036.

[5] State v. Beardsley, 88 Minn. 20, 92 N. W. 72. In this case the Home Co-operative Co. was a copartnership organized in another State and its contract with persons not members was held to be one of life insurance. Gen. Laws 1895, c. 105, § 101.

[6] See § 335h herein.

[7] See § 336f herein.

the state was valid even though said parties had failed to comply with the statute and that they could recover on the note.[8] In an Indiana case the Farmers Mutual was an unincorporated fire association of individuals partaking of the nature of a copartnership for the purpose of mutual insurance against fire and lightning. By its agreement a person to be insured must become a member, no capital was provided except a sum sufficient to pay expenses, the business was transacted by its officers, executive committee and other agents. The constitution and by-laws were set out in the policies. It was held that such an association was not a corporation and could not be sued in the company name and, unless another mode was authorized by its articles, the action should be against all the members.[9] Again, it is decided that a partnership contract is invalid where the policies issued are purely wager policies, a speculation upon life and contrary to public policy, even though the beneficiary is entitled to a certain share of the insurance.[10]

[8] Union Ins. Co. v. Smart, 60 N. H. 458.

[9] Farmers Mutual v. Reser (1909) 43 Ind. App. 634, 738, 88 N. W. 353.

[10] Cisna v. Shelby, 88 Ill. App. 385, 20 Nat. Corp. Repr. 546.

CHAPTER XVI.

DIFFERENT FORMS OF INSURANCE CLASSIFIED.

§ 336. Policy against railroad liability for fires is fire, not guaranty, insurance.
§ 336a. Whether inter-insurance or inter-indemnity plans are insurance contracts.
§ 336b. Same subject: agreement between printing companies.
§ 336c. When copartnership agreement is life insurance.
§ 336d. Burial or funeral benefit insurance is life insurance.
§ 336e. Whether annuities are life insurance.
§ 336f. Endowment: pure endowment and annuity contracts.
§ 336g. To what extent tontine insurance is life insurance.
§ 337. Whether contract one of loan or of life insurance.
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§ 337b. Whether policy, life or accident: generally.
§ 337c. Industrial insurance with provisions as to accidental death is not accident insurance.
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§ 337e. Employers' liability or indemnity insurance.
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§ 338a. Burglary insurance.
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§ 338c. When bicycle association not insurance company.
§ 338d. Sanitary inspection of buildings, etc., is not insurance.
§ 338e. Contracts to compensate unemployed employees.
§ 339. When guaranty or surety company contracts constitute insurance.
§ 339a. Fidelity guaranty bonds or contracts constitute insurance.
§ 339b. Same subject.
§ 339c. Contract to indemnify "assured" for banks' default is contract of insurance: bond to secure deposits.
§ 339d. When contract, guaranty bond, mortgage, and securities guaranty, do and do not constitute insurance.
§ 339e. Guarantee to repay loan is contract of insurance.
§ 339f. When building contractors' bonds are insurance contracts.
§ 339g. Title guarantee contract constitutes insurance.
§ 339h. Credit guarantee contracts constitute insurance.
§ 339i. Loss of crops: guarantee of realty revenue constitutes insurance.

§ 336. Policy against railroad liability for fires is fire, not guaranty, insurance.—A contract insuring a railroad company against claims for loss or damage to property occasioned by fire communicated by its locomotives, and for which it is liable under a statute and in which property it has an insurable interest, constitutes fire and not guaranty insurance and such policy may be issued by a company authorized to insure only against loss or damage by fire.[11]

§ 336a. Whether inter-insurance or inter-indemnity plans are insurance contracts.—The contract of inter-insurance involved in a Mississippi case, decided in 1910, is declared to be the first of its kind ever reviewed by any court. The plan is set forth in the appended note. The parties mutually insured each other. The association was a voluntary one but it was neither a "mutual" nor "stock" company, although it possessed features incident to both, and it was held that it came more nearly under the classification of a "mixed" company or association; that the question whether or not an association is doing an insurance business, within the meaning of the statutes of that state, is not affected by the fact that the association confines itself to the insurance of only a particular kind of property, and that such a construction is not unconstitutional; that the determining feature as to the application of insurance laws to an organization, such as this one, lies, not in the name by which it is called but in the business conducted by it; that the contract was clearly one of insurance falling literally within the Code provisions specifying the concerns subject to the insurance laws, also prohibiting any "foreign insurance company" from doing business in that state until it had complied with certain conditions precedent, and defining "company" and a contract of insurance. It was also decided that, in a more complicated form the association was in effect nothing but an insurance association organized for the purpose of profit to its originators, that they did receive a large profit, and in reality constituted the association itself. It was further determined that the business was unlawful, that the association was conducting it unlawfully, and that insurer's agent had unlawfully assumed to act as such in soliciting insurance.[12] In Missouri a statute, providing

[11] Canadian Pacific Ry. v. Ottawa Fire Ins. Co. 11 Ont. L. Rep. 465, 6 Amer. & Eng. Ann. Cas. 567.

[12] State v. Alley, 96 Miss. 720, 51 So. 467, 39 Ins. L. J. 629, under Code of 1906, c. 69, p. 766, secs. 2559, 2562, 2563, 2606. See Laws 1910, amd'g Code 1906, also Id. sec. 2559. Whitfield, C. J., dissenting. The plan in some of its operations was similar to Lloyds, but it differed therefrom in certain important features. The former comprehended an exchange of contracts between the individual underwriters, called "subscribers," consisting of a number of persons, firms, and corporations designated as Manufacturing Lumbermen's Underwriters, whereby the properties of each was to be protected against

that contracts between individuals, firms or corporations, indemnifying each other against fire, casualty, or other contingency or damage do not constitute insurance business, is held unconstitutional as to the title of the act and as to special laws. It is also held that the legislature cannot, within its power to regulate, discriminate or enact class legislation.[13]

§ 336b. Same subject: agreement between printing companies.—In a Missouri case it appeared that in 1906 certain corporations,

loss from fire. It was exclusive in that the association confined itself to the insurance of only a particular kind of property, no contracts of insurance were written for the public, and only known persons engaged in the same business and whose standing was of a satisfactory character acceptable to the others were permitted to subscribe. The exchange of contracts, on account of the number written, was accomplished through an attorney in fact who conducted the plan, to whom each concern entering into contractual relation executed its separate power of attorney. Said attorney in fact received for expenses and services twenty-five per cent of the amount of premiums paid in. His acts were directed by an advisory committee, which acted without pay and was selected from the subscribers. The treasurer was one of the subscribers. In addition to the above twenty-five per cent there was a certain element of profit in that the object of each subscriber joining in the association and taking out insurance was to effect cheap insurance. There was no actual capital other than the premiums paid by those becoming members. The individual subscribers were protected by the privilege of withdrawal at any time. A subscriber's application and note being satisfactory, a contract of indemnity following the standard forms used by insurance corporations, was executed to him by the attorney in fact for the underwriters. The policy, however, set out the various amounts for which each subscriber assumed liability in case of loss, and also contained a provision concerning litigation and fixing liability. Upon delivery of said contract the subscriber paid to the attorneys in fact the amount of a stipulated deposit or "premium," and this was delivered to the treasurer, and by him credited to the several other subscribers in the same proportion in which they assumed liability to the subscriber paying said deposit or "premium." Said sums thus credited were kept in separate and distinct accounts for each subscriber. The rate of premium was based upon that of reputable corporations writing similar risks for profit. The individual amount of indemnity was determined by the relative risk, and was exchanged by each subscriber with the others on a proportionate basis, that is, each agreed to indemnify the others in proportion as he received indemnity. In the event of a loss each contributed his pro rata share, based upon the indemnity that the one who had suffered loss had agreed to indemnify each of the other contracting parties. See plan set forth in Farmers Mutual Fire Ins. Co. v. Cole, 90 Miss. 508.

On contracts, by which individual or firms undertake to indemnify each other, as nuisance, see note in 47 L.R.A.(N.S.) 297.

[13] State (ex rel. Inter-insurance Auxiliary Co.) v. Revelle, 257 Mo. 529, 165 S. W. 1084, Laws 1911, p. 301, Const. art. 4, secs. 28, 53, par. 33. *Compare* Wallace & Co. v. Ferguson, 70 Oreg. 306, 140 Pac. 742, where by a similar enactment such contracts constitute insurance business; Laws 1911, pp. 376, 377, secs.

firms and individuals organized under the name of "The Printers' & Publishers' Reciprocal Underwriters at Printers' Exchange" for the purpose of insuring each other's business establishments. A number of different concerns in different cities became members of the association by signing the preliminary written agreement by which it was created. They indemnified each other against loss by fire. There was a committee of subscribers elected annually, also a manager who underwrote for subscribers in his own name policies of insurance against loss by fire or lightning, to reinsure same, etc. Said manager was under security. He also had power to adjust and settle losses, etc. The organization was not formed for profit but to provide insurance to members at cost. It was held not a contract for creation of insurance business within the statute, but an inter-indemnity contract or exchange.[14]

§ 336c. When copartnership agreement is life insurance.—A contract, although containing other provisions may be one of life insurance, and it is immaterial that such a contract does not on its face purport to be one for insurance and this applies to a copartnership agreement especially where such copartnerships are among those required by statute to obtain a license to do business.[15]

§ 336d. Burial or funeral benefit insurance is life insurance.—Burial insurance being determinable upon the cessation of human life and being dependent upon that contingency constitutes life insurance. So where a contract is issued by an association, to furnish the holder with the burial at his death, at a specified cost, based upon a system of mutual contribution or assessments, the members of the association being both underwriters and underwritees it comes within the above principle and constitutes life insurance in all respects similar to that of a mutual life insurance company, and is within the meaning of a statute regulating such business.[16] So an agree-

1–4, covering also the right of agents to a license, see next following section herein.

[14] Isaac H. Blanchard Co. v. Hamblin, 162 Mo. App. 242, 144 S. W. 880, 41 Ins. L. J. 894.

[15] State v. Beardsley, 88 Minn. 20, 92 N. W. 72. In this case the Home Co-operative Company was a copartnership organized in another state. It consisted of a number of citizens of the latter, and under the above name entered into its contracts as parties of the first part, the parties of the second part being holders merely of the contracts and not in any sense members of the copartnership or company. The company was entitled to all profits and bore all losses if any. A stipulated amount was paid for membership fee and also a certain monthly amount by each contract holder as a premium and there was no provision for levying assessments upon such holders to cover losses. The company assumed all obligations outside of that of the holder to pay his premium.

[16] State v. Willett, 171 Ind. 296, 23 L.R.A.(N.S.) 197 note, 86 N. E. 68, under Burns's Ann. Stat. 1908, sec. 4713, act 1901, p. 374. See also

ment to furnish funeral and requisite accessories when issued by a company organized for the purpose of selling such contracts constitutes life insurance, even though no beneficiary is designated.[17]

§ 336e. Whether annuities are life insurance.[17a]—Annuities are held not to constitute life insurance under a New York decision.[18] The New York insurance law provides for the incorporation of persons for the purpose of making life and health insurance, etc., "and to grant, purchase or dispose of annuities." [19] And in a Michigan case an agreement was made with the defendant, as a consideration for the sale of his business, to pay the vendor a certain monthly sum during his life, and it was contended that the corporation had no power to make such an agreement as it was in the nature of a contract for an annuity and under it the corporation would be practically dealing in life insurance but this contention was not sustained.[20] In a Maryland case the points involved were as to the necessity of a seal and the form of instrument required for the creation of an annuity and the power of a life insurance company to grant an annuity, but the contract was based upon the consideration of a sum certain to pay the annuitant specified sums annually dur-

State (ex rel. Atty. Genl.) v. Wichita Mutual Burial Association, 73 Kan. 179, 84 Pac. 757, under Gen. Stat. 1901, sec. 3386; Fickes v. State, 87 Miss. 251, 39 So. 783, under acts 1902, c. 59, sec. 10. See §§ VIIa, 7c herein.

On burial insurance and funeral benefits, see notes in 23 L.R.A.(N.S.) 197, and 47 L.R.A.(N.S.) 299.

[17] State (ex rel. Fishback) v. Globe Casket & Undertaking Co. 82 Wash. 124, L.R.A.1915B, 976, 143 Pac. 878.

[17a] See VIIc herein.

[18] People v. Security Life Insurance & Annuity Co. 78 N. Y. 114, 7 Abb. N. C. 189, case of receivership and distribution of assets. The court per Earl, J., said: "Fifth. There are several annuitants of this company—persons to whom the company, for gross sums paid, agree to pay certain sums annually during life. . . . These are not cases of insurance, and they are not to be governed by any of the rules applicable to life insurance." Id. 128.

[19] N. Y. Laws 1909, c. 33, sec. 70, c. 28, Consol. Laws; Laws 1914, p. 505, c. 204, sec. 70. Valuation of annuities; provisions as to lapsed or forfeited policies and annuities; deferred annuities. Laws 1909, c. 33, secs. 84, 88, c. 28, Consol. Laws.

[20] Lee v. United States Graphite Co. 161 Mich. 157, 125 N. W. 748. The court, per Montgomery C. J., said: "It is first insisted that the corporation itself did not have the power to make this agreement, as it was in the nature of an agreement for an annuity, and that this agreement would show the corporation to be practically dealing with life insurance and granting and disposing of annuities. We think this is too narrow a construction. The agreement to pay the plaintiff so much per month during his life was based upon a good and sufficient consideration. It involved more than the mere purchase of annuity. It involved supposed benefits to accrue to the company from time to time. It was only a means of measuring the extent of the consideration which should be parted with for the purchase of this business."

ing life and it was held that said annuity was a mere chose in action for the payment of money, the same as a policy of life insurance.[1]

§ 336f. Endowment: pure endowment and annuity contracts.—Under a Massachusetts decision a distinction is made between an ordinary endowment policy and the contract before the court. The validity under the statutes of that state of pure endowment and annuity contracts is also fully considered. The principal point decided, however, is that a pure endowment contract guarantying the payment of a certain sum to a person if living at the end of five years and if not, then said sum with the premium paid should remain the insurer's property, is not a contract of insurance, within the statutory definitions in Massachusetts, but it is a valid and enforceable contract.[2]

[1] Cahill v. Maryland Life Ins. Co. of Balt. 90 Md. 333, 47 L.R.A. 614, 45 Atl. 180.

[2] Curtis v. New York Life Ins. Co. 217 Mass. 47, 104 N. E. 553, 43 Ins. L. J. 551, under Rev. L. c. 118, sec. 3. The court, per De Courcy J., considers the statutory definition of insurance and says: "The contract in question does not provide for payment upon the 'destruction, loss or injury,' of anything. Under it the defendant assumed the obligation of payment not upon the destruction or loss during the period named, but upon the continuance of the life of Jenness during that period. It is not what is ordinarily known as an endowment insurance policy, under which the sum named in the policy is payable to the insured himself, if he lives a certain length of time, and in the event of his prior death is payable to his beneficiaries, as in the ordinary life policy. Carr v. Hamilton, 129 U. S. 252, 32 L. ed. 669, 9 Sup. Ct. 295; Briggs v. McCullough, 36 Cal. 542; State v. Federal Investment Co. 48 Minn. 110, 50 N. W. 1028. Such a contract is in reality a combination of a contract of investment and one of term insurance; and it is the kind that Jenness first applied for and which the defendant declined to issue. The plaintiff is right in his contention that the policy in controversy was not a contract of insurance within the scope of our statutory definition.

On whether endowment policies are within statute exempting life insurance policies, see note in 25 L.R.A. (N.S.) 722.

"(2) A pure endowment contract, such as that involved in this case, not being a contract of insurance within the definition of R. L. c. 118, sec. 3, the next question is whether it is an agreement which our laws prohibit an insurance company from making in this commonwealth. In the case of Lord v. Dall, 12 Mass. 115, 7 Am. Dec. 38, where the legality of a contract of insurance and a life was first decided in this state, Parker, C. J., in delivering the opinion of the court said: 'This is a contract fairly made; the premium is a sufficient consideration; there is nothing on the face of it which leads to the violation of the law; nor anything objectionable on the score of policy or morals. It must then be valid to support an action, until something is shown by the party refusing to perform it, in excuse of his nonperformance.' At that time insurance contracts were usually on marine risks. The system since then has grown and broadened until it now furnishes protection and indemnity in almost every department of

business and private life and enterprise. See Stat. 1907, c. 576, sec. 32, as amended by Stat. 1908 (chaps. 248, 509), and Stat. 1910, c. 499. Some of these contracts for many years have been a recognized part of the insurance business, although they do not come within our present statutory definition. This is especially true of contracts of pure endowment with return of premium. See Gould v. Curtis (1912) 1 K. B. 635; Prudential Ins. Co. v. Commissioners of Inland Revenue (1904) 2 K. B. 658; Carter v. John Hancock Ins. Co. 127 Mass. 153. And one of the well-known forms of contract is that of annuities—not within the technical meaning of the term, or incorporeal hereditaments created by grant but in the modern sense of a simple promise to pay a certain amount yearly. There is nothing in such contracts that offends against public policy or any principle of law. Hayden v. Snell, 9 Gray (75 Mass.) 365, 69 Am. Dec. 294; Cahill v. Maryland Life Ins. Co. 90 Md. 333, 45 Atl. 180, 47 L.R.A. 614; Berry v. Doremus, 30 N. J. Law, 399. As was said by the court in Mutual Life Ins. Co. v. Smith, 184 Fed. 1, 106 C. C. A. 593, 33 L.R.A. (N.S.) 439: 'We see very little to be urged against insurance of the nature in question, . . . that does not go to the merit of insurance itself. It is not unnatural that one should act upon the idea that, in the days when he is handling money, it is the part of wisdom to safeguard the period of old age, in which business and earning capacity will have become a thing of the past. Under modern conditions in the various industries, as well as in business and in official life, men are influenced to enter upon a particular work by various old-age safeguards which become operative at the end of a specified period of service.' In the Smith case the policies in question provided for deferred annuities, beginning in 1916, if the insured should be alive at that time. But what was there said seems equally applicable to a contract of pure endowment, as an annuity contract in effect is one providing for the payment of a series of pure endowments.

"Although as we have seen, such pure endowment and annuity contracts are not contracts of insurance as defined by R. L. c. 118, sec. 3, it does not follow that insurance companies are prohibited by our law from writing them. That these companies are not confined to the making of the contracts defined by section 3 above cited, is apparent from other provisions of the chapter. Thus, section 65 provides: 'All corporations, associations, partnerships or individuals doing business in this commonwealth under any charter, compact, agreement or statute of this or any other state, involving the payment of money or other thing of value to families or representatives of policy and certificate holders or members, conditioned upon the continuance or cessation of human life, or involving an insurance, guaranty, contract or pledge for the payment of endowments or annuities shall be deemed to be life insurance companies, and shall not make any such insurance, guaranty contract or pledge in this commonwealth, or to or with any citizen or resident thereof, which does not distinctly state the amount of benefits payable, the manner of payment and the consideration therefor, nor any such insurance, guaranty, contract or pledge, the performance of which is contingent upon the payment of assessments made upon survivors.'

"This recognition and regulation of policies conditioned upon the 'continuance' of life, and of contracts for the payment of 'endowments or annuities' is inconsistent with the view that insurance companies are forbidden to make such contracts. The reasonable inference rather is that, subject to the limitations stated, they may be made in this commonwealth, even though they are not contracts of insurance as defined in sec.

3. In other parts, also, of the insurance statute are provisions indicating that annuity contracts as well as those of endowment, may be written under the Massachusetts law. See R. L. c. 118, sec. 11, cl. 3; Id. secs. 68, 76. And in the revision of St. 1907 (c. 576), although the definition of R. L. c. 118, sec. 3, is retained, frequent reference is made to endowment, pure endowment, and annuity contracts as a recognized part of the business of life insurance companies. See, for instance, secs. 11, 69, 75, 76, 81. Section 80, as amended by statute 1908, c. 166, in dealing with the options open to the holder in case of surrender of the policy, provides that 'in case of an endowment policy, if the sum applicable to the purchase of temporary insurance shall be more than sufficient to continue the insurance to the end of the endowment term named in the policy, the excess shall be used to purchase in the same manner nonparticipating paid-up pure endowment, payable at the end of the endowment term on the same condition.' And the same section, as further amended by St. 1910, c. 366, concludes in these terms: 'The provisions of the section shall not apply to annuities, or to policies of pure endowment with or without return of premiums, or to survivorship insurance, and, in case of a policy providing for both insurance and annuity, shall apply only to that part of the contract providing for insurance, but every such contract providing for a deferred annuity on the life of the insured only shall, unless paid for by a single premium, provide that in the event of the nonpayment of any premium after three full years' premiums shall have been paid, the annuity shall automatically become converted into a paid-up annuity for such proportion of the original annuity as the number of completed years' premiums paid bears to the total number of premiums required under the contract.'

"From what has been said it seems clear that while the contract of pure endowment in question is not one of insurance as defined by R. L. c. 118, sec. 3, nevertheless it is a legal contract and one which the Massachusetts laws do not prohibit an insurance company from making. In form it complies with the requirements of sec. 65 in distinctly stating 'the amount of benefits payable, the manner of payment and the consideration therefor.' As it is not a 'contract of insurance' within the definition of our statute, the statutory requirements relative to medical examination and to the form of the application are not applicable and need not be considered. Nor is this a contract that can be rescinded as fraudulent or unconscionable. Jenness must have understood from the express terms of the application that the premium was not to be returned if he should die before the maturity of the pure endowment. The premium was based upon the standard American Experience Tables, and the loading added for expenses was less than 4 per cent. The wisdom of the investment which he carried for more than four years was for him to determine. Lee v. Kirby, 104 Mass. 420. Finally, that the making of the contract in controversy was within the charter power of the defendant corporation apparently is not questioned. Its amended charter, adopted under the New York Insurance Law of 1892 (Laws 1892, c. 690), provides: 'Article III. The business of the company shall be insurance on lives and all and every insurance pertaining to life, and receiving and executing trusts and making endowments and granting, purchasing and disposing of annuities, such kind of insurance being authorized under subdivision (1), sec. 70, of the Insurance Laws.'"

Endowment policy of benevolent Society is life insurance. Rockhold v. Canton Masonic Benevolent Soc.

§ 336g. To what extent tontine insurance is life insurance.—[2a] A tontine contract of insurance is more than a policy of life insurance. In addition, it is an agreement on the part of the insurance company to hold all the premiums collected on the policies forming that class for the specified period, which is called the tontine period or period of distribution, and, after paying death losses, expenses, and other losses out of the fund so accumulated, to divide the remainder among those who are alive at the end of the tontine period, and who have maintained their policies in force.[3] But when the accumulated surplus upon a policy is payable to assured at his option upon the completion of the tontine dividend period if he survives that period, and is not payable at all in the event of his death before the expiration thereof, the agreement is nothing in the nature of life insurance but is merely a contract to pay assured a computable sum upon certain contingencies, and this result is not varied by the fact that the wife of assured is named as beneficiary. The contract is only one such as a savings bank might make.[4]

§ 337. Whether contract one of loan or of life insurance.—In a Federal case the contract was one of loan secured by a mortgage on real estate with an agreement to release the remainder of the debt in case of death of the borrower before full payment. The contract had about it certain features of life insurance but it was declared "certainly not an ordinary 'life insurance contract,' in the general acceptation of the term," as the undoubted purpose was to loan money and secure at the same time, as far as possible, indemnity against loss at the borrower's expense. And under the circumstances of the case the contract was held to be tainted with usury and contrary to public policy warranting a cancellation of the notes and mortgage involved.[5] The same or substantially the same contract was under consideration in a Minnesota case although it did not there appear what the nature of the corporation was except that it was organized for pecuniary profit and that it had never complied

2 L.R.A. 420, 19 N. E. 710, aff'd 129 Ill. 440, 21 N. E. 794.

[2a] See § 11 herein.

[3] Equitable Life Assur. Society of U. S. v. Winn, 137 Ky. 641, 28 L.R.A.(N.S.) 558, 126 S. W. 153, 39 Ins. L. J. 587, holder held entitled to an accounting.

On right of tontine policyholder to an accounting by insurer, see note in 28 L.R.A.(N.S.) 558. On right to subject tontine policy to claims of creditors, see note in 4 L.R.A.(N.S.) 456.

[4] Ellison v. Straw, 119 Wis. 502, 97 N. W. 168.

[5] Krumseig v. Missouri, Kansas & Texas Trust Co. 71 Fed. 350, aff'd in Missouri, Kansas & Texas Trust Co. v. Krumseig, 77 Fed. 32, 23 C. C. A. 1, aff'd in Missouri Kansas & Texas Trust Co. 172 U. S. 351, 43 L. ed. 474, 19 Sup. Ct. 179, but whether the contract was one of life insurance, void because defendant had not complied with the Minnesota contract was not considered by the Supreme Court.

with the state laws regulating the transaction of life insurance and the court assumed, without deciding, that the contract was not one of life insurance.[6] But in another case in that state the Krumseig case[7] was considered and quoted from as being a combination of a mortgage loan and a life insurance policy and as holding that, viewed as a contract of a life insurance, either in whole or in part, it was void for non-compliance with the insurance laws of Minnesota and the court, per Collins, J., said: "The contract there under consideration does not really differ from the one now before us which we regard as a combination of a loan of money with security and a life insurance policy. It has the features and essentials of both, and the defendant having solicited and acted as agent in procuring it, without being licensed as an insurance agent, violated the law." [8] In a case in the District of Columbia the contract seemed to combine with the ordinary plan of insurance something of the principle of annuities, as well as some features of the scheme on which building and loan associations are established, and the principal characteristic feature that distinguished it from the ordinary plan of life insurance was, that the sum in gross payable by the insurance company was payable at the beginning instead of at the end of the risk. It was held that the contract was not one of loan but of insurance governed by the rules of construction applicable to ordinary insurance contracts.[9] In a Kentucky case it is held that a note given by insured for a loan as stipulated in the policy, where the stipulations in the note are not inconsistent with the terms of the policy but merely elaborate its meaning and effectuate its purpose, is not within a statute prohibiting the making of any contract of insurance except such as is expressed in the policy.[10]

§ 337a. Other instances of what is and what is not life insurance. —Life insurance is also held to include cattle or livestock insurance;[11] also an option to purchase realty upon certain conditions as to the disposition of the unpaid balance of the sum provided for in

[6] Missouri, Kansas & Texas Trust Co. v. McLachlan, 59 Minn. 468, 473, 61 N. W. 560.

On loan contracts canceled upon death as insurance, see note in 47 L.R.A.(N.S.) 298.

[7] Missouri, Kansas & Texas Trust Co. v. Krumseig, 77 Fed. 32, 23 C. C. A. 1, above *considered.*

[8] State v. Beardsey, 88 Minn. 20, 25, 26, 92 N. W. 472.

[9] United Security Life Insurance & Trust Co. v. Bond, 16 App. D. C. 579.

[10] Jagoe v. Aetna Life Ins. Co. 123 Ky. 510, 96 S. W. 598, 36 Ins. L. J. 104, Ky. Stat. 1903, sec. 656.

[11] Under the act 55, George III. c. 184, an insurance on the lives of cattle is held an insurance on lives. Attorney General v. Cleobury, 18 L. J. Ex. 395, 4 Ex. 65. See also State v. Vigilant Ins. Co. 30 Kan. 585, 2 Pac. 840; State v. Northwestern Mutual Live Stock Assoc. 16 Neb. 549, 20 N. W. 852; *Examine* State v. Burgess, — Tex. Civ. App. —, 107 S. W. 366. See §§ 7, 27g herein.

the contract, in case of death or total or permanent disability and so held even though the contract did not on its face purport to be one of insurance.[12] But an act to create a police relief, health, life insurance and pension fund and providing for the payment of a sum certain after death does not make a contract one of life insurance.[13]

§ 337b. Whether policy, life or accident: generally.—It is declared in Missouri that the calling of a contract of insurance an accident, tontine or regular life policy, or for that matter, by any other appellation that may be adopted for business or conventional uses or classification, cannot make a policy containing an agreement to pay to another a sum of money designated upon the happening of an unknown or contingent event dependent upon the existence of a life, less a policy of insurance on life, and it is none the less life insurance because coupled with an investment or bond feature. All policies of insurance in which the payment of the insurance money is contingent upon the loss of a life are included within insurance upon life.[14]

A policy of insurance which primarily secures a weekly indemnity in money to the insured in the event of his disability from accidental injury and in certain specified contingencies resulting from such injury agrees to pay a certain gross sum, or a proportionate

[12] State v. Beardsley, 88 Minn. 20, 92 N. W. 472.

[13] Clarke v. Police Life & Health Ins. Co. 123 Cal. 24, 55 Pac. 576.

[14] Logan v. Fidelity & Casualty Co. 146 Mo. 114, 47 S. W. 948, a case of the application of the statute, sec. 5855, Rev. Stat. 1889, as to death by suicide being no defense, to policies issued by accident insurance companies. The above case is *quoted* from in Zimmer v. Central Accident Ins. Co. 207 Pa. 472, 56 Atl. 1003, 33 Ins. L. J. 333, which holds that a life policy includes an accident policy under a provision of a statute requiring a copy of the application to be attached. Case is also *cited* 193 Fed. under this section. But *compare* Tiernin v. Fidelity & Casualty Co. (U. S. C. C.) 87 Fed. 543, deciding *contra* as to sec. 5855 of the Missouri statute and holding that it did not apply to accident policies notwithstanding Mo. Rev. Stat. 1889, sec. 5811, whereby life companies were authorized to engage in the business of accident insurance, but making it a separate department of the life insurance company engaging therein. This case is *cited* in Maryland Casualty Co. v. Gehrmann, 96 Md. 634, 650, 54 Atl. 678, where court, per Pearce, J., says: "We prefer to adopt and follow the view of the state court as the sounder and more salutary view," viz. the Logan case although the Federal case was decided prior thereto. In the Maryland case above noted, the main question was whether the warranties made in an application for an accident insurance policy were within the scope and operation of the Acts of 1894, c. 662 (codified in Poe's Suppl. to Code, as sec. 142A, of art. 23) relating to life insurance. Said Code art. 23, sec. 127, providing that life insurance companies included engagements for the payment of money in the event of sickness, accident and death, or other contingency, and so subject to all the requirements of law applicable to life insurance companies.

part of the principal sum, or the whole amount thereof, as in case of death resulting from the accident within a stated time, is not a life insurance policy within a statute relating "to life and fire insurance policies upon the lives or property of persons." [15] So a policy which insures against death resulting directly and independently of all other causes from bodily injuries effected through external, violent and accidental means, though in a sense a policy of life insurance is not the sort of policy contemplated by the Alabama Code [16] nor does it evidence the character of contract generally spoken of as life insurance.[17] Under a Federal decision rendered in 1912 it is decided that the Pennsylvania act of 1885,[18] providing for nonforfeiture of life policies in case of warranty, misrepresentation or untrue statement, unless the same relates to some matter material to the risk, applies to accident policies.[19] In a Massachusetts case the court, per Knowlton, C. J., says: "An ordinary life policy includes the occurrence of death by accident as one of the conditions which call for a payment by the company, as well as death from any other cause, and ordinary accident policies include injuries by accident causing death, and to that extent they provide insurance for life. Yet neither of these two classes of policies is, for that reason, brought within the other class also." [20] In that state a life insurance contract may combine certain features of accident in-

[15] Standard Life & Acci. Ins. Co. v. Carroll, 86 Fed. 567, 30 C. C. A. 253, 41 L.R.A. 19.

[16] Sec. 5283, Form 12.

[17] National Life & Accident Ins. v. Lokey, 166 Ala. 174, 52 So. 45.

[18] Act June 23, 1885, P. L. 134.

[19] Miller v. Maryland Casualty Co. 193 Fed. 343, 113 C. C. A. 267, 41 Ins. L. J. 990. The court, per Buffington, C. J., said: "While the case of Zimmer v. Central Accident Ins. Co." 207 Pa. 472, 56 Atl. 1003, 33 Ins. L. J. 333, "construed another insurance statute, yet, as that statute and the one before us are in pari materia, we consider that case evidences the views of the supreme court of Pennsylvania on the scope of such insurance legislation. Moreover, as the act of 1885 was passed after that court had, in Pickett v. Pacific Mutual Life Ins. Co. 144 Pa. 79, 13 L.R.A. 661, 27 Am. St. Rep. 618, 22 Atl. 871, held that the term 'life insurance' in the act of 1881 (act May 11, 1881 [P. L. 20]) covered accident policies, it is reasonable to suppose that the legislature by its subsequent use in the act of 1885 of the words 'life insurance' meant to cover accident policies also. [3] For these reasons, and with a view to harmonize state and Federal decisions, and producing uniformity in the Pennsylvania system of insurance, we hold the act of 1885 is applicable to accident policies. Support of this conclusion is found in Logan v. Fidelity & Casualty Co. 146 Mo. 114, 47 S. W. 948; Maryland Casualty Co. v. Gehrmann, 96 Md. 634, 54 Atl. 678; Dulany v. Fidelity & Casualty Co. 106 Md. 17, 66 Atl. 614; Cook on Life Ins. sec. 2; and McClain v. Provident Savings Life Assur. Soc. 110 Fed. 80, 49 C. C. A. 31."

[20] Metropolitan Life Ins. Co. v. Hardison, 208 Mass. 386, 94 N. E. 477, 40 Ins. L. J. 901.

surance upon compliance with provisions of the statutes as to statements of benefits and cost of concessions.[1]

If it is evident from the whole contract that the risk is strictly an accident insurance, and not a fire risk, it will be so construed.[2]

"Travelers insurance" is made a specialty of by most accident companies.[3]

§ 337c. Industrial insurance with provisions as to accidental death is not accident insurance.—Where an industrial insurance policy makes a distinction between death from different causes and excepts death from accident occurring within a certain time and also limits the amount payable if death occurs within said specified time, such provisions are only incidental to the business of life insurance and the contract is not one of insurance against accident except so far as all life insurance which includes death by accident is to that extent insurance against accident. It is not the giving of direct affirmative benefits of a special kind on account of the accident. It is simply the exception of this class of cases from the limitation upon the ordinary rights of an insured person. The provision is as if the limitation upon payments for death occurring within the time specified were expressed as applying to such deaths occurring from causes other than accident.[4]

§ 337d. Newspaper contract may constitute an accident policy: ultra vires.—If one is induced to buy or to subscribe for a copy of a newspaper by reason of a promise to pay a certain sum of money to his heirs, in case of death by accident within a specified and limited time, such person to be identified by having the paper in his possession, it is a contract of accident insurance although it may be beyond the company's power to issue it.[5]

[1] Metropolitan Life Ins. Co. v. Hardison, 220 Mass. 52, 107 N. E. 397, Stat. 1912, c. 524. The question in the above case was whether the provision as to cost of concessions had been complied with. Prior to this statute, however, accident insurance could not be issued in combination with life insurance in one policy. Ætna Life Ins. Co. v. Hardison, 199 Mass. 181, 85 N. E. 407, *distinguished* in Metropolitan Life Ins. Co. v. Hardison, 208 Mass. 386, 94 N. E. 477, 40 Ins. L. J. 901.

[2] Western Refrigerator Co. v. American Casualty & Security Co. (U. S. C. C.) 51 Fed. 155.

[3] Travelers' Ins. Machine Co. v. Travelers' Ins. Co. of Hfd. 142 Ky. 523, 528, 529, 134 S. W. 877, a case of action to enjoin use of a name. See also Herron's Suppl. 1908–1910, to Sayles' Tex. Civ. Stat. p. 233. See §§ 8, 9a herein.

[4] Metropolitan Life Ins. Co. v. Hardison, 208 Mass. 386, 94 N. E. 477, 40 Ins. L. J. 901, under Stat. 1907, c. 576, sec. 34, cl. 5, *distinguishing* Ætna Life Ins. Co. v. Hardison, 199 Mass. 181, 85 N. E. 407.

[5] Commonwealth v. Philadelphia Inquirer, 15 Pa. Co. Rep. 463. See § 2535 herein.

On newspapers undertaking to indemnify against accident as insurance, see note in 47 L.R.A.(N.S.) 299.

§ 337e. Employers' liability or indemnity insurance.[6]—An employers' liability or indemnity policy is held to be a contract of insurance[7] and such a policy is construed most favorably, for insured.[8] And the right of subrogation exists in case of employers' liability insurance, as in cases of fire and marine insurance, against the wrongdoer or person liable for the loss upon payment by such company of the loss.[9] It is also decided that employers' liability insurance is a branch of accident and casualty insurance even though a distinction is seemingly made by statute as to capital stock and the right to do business.[10]

§ 338. Insurance of and by carriers: agreement of, to procure insurance.—As we have elsewhere stated the insurance of carriers against liability for losses from injuries to passengers is a contract of indemnity,[11] and where goods are received by a common carrier for transportation he is held to be an insurer of the goods with a continuing liability until the goods arrive at their destination and are there delivered so that such carrier becomes liable as an insurer where the goods have been delivered to it by a railroad company and they are destroyed by fire while in possession of such carrier.[12]

[6] See § 9a herein.

[7] Standard Life & Accident Ins. Co. v. Bambrick Bros. Construction Co. 163 Mo. App. 504, 143 S. W. 845; Mears Mining Co. v. Maryland Casualty Co. 162 Mo. App. 178, 191, 144 S. W. 883. *Examine* §§ 27a–27d herein.

On employers' indemnity contracts as insurance, see note in 47 L.R.A. (N.S.) 294.

[8] London Guarantee & Accident Co. Ltd. v. Morris, — Ill. App. —, 40 Natl. Corp. Rep. 889.

On construction of bond or policy indemnifying employer against loss from negligence of employee, see note in 31 L.R.A.(N.S.) 775.

[9] Travelers' Ins. Co. v. Great Lakes Engineering Works Co. 36 L.R.A. (N.S.) 60, 184 Fed. 426, 107 C. C. A. 20.

On right of life or accident insurance company to subrogation, see note in 18 L.R.A.(N.S.) 211. On right of action of one legally responsible for another's death against a third person whose negligence caused the death, see note in 36 L.R.A.(N.S.) 61. On right of insurer who has paid loss to maintain action against the party causing the loss, see note in 2 L.R.A. (N.S.) 922.

[10] Metropolitan Casualty Ins. Co. v. Basford, 31 S. Dak. 149, 139 N. W. 145, 42 Ins. L. J. 579, Laws 1911, c. 176. See also Laws 1905, c. 73, sec. 2; Laws 1907, c. 110; Laws 1909, c. 243. See Traders Insurance Machine Co. v. Travelers Ins. Co. 142 Ky. 523, 531, 134 S. W. 877, 881, per Lassing, J.

That employers' liability insurance for liability under employers' liability act, 1880, workmen's compensation act of 1897, and common law is not a policy of insurance against accident under the English stamp act of 1881, sec. 98, sched. 1. See Lancashire Ins. Co. v. Commissioners of Inland Rev. [1899] 1 Q. B. Div. L. Rep. 353.

[11] See § 27e herein.

As to distinction between agent and carrier in accident policies, see § 2862 herein.

As to agent and insurance by carrier, see § 630 herein.

[12] Arkadelphia Milling Co. v.

An agreement made by carriers by water, in consideration of the shipping of goods and of the money to be paid for its carriage, that they would procure insurance of the goods against loss by fire in a consignee's open fire policy, from the time received until delivery to the consignee, is not a contract of insurance, nor a maritime contract, even though a contract of insurance may be a maritime contract.[13]

§ 338a. Burglary insurance.—Burglary insurance falls under the general designation of insurance and is within a statutory condition precedent to obtaining a license to carry on insurance business.[14] So a corporation is an insurance company where it has a system of protection against burglary and fire by means of wire connections and the contract is based upon a consideration of periodical payments, and an indemnity up to a specified amount in case of loss is to be paid by the company.[15]

§ 338b. What is not insurance on automobiles.—A guarantee or indemnity policy does not constitute insurance authorized by statute "upon automobiles, whether stationary or being operated under their own power against any hazard," nor is it an insurance upon property, where the indemnity provided is against loss or expense resulting from claims upon the assured for damages by reason of the ownership, maintenance, manipulation or use of any automobile, on account of injury to or death of persons resulting from accident, or on account of damage to or destruction of property, with certain exceptions, said provisions being connected with an agreement to defend suits, pay costs, and reimburse insured for the expense of providing medical aid for immediate relief when imperative in case of accident.[16]

Smoker Merchandise Co. 100 Ark. 37, 139 S. W. 680.

Carriers as insurers, see notes 3 L.R.A. 424; 1 L.R.A. 702.

[13] City of Clarksville, The (U. S. D. C.) 94 Fed. 201, 205.

As to liability of warehouseman under agreement with carriers to insure, see § 2750 herein.

As to limitation of liability of shipowners under acts of Congress 1894, 1851. See Great Lakes Towing Co. v. Mills Transp. Co. 155 Fed. 11, 83 C. C. A. 607, 22 L.R.A.(N.S.) 769, and note.

[14] United States Fidelity & Guaranty Co. v. Linehan, 73 N. H. 41, 58 Atl. 956, 33 Ins. L. J. 1023.

As contract of indemnity, see § 27f herein.

On burglary and theft insurance, see notes in 46 L.R.A.(N.S.) 562, and 47 L.R.A.(N.S.) 296.

[15] Wood v. Gross, Rap Jud. Quebec, 5 B. R. 116.

[16] American Automobile Ins. Co. v. Palmer, 174 Mich. 295, 140 N. W. 557, 42 Ins. L. J. 885, Pub. acts 1869, No. 136, as am'd by Pub. acts 1911, No. 15, sec. 1. The court, per Moore, J., said: "The primary question presented for determination is whether or not in that act the words 'any hazard' mean 'any hazard' or 'any hazard except personal liability.' . . . The language of

§ 338c. When bicycle association not insurance company.—A mutual protective association is not an insurance company where it was chartered for the purpose of the accumulation of a fund derived from the payment of a fixed annual due and certain specified amounts periodically for the protection of its members, by virtue of which payments they became entitled to have their bicycles cleaned; also repaired when damaged by accident, or replaced when destroyed by accident; the tires repaired when punctured by accident; and the bicycle replaced when stolen, if not recovered in a certain time, and to provide a bicycle during that time. Such corporation does not fall within a statutory class authorized to make insurance against loss, damage or liability, "arising from any unknown or contingent event whatever." [17]

§ 338d. Sanitary inspection of buildings, etc., is not insurance.—The inspection and certification as to the sanitary condition of buildings and premises is not insurance, within the New York statute.[18]

§ 338e. Contracts to compensate unemployed employees.—An association incorporated for the purpose of selling contracts to employees to compensate them when out of employment is an insurance company within a statute regulating insurance companies and

the statute is not complex. Authority is given to make insurance on automobiles. If it was an insurance on the automobile against fire, that would be a recognized hazard to which automobiles are subject. If it was an insurance on the automobile against theft, that, too, would be a recognized hazard to which the automobile is subject. So of injury by accident, and the liability in each case would not be greater than the value of the automobile. Is not the relator doing more than placing insurance on automobiles? . . . We think it is a strained construction of language to say that a contract of this sort is simply the placing of insurance on an automobile. The liability thus created is not limited by the value of the automobile. Instead of being property insurance, it makes a contract of an entirely different character from that authorized by the amendment."

On insurance covering automobiles, or indemnifying against injury or liability for injury caused thereby, see notes in 44 L.R.A.(N.S.) 70; 51 L.R.A.(N.S.) 583; and L.R.A.1915E, 575.

[17] Commonwealth (ex rel. Hensel) v. Provident Bicycle Assoc. 178 Pa. 636, 30 W. N. C. 498, 36 L.R.A. 589, 36 Atl. 197.

On insurance of bicycles, see notes in 47 L.R.A. 307, and 47 L.R.A. (N.S.) 298.

[18] People (ex rel. Woodward) v. Rosendale, 142 N. Y. 126, 36 N. E. 806; reversing 25 N. Y. Supp. 769. The court said: "This is not insurance in any legal sense, but an entirely distinct kind of business not within the purview of the statute now under consideration. We therefore hold that the declaration and charter of the proposed company were not in accordance with the requirements of law, and are not entitled to be filed in the office of the superintendent of insurance."

applying to all kinds of insurance except that of life, and requiring a license from all insurance companies whose object is to transact business within the state.[19]

§ 339. When guaranty or surety company contracts constitute insurance.—A class of contracts generally designated as guarantee insurance has been before the courts in numerous cases for adjudication. This class comprises fidelity, title, credit, bond and contract guaranty generally, and after much discussion it seems to be well settled that these contracts are essentially those of insurance where the companies engage in the business for profit and where the terms of the contract itself closely resemble the essential elements of an insurance contract, so that the rights and liabilities of the parties are governed by the rules of construction applicable to insurance rather than by the rule strictissimi juris which determines the rights of ordinary guarantors or sureties without pecuniary consideration. The application of this rule will appear under the next following sections.[20] But an insurance company is not a guaranty or security company within the ordinary meaning of that term within a statutory declaration of what is meant by guaranty or security company.[1]

339a. Fidelity guaranty bonds or contracts constitute insurance.[1a]—The bonds or contracts of those companies which guarantee the fidelity of employees and which make the business one for profit are essentially insurance contracts. This is well settled, not only by express adjudications but also inferentially by those decisions where these contracts are involved but where the point is not

[19] State (ex rel. National Employees' Assoc.) v. Barton, 92 Neb. 666, 139 N. W. 225.

[20] As contracts of indemnity, see §§ 27h, 27i, 27l herein.

"Many companies issue 'guaranty policies.' The use of the word 'policy' or 'insurance' does not necessarily determine whether a contract is one of insurance or guaranty; the whole contract must be looked at in order to ascertain its real nature, and whether the parties contemplated the rights and duties of principal and surety or of assurer and assuree." 6 Renton's Ency. of Laws of Eng. p. 106. See Dane v. Mortgage Ins. Corp. Law Rep. [1894] 1 Q. B. 54, noted under § 339c herein.

Character of, and rules governing contracts by corporations engaged for profit in business of guarantying the fidelity or contracts of other persons: "The overwhelming weight of authority supports the proposition that the rule of strictissimi juris by which the rights of uncompensated sureties are determined, is not applicable to the contracts of surety companies which make the matter of suretyship a business for profit: that their business is essentially that of insurance: and that, therefore, their rights and liabilities under their contracts will be governed by the laws of insurance." Note 33 L.R.A.(N.S.) 513–519.

On what constitutes insurance, see note in 47 L.R.A.(N.S.) 290.

[1] Ætna Life Ins. Co. v. Coulter, 25 Ky. L. Rep. 193, 197, 74 S. W. 1050, a case of assessment of a foreign company for franchise tax. Ky. Stat. 1899.

[1a] See § 339 herein.

discussed as it is evidently conceded by the contract being dealt with as one of insurance.[2] So a bond given to indemnify a county treasurer against loss occurring through acts of a deputy treasurer is to be treated as a contract of insurance and is to be construed against the insurer as the rule strictissimi juris does not apply to a surety for hire.[3] It is declared in a Georgia case that, under the Code[4] there is a well recognized difference between a contract of suretyship and of guaranty, but it was not necessary to determine whether the contract involved was one of suretyship or of fidelity insurance as it possessed some of the features of both and that that point was not the real question in issue.[5]

§ 339b. Same subject.—In the Federal supreme court the rule of construction governing insurance contracts is applied to fidelity guaranty contracts.[6] And in the lower Federal court a bond guarantying against loss and dishonesty of a cashier of a bank is in effect one of insurance although the attitude of a "surety" is assumed by the form,[7] and it is also determined that the law of insurance applies by analogy.[8] In Arkansas a bond insuring the fidelity of an employee issued by a paid surety is not an ordinary obligation given by a surety, but is an indemnity bond in the nature of a con-

[2] See Champion Ice Manufacturing & Cold Storage Co. v. American Bonding & Trust Co. 25 Ky. L. Rep. 239, 75 S. W. 197; Northern Assur. Co. of England v. Borgelt, 67 Neb. 282, 93 N. W. 226. As to the latter class of decisions see the following cases:

United States.—Missouri, Kansas & Texas Trust Co. v. German National Bk. 77 Fed. 117, 23 C. C. A. 65; Supreme Council Catholic Knights of America v. Fidelity & Casualty Co. 63 Fed. 48, 11 C. C. A. 96.

Iowa. — Perpetual Building and Loan Assoc. v. United States Fidelity & Guarantee Co. 118 Iowa, 729, 92 N. W. 686.

Minnesota.—Fidelity & Casualty Co. v. Crays, 76 Minn. 450, 79 N. W. 531; Eickhoff v. Fidelity & Casualty Co. 74 Minn. 139, 76 N. W. 1030; Fidelity & Casualty Co. v. Eickhoff, 63 Minn. 170, 56 Am. St. Rep. 464, 30 L.R.A. 586, 65 N. W. 351.

New York.—People (ex rel. National Surety Co.) v. Feitner, 166 N. Y. 129, 59 N. E. 731, s. c. 65 N. Y. Supp. 523, 31 Misc. 433, aff'd (mem.) 66 N. Y. Supp. 1140, 54 App. Div. 633; Buchner v. Title Guaranty & Surety Co. 128 N. Y. Supp. 1007, — App. Div. —, 40 Ins. L. J. 1510.

South Carolina.—Walker v. Holtzclaw, 57 S. Car. 459, 35 S. E. 754.

On contracts guarantying fidelity of employees as insurance, see note in 47 L.R.A.(N.S.) 295.

[3] American Surety Co. of N. Y. v. Pangburn, 182 Ind. 116, 105 N. E. 769.

[4] Civ. Code (1910) secs. 2550, 3538.

[5] John Church Co. v. Ætna Indemnity Co. 13 Ga. App. 826, 80 S. E. 1093.

[6] American Surety Co. v. Pauly, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. 552, s. c. 170 U. S. 160, 42 L. ed. 987, 18 Sup. Ct. 563.

[7] Guarantee Co. of North America v. Merchants' Sav. Bk. & Trust Co. 80 Fed. 766, 772, 26 C. C. A. 146.

[8] Mechanics Savings Bank & Trust Co. v. Guarantee Co. (U. S. C. C.) 68 Fed. 459.

tract of insurance.[9] It is also declared in Illinois that guaranty insurance by whatever name called is an insurance contract,[10] and in that state guarantying the fidelity of officers and the performance of contracts is insurance within a statute excepting insurance business from those for which corporations may be formed, although such insurance is of a kind not known at the time of the passage of the enactment and provision is made in another statute for corporations to transact all kinds of insurance then known.[11] In Kentucky the contract expressed in a fidelity bond is but a form of insurance within the rule that ambiguities must be construed most strongly against the insurer.[12] It is also decided in that state that such contracts are those of insurance and are equally, as well as policies of life and fire insurance, within a statute as to representations and warranties.[13] Under a Michigan decision a bond for indemnity against loss through default of an employee makes the surety an insurer in all essential particulars and subject to the same rules as fire and life insurance companies in regard to a general agent's authority.[14] So in Missouri these companies are classed as insurers and their contracts interpreted by the rules applicable to ordinary insurance contracts.[15] Under a North Carolina decision a fidelity indemnity bond, given by a surety company, which in its form and essence resembles an insurance contract and differs materially from the ordinary forms of bonds should be placed in the general class of insurance policies, at least so far as the same general principles of construction apply.[16] In Tennessee employers' indemnity or fidelity bonds are contracts of insurance,[17] and a fidelity corporation is an insurance company within the statute of that state imposing a privilege tax on insurance companies,[18] and a statute as

[9] Title Guaranty & Surety Co. v. Bank of Fulton, 89 Ark. 471, 33 L.R.A.(N.S.) 676, 117 S. W. 537, 38 Ins. L. J. 722.

[10] People (ex rel. Gosling) v. Potts, 264 Ill. 122, 106 N. E. 524.

[11] People (ex rel. Kasson) v. Rose, 174 Ill. 310, 44 L.R.A. 124, 51 N. E. 246.

[12] Champion Ice Manufacturing & Cold Storage Co. v. American Bonding & Trust Co. 115 Ky. 863, 103 Am. St. Rep. 356, 75 S. W. 197.

[13] Fidelity & Guaranty Co. v. Western Bk. 29 Ky. L. Rep. 639, 94 S. W. 3, 35 Ins. L. J. 692.

[14] Crystal Ice Co. Ltd. v. United Surety Co. 159 Mich. 102, 123 N. W. 619.

[15] Long Bros. Grocery Co. v. United States Fidelity & Guaranty Co. 130 Mo. App. 421, 110 S. W. 29; Roark v. City Trust, Safe Deposit & Surety Co. 130 Mo. App. 401, 110 S. W. 1.

[16] Bank of Tarboro v. Fidelity & Deposit Co. 128 N. Car. 366, 83 Am. St. Rep. 662, 38 S. E. 908.

[17] Hunter v. United States Fidelity & Guaranty Co. 129 Tenn. 572, 167 S. W. 692.

[18] American Surety Co. v. Folk, 124 Tenn. 139, 135 S. W. 778, 40 Ins. L. J. 1074 and note, Laws 1907, c. 541, sec. 6.

to representations and warranties also applies to such fidelity bonds.[19] In Texas the rule of construction against the insurer applies to fidelity indemnity contracts.[20] So in Wisconsin bonds of this character have all the essential features of insurance contracts,[1] so as to make the rule of construction against the insurer applicable.[2]

§ 339c. Contract to indemnify "assured" for banks' default is contract of insurance: bond to secure deposits.—If a party designated as the assured be guaranteed under an instrument purporting to be a policy of "insurance" against the loss of a sum of money deposited in a bank, it is a contract of insurance.[3] In this case there was a contract under which "the Mortgage Insurance Corporation, Limited," guaranteed to a depositor in a certain bank the payment of the amount deposited, should the bank fail to pay. The contract used these words: "This policy of insurance," and the court in construing the same said: "It seems to me that the intention was this contract should be one of insurance, and that those who entered into it with the plaintiff should be in the position of underwriters. Here the policy recites that the plaintiff is the holder of a deposit receipt for one thousand pounds of the Commercial Bank of Australia, and is desirous of being 'insured' as thereinafter appearing, and the defendants thereby in effect promise to pay the assured the principal sum if the debtors have made default in so doing. What the defendants have done, as it appears to me, is to insure payment of the deposit receipt according to the contract made between the depositor and the bank, i. e., that the bank will pay the amount at the date fixed by that contract for payment. The policy is not a guaranty that the bank will be able to pay. It is a positive, direct contract that if the bank does not pay a certain sum on a fixed day, the insurance company will pay that amount."[4] So companies organized for the purpose of guarantying the repayment of deposits in state and national banks are within the Kansas statute relating to the incorporation of surety, fidelity, and guaranty companies.[5]

[19] First National Bank v. United States Fidelity & Guaranty Co. 110 Tenn. 10, 75 S. W. 1076.

[20] Griffin v. Zuber, 52 Tex. Civ. App. 288, 113 S. W. 961.

[1] First National Bank v. United States Fidelity & Guaranty Co. 150 Wis. 601, 137 N. W. 742.

[2] United American Fire Ins. Co. v. American Bonding Co. of Balt. 146 Wis. 573, 40 L.R.A.(N.S.) 661n, 131 N. W. 994, 40 Ins. L. 1805.

[3] Dane v. Mortgage Ins. Corp. Ld. (Eng. C. A. 1894), 1 Q. B. Div. 54. See § 339 herein. *Examine* Shaw v. Royce, Ltd. [1911] 1 Law Rep. Ch. D. 138, *considered* under § 339d herein.

[4] See Young v. Trustee Assets & Invest. Ins. Co. Ld. (Scot. C. S. 1894), 31 Scot. L. R. 199.

[5] Bankers' Deposit, Guaranty & Surety Co. v. Barnes, 81 Kan. 422, 105 Pac. 697, Laws 1905, c. 159, sec. 1, p. 223.

As to bond given to secure mu-

§ 339d. When contract, bond, mortgage and securities guaranty do and do not constitute insurance.[6]—A surety or bonding company organized under the Nebraska statute "regulating insurance companies" and whose declared business, among other chartered purposes, is to be responsible for any violation of contract or statutory duty of the principal for whose conduct it becomes responsible is in its character an insurance and this applies where such a company becomes surety on the bond of a licensed saloon keeper.[7] Under the New York Insurance Law which classifies as insurance companies those guarantying the performance of contracts other than insurance policies and executing or guarantying bonds and undertakings required or permitted in all actions or proceedings or by law required,[8] and also limiting the amount of risk to which an insurance company may expose itself,[9] a surety company is an insurance company and is not exempt from such limitation of hazard.[10] In a South Dakota case a bond of indemnity against liability on an undertaking in a criminal action was given, indemnity being defined under the statute as a contract by which one agrees to save another from a legal consequence of the conduct of one of the parties or of some other person, and a distinction was made by the decision between an indemnity contract as an independent one, and

nicipal funds deposited with trust company: action for premiums, see Fidelity & Desposit Co. of Md. v. Commonwealth Trust Co. 65 Misc. 88, 119 N. Y. Supp. 598.

As to bond given for repayment of deposits or money received for transmission to foreign countries by sellers of foreign steamship tickets, under N. Y. Laws 1908, c. 479. See Russo v. Illinois Surety Co. 125 N. Y. Supp. 991, 141 App. Div. 690. *Examine* Cappadona v. Illinois Surety Co. 68 Misc. 470, 125 N. Y. Supp. 162, under same statute; Mattone v. Illinois Surety Co. 123 N. Y. Supp. 236, under same statute.

[6] See § 339 herein.

[7] Sullivan v. Radzuweit, 82 Neb. 657, 118 N. W. 571 (Gen. Stat. Neb. 1873, c. 23), *citing* U. S. Guarantee Co. of North America v. Mechanics' Savings Bank & Trust Co. 183 U. S. 402, 46 L. ed. 253, 22 Sup. Ct. 124 (fidelity); Tebbets v. Mercantile Credit Guarantee Co. of N. Y. 73 Fed. 95, 19 C. C. A. 281 (credit guaranty); American Credit Indemnity Co. v. Wood, 73 Fed. 81, 19 C. C. A. 264 (credit guaranty).

Arkansas.—American Bonding Co. v. Morrow, 80 Ark. 49, 117 Am. St. Rep. 72, 96 S. W. 613 (fidelity).

Illinois.—People (ex rel. Kasson) v. Rose, 174 Ill. 310, 44 L.R.A. 124, 51 N. E. 246 (fidelity).

Iowa.—Van Buren County v. American Surety Co. 137 Iowa, 490, 115 N. W. 24 (building contractor's bond; public).

Wisconsin.—Shakman v. United States Credit System Co. 92 Wis. 366, 32 L.R.A. 383, 53 Am. St. Rep. 920, 66 N. W. 528 (credit guaranty).

[8] N. Y. Ins. Law (L. 1892, c. 690), sec. 70, and amdts. L. 1895, c. 917; L. 1899, c. 693; L. 1901, c. 634; L. 1905, c. 573; L. 1906, c. 326.

[9] N. Y. Ins. Law (L. 1892, c. 690) § 24, amdts L. 1906, c. 326.

[10] Industrial & General Trust, Ltd. v. Tod, 67 N. Y. Supp. 362, 56 App. Div. 39.

a contract of guaranty or suretyship as one collateral to a principal existing contract, but the question of insurance as such was not discussed.[11] Under an English decision a contract, called a policy and which purported to insure a mortgage debt and securities, was held to be a contract of suretyship and not of insurance but that whether the contract was one of suretyship or insurance the company and surety were, under the facts of the case liable to contribute in proportion to their respective liability as their position was that of persons under a common liability arising in the same transaction which had been paid by one of them.[12] This case is, however, distinguished in another English decision. As where certain debentures were issued by a guaranty company forming part of an issue secured by a trust deed, which provided that the debentures should be guaranteed by a guaranty trust society which was to be trustee for the debenture-holders in consideration of a remuneration for services as trustee at a stipulated premium, it was held that the guarantee was in the nature of a policy of insurance as well as a contract of suretyship and was not destroyed by the disappearance of the debt.[13] Under an Illinois decision a mortgage guaranty company or one organized for the purpose of guarantying the performance of contracts, bonds, recognizances and indebtedness of every kind, secured by real estate mortgage or deed of trust cannot be organized under the casualty insurance act of Illinois,[14] but may be organized under the surety act [15] of that state although such a company might be classed as guaranty or casualty insurance company.[16]

§ 339e. Guaranty to repay loan is contract of insurance.[17]—An instrument whereby underwriters at Lloyds agreed to "guarantee"

[11] Western Surety Co. v. Kelley, 27 S. Dak. 465, 131 N. W. 808.

[12] Denton's Estate, In re (Licenses, Insurance, Corporation & Guarantee Fund, Ltd. v. Denton) [1903] Law Rep. Ch. Div. 670, 2 Ch. 178. See § 339e herein.

[13] Shaw v. Royce, Ltd. [1911] 1 Law Rep. Ch. D. 138 (a case of a majority of bondholders binding the minority, and for an injunction). The court, per Washington, J., said: "I think this document, which contains an obligation on the part of the society, to arise only in case of default, is more like the documents which were the subject of discussion in the case of Dane v. Mortgage Ins. Corporation [1894] 1 Q. B. 54, and Finley v. Mexican Investment Corporation [1897] 1 Q. B. 517, than the document which was under discussion in In re Denton's Estate [1904] 2 Ch. 178. Without going more into the matter I think there are material distinctions between this document and the one discussed in In re Denton's Estate, and no material distinctions between this and the documents discussed in the other two cases." See § 339e herein.

[14] Par. 7, sec. 1 (Hurd's Stat. 1913, p. 1466).

[15] Act 1899 (Hurd's Stat. 1913, p. 602).

[16] People (ex rel. Gosling) v. Potts, 264 Ill. 522, 106 N. E. 524.

[17] See § 339 herein.

to a bank to repay a loan, which instrument is deposited with the bank as security for a loan made to a syndicate upon the personal guaranty of two of the directors of the syndicate is with respect to said underwriters' contract, a contract of insurance and not of suretyship, and the latter having paid the loss are subrogated to the rights of assured, and the underwriters and the sureties do not stand in the relation of co-sureties.[18]

§ 339f. When building contractor's bonds are insurance contracts.[19]—The rule that the bonds of surety companies, who engage in the business for profit, are essentially insurance contracts governed by the rules of construction applicable thereto rather than by the rules applicable to suretyship applies also to building contractor's bonds. Thus in a Pennsylvania case a surety company became surety on the bond of a contractor for the erection of a schoolhouse, said bond being given under a city ordinance to secure payment to subcontractors and others for labor and materials supplied in the prosecution of the work, and the court, per Moschzisker, J., quoting with approval from another case in that state, said: "'The trend of all our modern decisions, state and federal, is to distinguish between individual and corporate suretyship where the latter is an undertaking for money consideration by a company chartered for the conduct of such business. In the one case the rule of strictissimi juris prevails as it always has, with respect to the other, because it is essentially an insurance against risk, underwritten for a money consideration by a corporation adopting such business for its own profit, the courts generally hold that such a company can be relieved from its obligation for suretyship only where a departure from the contract is shown to be a material variance. . . . While such corporations may call themselves surety companies, their business is in all essential particulars that of insurance. Their contracts are usually in the terms prescribed by themselves, and should be construed most strictly in favor of the obligee.'" And the court continues as follows: "Here the bond was for the protection of subcontractors and others in the construction of a public building. It differs from the ordinary suretyship in that it is not an obligation for the performance of any particular contract. It was given for the benefit of all persons who might furnish labor or material in the course of the work, whether the contracts for such labor and materials were in existence at the time the bond was executed or not, and without regard to the terms of purchase, whether for cash or credit. In its nature the obligation was more

[18] Parr's Bank v. Albert Mines Syndicate (1900) 5 Com. Cas. 116 Mathew, J.

[19] See § 339 herein.

of a contract of insurance than of suretyship."[20] Under a Maryland decision it appeared that the indemnity company in a letter to insured, as was said by the court, characterized "the bond very properly as a contract of insurance."[1] In an Iowa case, a bond for the faithful performance of a building contract, it is held that the suretyship was not gratuitous, and as the bond was prepared by the company for the purpose of furnishing security for hire, the rules applicable to guaranty insurance governed and if the language of the bond is in doubt, and is fairly and reasonably susceptible of two constructions, one favorable to the obligee and the other to the surety, the one favorable to the obligee should be adopted.[2] So in Minnesota a guarantee insurance bond given to secure the performance of a building contract, and entered into by a surety company engaged in the business for profit is to be construed by the rules governing ordinary insurance contracts, and not by the rules of construction governing contracts of suretyship, as such guarantee bonds are in effect insurance contracts, even though in form they resemble those of suretyship.[3] So under a Washington decision a guaranty company which, for a compensation, becomes surety on a building contractor's bond for the faithful performance of his contract effects a contract of insurance which cannot be distinguished in principle from a fidelity guarantee insurance.[4] Under a Missouri decision, however, where the bond involved was executed, in compliance with a statutory requirement, to a board of education by a contractor, conditioned for the faithful performance of a contract and for the benefit of all persons furnishing material or labor under a contract to install heating, etc. apparatus in a school building the court, per Norton, J. said: "Though a surety is regarded as a favorite of the law and the obligation of suretyship in its application to concrete facts is therefore considered strictissimi juris, the suretyship contract itself is nevertheless interpreted and con-

[20] City of Philadelphia v. Fidelity & Deposit Co. of Md. 231 Pa. 208, 80 Atl. 62, *quoting* from Young v. American Bonding Co. 228 Pa. 373, 77 Atl. 623.

[1] Ætna Indemnity Co. v. George A. Fuller Co. 111 Md. 321, 338, 73 Atl. 738, 743, 74 Atl. 369. Case of subcontractor's bond.

[2] A. E. Shorthill Co. v. Ætna Indemnity Co. of Hfd. 145 Iowa, 651, 124 N. W. 612, 619, *citing* Van Buren County v. American Surety Co. 137 Iowa, 490, 126 Am. St. Rep. 290, 115 N. W. 24.

[3] Hornell & Co. v. American Bonding Co. 112 Minn. 288, 33 L.R.A. (N.S.) 513, and note 513–519 (on character of and rules governing contracts by corporations engaged for profit in business of guarantying the fidelity or contracts of other persons) 128 N. W. 12, 40 Ins. L. J. 137.

[4] Cowles v. United States Fidelity & Guaranty Co. 32 Wash. 120, 98 Am. St. Rep. 838, 72 Pac. 1032.

strued in accord with the identical rules which obtain with respect to other undertakings. In other words the terms employed in the obligation are to be given a reasonable interpretation according to the intent of the parties as disclosed by the instrument read in the light of surrounding circumstances and the purpose for which it was made." The analogy of such a bond to a contract of insurance was not discussed and except so far as the above rule of construction is applicable to insurance contracts in general with others this case is certainly not in accord with the Pennsylvania decision above considered.[5] And in that state as only a substantial compliance is required with the contract of a surety for hire the obligation is not discharged by technical or immaterial variations from the strict letter of the contract and this applies to a building contractor's bond.[6]

§ 339g. Title guaranty contract constitutes insurance.—A title guaranty contract constitutes insurance within the rule above stated.[7] And a title insurance company is not a surety where it agrees to "indemnify, keep harmless, and insure" a mortgagee "from all loss or damage, not exceeding" the amount of the mortgage debt, which he or his assigns might sustain by reason of defects in the title to the mortgaged premises, or by reason of liens or encumbrances thereon existing at the date of the policy.[8] So it is determined in Missouri that a guaranty of title is also an indemnity similar to that of insurance and is governed by the same rule.[9] In Pennsylvania it is decided that a contract to indemnify and insure against all loss or damage from defects or unmarketableness of title, or against loss on a mortgage given as collateral security on a loan, coupled with a guarantee for the completion of certain buildings is one of indemnity alone and cannot be severed, and evidence is inadmissible as to the nonerection of the buildings in the absence of a showing that a loss on the mortgage had been sustained by reason thereof.[10] Under a New York case a contract of title guaranty is one of insurance and it is also there declared that the contract in-

[5] Board of Education of City of St. Louis v. United States Fidelity & Guaranty Co. 155 Mo. App. 109, 134 S. W. 18.

[6] Boppart v. Illinois Surety Co. 140 Mo. App. 675, 126 S. W. 768.

[7] See § 339 herein, as to decisions where it is treated as an insurance contract without discussion, see Stensgaard v. St. Paul Real Estate Title Ins. Co. 50 Minn. 429, 17 L.R.A. 425, 52 N. W. 910; Wheeler v. Real Estate Title Ins. & Trust Co. 160 Pa. 408, 28 Atl. 849.

Title guaranty insurance is contract of indemnity, see § 27g herein.

[8] Minnesota Title Ins. & Trust Co. v. Drexel, 70 Fed. 194, 198, 17 C. C. A. 56.

[9] Purcell v. Land Title Guarantee Co. 94 Mo. App. 5, 67 S. W. 726.

[10] Wheeler v. Equitable Trust Co. 206 Pa. 428, 55 Atl. 1065, s. c. 221 Pa. 276, 70 Atl. 750, 37 Ins. L. J.

suring against loss or damage on account of defects of title, by reason of liens and encumbrances, etc., was a contract of insurance pure and simple and that such corporations were, under the statute, placed upon substantially the same footing and were subject to the same rules as applied to other insurance companies, except so far only as the character of the business transacted differed from that transacted by other insurance companies recognized and provided for in the same law, and that these contracts are subject to the same rules of construction as are applicable to other insurance contracts.[11]

§ 339h. Credit guaranty contracts constitute insurance.—The rule above stated[12] applies to credit guaranty contracts.[13] So in a Federal case it is declared that these contracts "of indemnity are merely contracts of insurance carefully framed to limit as narrowly as possible the liability of the insurer." [14] And in another Federal case it is decided that a contract to guarantee against loss by uncollectible debts is a contract of insurance and not one of suretyship and whether such corporations call themselves "guaranty" or "surety" companies their business is in all essential particulars that of insurers.[15] Again, under a Massachusetts decision an agreement to purchase at a fixed price all accounts which during one year a certain business firm should have against ascertained insolvent debtors

1037. See Ganler v. Solicitors' Loan & Trust Co. 9 Pa. Co. Ct. R. 634.

[11] Trenton Potteries Co. v. Title Guarantee & Trust Co. 64 N. Y. Supp. 116, 50 App. Div. 490. See also Trenton Potteries Co. v. Title Guarantee & Trust Co. 176 N. Y. 65, 68 N. E. 132.

[12] § 339 herein.

[13] Hayne v. Metropolitan Trust Co. 67 Minn. 245, 69 N. W. 916 (is insurance within the statute). See Seaton v. Heath [1899] 1 Q. B. Div. Law Rep. 782, 68 L. J. Q. B. 631, 80 Law T. N. S. 579, 47 Wkly. Rep. 487.

On contracts securing against loss by giving credit as insurance, see note in 47 L.R.A.(N.S.) 293.

As to decisions where point is not discussed but such contract is treated as one of insurance. See:

United States.—American Credit Indemnity Co. v. Wood, 73 Fed. 81, 19 C. C. A. 264; United States Credit System Co. v. American Indemnity Co. (U. S. C. C.) 51 Fed. 751.

Maryland.—American Credit Indemnity Co. v. Cassard, 83 Md. 272, 34 Atl. 703.

Minnesota.—Smith v. National Credit Ins. Co. 65 Minn. 283, 33 L.R.A. 511, 68 N. W. 28.

New Jersey.—United States Credit System Co. v. Robertson, 57 N. J. L. 12, 29 Atl. 421; Lauer v. Gray, 55 N. J. Eq. 544, 37 Atl. 53; Gray v. Reynolds, 55 N. J. Eq. 501, 37 Atl. 461.

New York.—People v. Mercantile Credit Guarantee Co. 166 N. Y. 416, 60 N. E. 24; Steinwender v. Philadelphia Casualty Co. 126 N. Y. Supp. 271, 141 App. Div. 432.

Credit guarantee insurance is contract of indemnity, see § 271 herein.

[14] American Credit Indemnity Co. v. Athens Woolen Mills, 92 Fed. 581, 34 C. C. A. 161.

[15] Tebbets v. Mercantile Credit Guarantee Co. 73 Fed. 95, 97, 19 C. C. A. 281.

or judgment debtors against whom execution should be returned unsatisfied is a contract of insurance.[16] So in another case in that state a guaranty as to insolvency of debtors is considered as a contract of indemnity, although there is no discussion upon the point of analogy to insurance.[17] And under a Missouri decision a bond of indemnity or credit guaranty contract to indemnify against loss of claims is held one of indemnity against loss of property.[18] Again, in North Carolina a contract indemnifying a merchant against a credit loss is construed against the insurer as the application, bond and a schedule to which the bond refers are held to constitute a contract of insurance although a new branch of underwriting.[19] In Ohio an indemnity contract against losses from debts which are not collectable constitutes an insurance contract and is construed against the insurer in case of ambiguities.[20] So under a Wisconsin decision a contract to indemnify against loss for insolvency of customers is a contract of insurance, as the peril of loss to a merchant or manufacturer is as definite and real a peril as that of loss by fire, lightning, tornado or accident and may occur more frequently.[1]

§ 339i. Loss of crops: guarantee of realty revenue constitutes insurance.—A contract guarantying a fixed revenue per acre from farming land and which for a certain consideration agrees to pay a fixed amount per acre for the crop grown upon such land, without regard to its value, if the owner chooses to sell it constitutes an insurance contract very like that of a valued policy. When the contingency happens which creates the liability then the amount of the policy must be paid and it cannot be distinguished in principle from a contract to purchase bad accounts and judgments at a fixed price, irrespective of value, which contracts constitute insurance.[2]

[16] Clafflin v. United States Credit System Co. 165 Mass. 501, 52 Am. St. Rep. 528, 43 N. E. 293, *quoting* definition in Commonwealth v. Weatherbee, 105 Mass. 149, 160.

[17] Rice v. National Credit Co. 164 Mass. 285, 41 N. E. 276, *cited* in American Credit Indemnity Co. v. Champion Coated Paper Co. 103 Fed. 609, 614, 43 C. C. A. 270 (no discussion, but bonds of this character declared to be essentially insurance contracts. Id. p. 614).

[18] State v. Phelan, 66 Mo. App. 548, 549, 558.

[19] Lexington Grocery Co. v. Philadelphia Casualty Co. 157 N. Car. 116, 72 S. E. 870.

[20] Mercantile Credit & Guaranty Co. v. Littleford Bros. 18 Cir. Ct. Rep. (42 Wkly. L. Bull.) 889.

[1] Shakman v. United States Credit System Co. 92 Wis. 366, 374, 32 L.R.A. 383, 53 Am. St. Rep. 920, 66 N. W. 528, *cited* in People v. Rose, 174 Ill. 310, 314, 44 L.R.A. 124, 51 N. E. 246.

[2] Hogan, In re, 8 N. Dak. 301, 45 L.R.A. 166, 73 Am. St. Rep. 759, 78 N. W. 1051, 28 Ins. L. J. 520, under Rev. Codes, secs. 4441, 4445, regulating insurance. *Citing* Clafflin v. United States Credit System Co. 165 Mass. 501, 52 Am. St. Rep. 528, 43 N. E. 293; Shakman v. United States Credit Systems Co. 92 Wis. 366, 32 L.R.A. 383, 53 Am. St. Rep. 920, 66 N. W. 528, both *considered* under § 339h herein.

CHAPTER XVII.

PARTIES—MUTUAL COMPANIES, BENEFIT, ETC., SOCIETIES.

§ 340. Mutual insurance benefit, etc. companies or associations defined.
§ 341. Mutual and benefit, etc. companies or associations: capital stock: funds for payment of losses: guaranty or reserve funds.
§ 341a. Same subject.
§ 342. Kinds of mutual insurance companies or associations.
§ 343. Plans of mutual insurance.
§ 344. When mutual, etc. societies or associations are and are not insurance companies.
§ 344a. Same subject: pecuniary profit as a factor.
§ 344b. Same subject: pecuniary profit as a factor: lodge systems.
§ 344c. Same subject: lodge system continued.
§ 344d. Same subject: pecuniary profit as a factor: masonic benevolent or relief associations.
§ 344e. Same subject: rules of construction as a factor.
§ 344f. Same subject: attachment of copy of application or by-laws.
§ 344g. Same subject: other insurance as a factor.
§ 344h. Same subject: liability as a factor.
§ 344i. Same subject: applicability of insurance laws: statuory exemptions.
§ 344j. Applicability of insurance laws continued: right to do business as a factor.
§ 344k. Applicability of insurance laws: live stock association.

§ 340. Mutual insurance benefit, etc. companies or associations defined.—A mutual insurance company is one in which the members mutually contribute to the payment of losses and expenses, where the benefit to accrue or indemnity is conditioned in any manner upon persons holding similar contracts. Such companies differ essentially from stock insurance companies. The former need many by-laws and conditions that are not required in stock companies, and each person who insures therein becomes a member of the association.[3] A mutual company is also defined as one wherein

[3] Baxter v. Chelsea Mutual Fire Corporation Law of New York, Laws Ins. Co. 1 Allen (83 Mass.) 294, 79 1892, c. 687, sec. 2, a membership Am. Dec. 730; under the General corporation includes benevolent

the members constitute both insurer and insured, where the members all contribute by a system of assessments, to the creation of a fund from which all losses and liabilities are paid, and wherein the profits are divided among themselves in proportion to their interests.[4] And a benevolent association is defined as a corporation society or voluntary association conducted not for profit but for the sole benefit of its members and their beneficiaries.[5]

orders. Jones' Business and Corporation Laws, 87; N. Y. Ins. L. c. 28, Consol. L. c. 33 of L. 1909, sec. 1 (Parker's Ins. L. [ed. 1915] p. 3) the term "Insurance Law" is declared "applicable to all . . . corporations, associations and societies . . . authorized by law to make insurances."

As to stockholders and members, see § 341 herein.

Although the distinction between stock and mutual companies is now clear, nevertheless it was declared at an early date that: "There has been much controversy between 'stock' and 'mutual' companies, most of which is a mere war of words. Insurance, as an average contributionship, is fundamentally mutual in its structure. Whether a premium shall be anticipated as absolute or contingent, is a question of administration." Pamphlet on Progress of American Life Insurance (Review Pub. Co. Philadelphia, 1877).

[4] State v. Willett, 171 Ind. 296, 23 L.R.A.(N.S.) 197, 86 N. E. 68.

[5] Thompson v. Royal Neighbors of America, 154 Mo. App. 109, 133 S. W. 146, Rev. Stat. 1909, sec. 7109. Mutual companies defined, see Burt on Life Assurance (1849) p. 53.

"Where two or more persons mutually agree to insure each other against marine losses there is said to be a mutual insurance." Earl of Halsbury's Laws of England, vol. 17, p. 505 and note.

For other definitions see the following cases:

United States.—Union Ins. Co. v. Hoge, 21 How. (62 U. S.) 35, 64, 65, 16 L. ed. 61 (mutual, organized under N. Y. act, April 10, 1849); Modern Woodmen of America v. Tevis, 117 Fed. 369, 372, 54 C. C. A. 293 (fraternal); National Union v. Marlow, 74 Fed. 775, 21 C. C. A. 89, 40 U. S. App. 95 ("fraternal beneficial society").

Colorado.—Spruance v. Farmers & Merchants' Ins. Co. 9 Colo. 73, 77, 10 Pac. 285, 287 (mutual).

Connecticut.—Examine Miles & Co. v. Odd Fellows Mutual Aid Assoc. 76 Conn. 132, 134, 55 Atl. 607, under Pub. acts 1895, p. 592, c. 255, sec. 1 (fraternal).

Illinois.—Examine Love v. Modern Woodmen of America, 259 Ill. 102, 106, 107, 102 N. E. 183 (fraternal).

Indiana.—Muller v. State Life Ins. Co. 27 Ind. App. 45, 51, 60 N. E. 958, 960.

Maine.—Adams v. Mutual Fire Ins. Co. 16 Shep. (29 Me.) 292, 294.

Michigan.—Walker v. Giddings, Commr. 103 Mich. 344, 347, 348, 61 N. W. 512 (fraternal).

Minnesota.—National Protective Legion v. O'Brien, 102 Minn. 15, 16, 17, 112 N. W. 1050 (beneficial and fraternal).

Missouri.—Rodgers v. National Council Junior Order United American Mechanics, 172 Mo. App. 719, 155 S. W. 874 (fraternal beneficiary societies included in "insurance companies," under Rev. Stat. 1909, secs. 7109, 7112, 7114); Umberger v. Modern Brotherhood of America, 162 Mo. App. 141, 143, 144, 144 S. W. 898 (fraternal, Rev. Stat. 1909, sec. 7109).

New York.—Mygatt v. New York Protection Ins. Co. 21 N. Y. 52, 65.

North Dakota.—J. P. Lamb & Co.

The statutes of some of the states define mutual insurance companies, mutual benefit associations, fraternal beneficiary orders and like associations.[6]

v. Merchants' National Mutual Fire Ins. Co. 18 N. Dak. 253, 259, 119 N. W. 1048 (mutual fire).

Pennsylvania.—Given v. Rettew, 162 Pa. 638, 640, 29 Atl. 703.

Texas.—*Examine* Splawn v. Chew, 60 Tex. 532, 535 (benefit association).

Becomes member Boeck v. Modern Woodmen of America, 162 Iowa, 159, 143 N. W. 999; J. P. Lamb & Co. v. Merchants' National Mutual Fire Ins. Co. 18 N. Dak. 253, 119 S. W. 1048; Bixler v. Modern Woodmen of America, 112 Va. 678, 38 L.R.A. (N.S.) 571n, 72 S. E. 704, 41 Ins. L. J. 89. See § 317 herein.

[6] *California.*—Cal. Stat. 1891. c. 116, p. 126, secs, 1, 14, pp. 126–130.

Colorado.—1 Mill's Ann. Stat. sec. 638 (what associations not insurance companies).

Connecticut.—Public acts 1895, p. 592, c. 255, sec. 1, construed in Miles & Co. v. Odd Fellows Mutual Aid Assoc. 76 Conn. 132, 55 Atl. 607 (fraternal).

Georgia.—Ga. Code 1911 (Civ.) sec. 2529 (sec. 2134) p. 660 (mutual insurance); Civ. Code 1910, secs. 2866–2877, construed in Purycar v. Farmers Mutual Ins. Assoc. 137 Ga. 579, 73 S. E. 851 (fraternal). Laws 1900, p. 71 (fraternal beneficial order defined as a corporation, society, or voluntary association having no capital stock and having a representative form of government and a lodge system, etc.), construed in Graham v. Eminent Household of Columbian Woodmen, 135 Ga. 777, 70 S. E. 649, 40 Ins. L. J. 1098 (constituent members and powers of "supreme bodies").

Illinois.—Hurd's Rev. Stat. 1908, c. 73, sec. 258 (fraternal beneficiary society defined, societies on lodge system), construed in Peterson v. Manhattan Life Ins. Co. 244 Ill. 329, 15 Am. & Eng. Ann. Cas. 96, 91 N. E. 466, 39 Ins. L. J. 817.

Iowa.—Acts 21st Gen. Assembly, c. 65, sec. 20 (what deemed a mutual association).

Kentucky.—Ky. Stat. secs. 641, 664 (insurance company or insurance corporation defined; societies with lodge system, etc.), construed in Sims v. Commonwealth, 114 Ky. 827, 71 S. W. 929 (as to unlicensed agents and incorporation); also in Grand Lodge Ancient Order United Workmen v. Edwards, 27 Ky. L. Rep. 469, 85 S. W. 701 (as to attachment of application to policy).

Louisiana.—Acts La. 1912, p. 565, No. 256.

Maine.—Rev. Stat. 1903, p. 497, c. 49, sec. 134 (fraternal).

Michigan.—Pub. acts 1893, No. 119 (fraternal beneficiary societies); construed in McMorran v. Great Hive of the Ladies of the Maccabees, 117 Mich. 398, 5 Det. Leg. N. 266, 75 N. W. 743 (title of act not unconstitutional).

Missouri.—Rev. Stat. 1909, sec. 7109, p. 371; Rev. Stat. 1909, sec. 6896; Rev. Stat. 1899, secs. 1408, 7853 (benevolent association; fraternal, with lodge system; mutual companies), construed in National Union v. Marlow, 74 Fed. 775, 778, 21 C. C. A. 89; Toomey v. Supreme Lodge Knights of Pythias, 147 Mo. 129, 136, 48 S. W. 936; Jacobs v. Omaha Life Assoc. 146 Mo. 523, 48 S. W. 462 (Rev. Stat. 1889, sec. 5860, "assessment companies"); Umberger v. Modern Brotherhood of America, 162 Mo. App. 141, 144 S. W. 898; Thompson v. Royal Neighbors of America, 154 Mo. App. 109, 133 S. W. 146; Tice v. Supreme Lodge Knights of Pythias, 123 Mo. App. 85, 100 S. W. 519, aff'd 204 Mo. 349, 102 S. W. 1013. For history of state legislature as to same, see State

Other statutes exempt certain mutual benefit or fraternal organizations from the insurance laws, although such societies or associations might otherwise come within their operation.[7]

(ex rel. Supreme Lodge K. of P.) v. Vandiver, 213 Mo. 187, 204 et seq. 111 S. W. 911; Kern v. Supreme Council American Legion of Honor, 167 Mo. 471, 479 et seq., 67 S. W. 252.

Nevada.—Rev. Laws 1912, p. 379, sec. 1310 (mutual companies), Comp. L. 1900, sec. 942.

New Hampshire.—Pub. Stat. 1901, p. 578, c. 86, sec. 1 (fraternal).

New York.—Ins. Law, c. 28, Consol. Laws, c. 33 of L. 1909; (Parker's Ins. Law, N. Y. [ed. 1915] p. 342) sec. 230 (fraternal). See also sec. 1 of the same Law *considered* in first note to this section.

North Carolina.—N. C. Revisal 1905, sec. 4795 (fraternal), construed in State v. Arlington, 157 N. C. 640, 73 S. E. 122, 41 Ins. L. J. 319.

Oklahoma.—Okla. Rev. Stat. 1903, sec. 3236 (fraternal).

Texas.—Tex. Rev. Stat. 1899, sec. 1408, Ann. Stat. 1906, p. 1111.

Washington.—2 Rem. & Ball. Ann. Codes & Stats. sec. 6166, p. 1012 (fraternal).

Porto Rico.—Rev. Codes (Civ.) 1902, sec. 1694 (mutual insurance).

[7] *Arkansas.*—Ark. Stat. (Sand & H. Dig.) sec. 4133 (mutual insurance company on assessment plan), construed in Ingle v. Batesville Grocery Co. 89 Ark. 378, 117 S. W. 241.

California.—Stat. 1891, c. 116, p. 126, sec. 14, p. 130.

Illinois.—Stat. 1885, c. 32, sec. 31.

Kentucky.—Stat. 1903, sec. 641 (fraternal).

Massachusetts.—Pub. acts 1882, c. 115, secs. 8–10, amdt. 1882, c. 195, sec. 2.

Michigan.—Pub. acts 1893, p. 186, No. 119; acts 1907, p. 243, No. 180, construed in Knights of the Modern Maccabees v. Barry, 155 Mich. 693, 118 N. W. 585 (fraternal).

Missouri.—Laws 1881, p. 87; Laws 1897, p. 132, construed in Westerman v. Supreme Lodge Knights of Pythias, 196 Mo. 670, 94 S. W. 470 (fraternal beneficiary associations); acts 1887, construed in Aloe v. Fidelity Mutual Life Ins. Co. 164 Mo. 675, 55 S. W. 993, 29 Ins. L. J. 679 (assessment companies); Jacobs v. Omaha Life Assoc. 142 Mo. 49, 43 S. W. 375 (what is not contract on assessment plan under Rev. Stat. 1889, sec. 5849); Ordelheide v. Modern Brotherhood of America, 158 Mo. App. 677, 139 S. W. 269, 40 Ins. L. J. 1845 (fraternal association not within general insurance laws); Missey v. Supreme Lodge Knights & Ladies of Honor, 147 Mo. App. 137, 126 S. W. 559 (benevolent or mutual benefit plan: not subject to general insurance laws); City of Trenton v. Hunnel, 134 Mo. App. 595, 114 S. W. 1131, Rev. Stat. 1899, sec. 1408, Ann. Stat. 1906, p. 1111 (fraternal beneficiary association); Tice v. Supreme Lodge Knights of Pythias, 123 Mo. App. 85, 100 S. W. 519, aff'd 204 Mo. 349, 102 S. W. 1013 (as to non-exclusion from operation of Rev. Stat. 1899, sec. 1423, Ann. Stat. p. 1118, Laws 1897, p. 132, relating to fraternal beneficiary association and specifying lodges or orders excluded); Shotliff v. Modern Woodmen of America, 100 Mo. App. 138, 73 S. W. 326, Rev. Stat. 1899, sec. 1408 (fraternal); Missouri statutes are also construed in National Union v. Marlow, 74 Fed. 775, 21 C. C. A. 89, 40 U. S. App. 95 ("fraternal beneficial society"); Grand Lodge Ancient Order United Workmen v. Grand Lodge A. O. U. W. 83 Conn. 241, 76 Atl. 533 (fraternal).

New York.—See Parker's Ins. Law (ed. 1915) p. 343.

Ohio.—Rev. Stat. 1880, sec. 3630; Rev. Stat. secs. 3631–11, construed in

§ 341. Mutual and benefit, etc., companies or associations: capital stock: funds for payment of losses: guaranty or reserve funds.—The funds out of which damages and losses are to be paid are the premiums, the earnings in the business, and premium and deposit notes, which latter are a sort of reserve fund.[8] These usually constitute the capital of the company,[9] although an absolute reserve or safety fund may be provided, and all the notes, whether in one department or another, must be resorted to if necessity exists.[10] So where a mutual company is authorized to and does issue policies on the cash principle to other than its members, the premium notes of the members represent the capital stock of the company to such other insurers.[11] So parol evidence is admissible to show whether a note executed prior to the completion of the organization, and in form like those required to form part of the capital, was intended to and did constitute a part thereof.[12] But a guaranty fund in approved notes to be used only in paying claims, and any part so used to be refunded out of the first surplus receipts, cannot be reckoned as assets in determining whether the company is solvent;[13] So a guaranty fund is not, strictly speaking, assets of a mutual insurance company for the purpose of determining its solvency, when the company is required to refund all moneys obtained from it,[14] nor can a premium note be treated by a receiver of the company as capital, and the whole note collected, regardless of losses.[15] But it is held in another case that a note for premiums in advance passes

Gilligan v. Supreme Council of Royal Arcanum, 26 Ohio Cir. Ct. R. 42 (fraternal).

Pennsylvania.—Acts 1893, sec. 4 (P. L. 9), construed in Thayer v. Thompson, 220 Pa. 241, 69 Atl. 758 (beneficial association limited to certain city employees exempt).

Texas.—Rev. Stat. 1895, art. 3096 (mutual relief associations).

Wisconsin.—Laws 1891, c. 418, construed in State v. National Accident Soc. 103 Wis. 208, 79 N. W. 220, 28 Ins. L. J. 793 (beneficiary association furnishing casualty or life insurance on assessment plan).

See cases in §§ 344–346 herein.

[8] Planters' Ins. Co. v. Comfort, 50 Miss. 662, 668.

[9] Planter's Ins. Co. v. Comfort, 50 Miss. 662, 668.

[10] Sands v. Sanders, 28 N. Y 416, 25 How. Pr. 82.

[11] Hays v. Lycoming Fire Ins. Co. 98 Pa. St. 184.

[12] Dana v. Munson, 23 N. Y. 564, limited in Jackson v. Van Slyke, 52 N. Y. 645, to the extent that when a note is given before the organization of the company there is ground for an inference that it was given as a stock note, although evidence of the attendant facts and circumstances may be sufficient to raise a question for the jury whether the note was a premium or stock note. The last case is *cited* in Sands v. Isaac Son, 56 N. Y. 662.

[13] Russell v. Bristol, 49 Conn. 251.

[14] Corey v. Sherman, 96 Iowa, 114, 60 N. W. 232, 64 N. W. 828, 32 L.R.A. 490. See §§ 1273, 1288, 1455 herein.

[15] Bell v. Shibley, 33 Barb. (N. Y.) 610. See Farmers' Ins. Co. v. Smith, 63 Ill. 187.

to the receiver of a company on its becoming insolvent.[16] But the notes advanced to the company by intending insurers do not constitute the makers stockholders;[17] So a guaranty fund which is merely a temporary advancement or loan and does not constitute any part of its working capital does not change the character of a mutual fire insurance company organized exclusively to insure the property of its members so as to make subscribers liable to creditors as stockholders.[18] And the fact that a mutual company, authorized by statute to insure the property of its members on the mutual plan, provides in its articles for a guaranty fund to consist of shares issued to subscribers does not make it a stock company.[19] Although it is decided that in the absence of a charter provision to the contrary the policy holders are, so far as rights and remedies are concerned, stockholders the same as stockholders in a stock corporation.[20]

If a note be proven to be a capital stock note, given, taken, and used as such, on the organization of the company, the whole amount may be recovered without an assessment.[1] A guaranty fund note may be given to a mutual company to create a reserve fund required by statute and where the withdrawal of such notes is prohibited except on certain conditions the maker is released from liability where certain notes are returned without complying with said conditions.[2] If the charter provides that its working capital shall be in lieu of a reserve, under the Connecticut statute such capital is treated as a liability in proceedings for a receiver.[3]

Where a mutual insurance company has deposited securities with the state treasurer, under a statutory requirement therefor, it has no absolute right to collect the income therefrom. But the treasurer may grant permission to the company to receive such income,

[16] Cruikshank v. Brouwer, 11 Barb. (N. Y.) 228.

[17] Hill v. Nautilus Ins. Co. 4 Sand. Ch. (N. Y.) 577.

[18] Smith v. Sherman, 113 Iowa, 601, 85 N. W. 747.

[19] Mutual Guaranty Fire Ins. Co. In re (Alvord v. Barker) 107 Iowa, 143, 70 Am. St. Rep. 149n, 77 N. W. 868, 28 Ins. L. J. 205.

[20] Huber v. Martin, 127 Wis. 412, 3 L.R.A.(N.S.) 653n, 115 Am. St. Rep. 1023, 7 Am. & Eng. Ann. Cas. 400, 105 N. W. 1021, 1135, 35 Ins. L. J. 334.

[1] Sands v. St. Johns, 36 Barb. (N. Y.) 628.

As to liability of maker of capital stock note of mutual fire insurance corporation, see Raegener, Receiver, v. Hubbard, 57 N. Y. Supp. 1018, 40 App. Div. 359, aff'd 167 N. Y. 301, 60 N. E. 633; Raegener, Receiver, v. Warner, 56 N. Y. Supp. 310; Raegener, Receiver, v. Phillips, 26 Misc. 311, 56 N. Y. Supp. 174. *Examine* Raegener v. Medicus, 32 Misc. 591, 66 N. Y. Supp. 460.

[2] Neale v. Head, 133 Cal. 42, 65 Pac. 131, 576, Cal. Stat. 1865–66, p. 752.

[3] Betts v. Connecticut Indemnity Co. 71 Conn. 751, 44 Atl. 65, Genl. Stat. secs. 2854, 2870.

should it be best for the interests of the policy holders. Should such permission be refused, the accrued interest, with the principal, goes to the payment of the policy holders and creditors in the order named.[4]

§ 341a. Same subject.—In the absence of a charter limitation to the contrary it is competent for a mutual insurance corporation to make rates for insurance with a view of probably creating a surplus and of subsequently distributing the same to members so far as experience shall show that the same is not needed in the business.[5] And if a reserve fund is not created under any by-law or rule and there is no provision specifying of what it shall consist, but certain moneys are specially devoted to other purposes, all the net assets not so specially appropriated may be treated as belonging to said fund.[6] The Indiana statute providing for the organization of companies on the assessment plan also provides that nothing therein shall prevent the accumulation of other funds exceeding the amount required for the purposes of incorporation.[7] Again, a special fund may be created as where a foreign insurance company may, in the absence of fraud or some positive prohibitory law, agree voluntarily with its local agent that a certain per cent of the premiums received by him shall be deposited in trust as a fund for policy holders insured by such agent as a special fund for payment of losses in preference to other policy holders.[8] And a reserve or special deposit fund with a lien in favor of beneficiaries may be required by statute in the case of mutual assessment life companies.[9] So the

[4] Meies v. Economical Mutual Life Ins. Co. 12 R. I. 259. As to what is capital, subject to taxation, see People v. Board of Supervisors, 20 Barb. (N. Y.) 81; People v. Board of Supervisors, 16 N. Y. 424; Sun Mutual Ins. Co. v. Mayor of New York, 8 N. Y. (4 Seld.) 241, 5 Sand. Ch. (N. Y.) 10; Mutual Ins. Co. v. Board of Supervisors, 4 N. Y. (4 Comst.) 442.

[5] Huber v. Martin, 127 Wis. 412, 3 L.R.A.(N.S.) 653, 115 Am. St. Rep. 1023, 7 Amer. & Eng. Ann. Cas. 400, 105 N. W. 1031, 1135, 35 Ins. L. J. 334.

When net surplus of mutual plan life insurance company constitutes "annual profits or gains" assessable to income tax irrespective of return or credit to policyholders, see Equitable Life Assur. Soc. v. Bishop [1899] L. R. 2 Q. B. Div. 439, *distinguishing* New York Life Ins. Co. v. Styles [1889] 14 App. Cas. 381; Last v. London Assur. Corp. [1885] 10 App. Cas. 438.

[6] Hass v. Mutual Relief Assoc. 118 Cal. 6, 49 Pac. 1056, 26 Ins. L. J. 992.

[7] Federal Life Ins. Co. v. Arnold, 46 Ind. App. 114, 90 N. E. 493, Laws 1897, p. 318, c. 195.

[8] Babcock Printing Press Mfg. Co. v. Ranous, 164 N. Y. 440, 58 N. E. 529, 30 Ins. L. J. 164, aff'g 54 N. Y. Supp. 1048, 31 App. Div. 629.

[9] San Francisco Savings Union v. Long, 123 Cal. 107, 53 Pac. 907, Stat. 1891, p. 126, secs. 2, 4.

As to right to issue paid up insurance under statute providing for creation, maintenance, disbursement, and application of reserve, emergency or surplus fund by mutual benefit society, see State (ex rel. Grand

statutes of the state may contemplate the payment of fraternal benefit certificates from surplus or reserve funds derived from assessments and the charter may provide for a "mortuary fund" to meet death claims from special causes, also a "death benefit fund" to meet ordinary death claims when regular assessments are insufficient. Such reserve adds to the security of the contract of insurance and makes more valuable the contributor's rights as certificate holders. The intent being to create permanent funds. And during the life of the order, the existence of the trust and the fulfillment by the contributors of their insurance contracts, their interest is limited to the right to endow their beneficiaries and compel the preservation of the funds and maintenance of the trust and such funds are for the benefit of all who may become members during the life of the fund.[10] And although assessments may be made, still the reserve fund may be drawn on when necessary to pay death claims in full.[11] So where the articles of association so provide, the guaranty fund, consisting of deposits or pledges by members for payment of assessments, may be resorted to and levied upon for the death benefit fund.[12] But where a statute for the incorporation and regulation of co-operative or assessment life and casualty insurance corporations authorizes the creation of a reserve fund for the payment of death losses it does not permit the accumulation wholly from one class of members of such reserve fund and then devote it to the payment of death losses to another class who have not contributed to it.[13]

The reserve fund may be one not set apart for any special purpose and may be transferable to the policy fund when deemed expedient by the directors of a beneficial association without capital stock, and without funds for payment of losses except those derived from assessments of members. In such case a member has no vested interest in the reserve fund.[14] Again, the safety fund of a non-fraternal co-operative company may only be available for death claims where it is transferred, by express direction of the trustees, to the mortuary fund, and be also limited to persistent living

Fraternity) v. Lemert, 66 Ohio L. Bull. 118; Ohio Laws 423, Act 97, sec. 9, Gen. Code 9470.

[10] Kane v. Knights of Columbus, 84 Conn. 96, 79 Atl. 63, 40 Ins. L. J. 874.

[11] Supreme Lodge National Reserve Assoc. v. Mondrowski, 20 Tex. Civ. App. 322, 49 S. W. 919.

[12] Purdy v. Bankers' Life Assoc. 104 Mo. App. 91, 74 S. W. 486.

[13] People (ex rel. Atty. Genl.) v. Life & Reserve Assoc. 150 N. Y. 94, 45 N. E. 8. See this case also as to transfer from "reserve fund" to "death fund" and assessments on holders of "life reserve certificates."

[14] Kahn v. Fulton (Wisconsin Odd Fellows Mutual Life Ins. Co. In re.) 101 Wis. 1, 42 L.R.A. 300, 76 N. W. 775.

members [15] and only the surplus of the reserve fund over a certain sum may be available for death claims which may be limited to persistent members for a certain time after the completion of the fund.[16] The "surplus" of a mutual life insurance company belongs equitably to the policy holders who contributed to it, in the proportion in which they contributed.[17]

Where an association is required to accumulate and maintain an "assessment fund" and an "endowment fund" and all endowments are to be paid out of the latter fund which is made up of a certain per cent of all assessments actually paid in, except all first assessments, the balance of the assessments, less expenses, constitutes the "assessment fund" out of which beneficiaries are paid where they die within the endowment period.[18]

§ 342. Kinds of mutual insurance companies or associations.—Mutual insurance companies may be divided into two general classes 1. Those which are organized for the purpose of doing an insurance business; 2. Those mutual societies or associations which have a social, benevolent, or like character, but the nature and prevalent purpose of which is that of insurance.[19]

§ 343. Plans of mutual insurance.—There are numerous plans or schemes of mutual insurance. Premium notes may be given which are assessable from time to time to the amount stated therein: or the members may be assessed periodically, or as required; or they may be obligated to pay a fixed sum upon a loss; or notes may be given for a part only of the premium, the other part being payable in cash, or the entire premium be paid in advance in cash. Mutual companies are also organized to issue policies upon premium notes, and also for all cash premiums, and the fund thus realized may constitute a common fund for the payment of losses.[20] Again, the plan may require a cash deposit, from each member of an unincorporated association, from which losses are to be met such member

[15] People v. Family Fund Soc. (Shorb's Appeal) 52 N. Y. Supp. 867, 31 App. Div. 166, appeal dismissed (mem.) 159 N. Y. 534, 53 N. E. 1129.

[16] Bird v. Mutual Union Assoc. of Rochester, 52 N. Y. Supp. 1044, 30 App. Div. 346.

[17] United States Life Ins. Co. v. Spinks, 126 Ky. 405, 13 L.R.A. (N.S.) 1053, 96 S. W. 389. See also Calkins v. Bump, 120 Mich. 335, 6 Det. Leg. N. 182, 79 N. W. 491. See §§ 1273, 1288, 1455 herein.

On the distribution of the surplus upon the dissolution of a mutual insurance company, see note in 3 L.R.A.(N.S.) 653.

[18] Kerr v. Minnesota Mutual Benefit Assoc. 39 Minn. 174, 177, 12 Am. St. Rep. 631, 39 N. W. 312.

[19] As far as necessary we have also noticed the shipping clubs and Friendly Societies of England under § V. herein.

[20] Lehigh Valley Fire Ins. Co. v. Schimpf, 13 Phila. (Pa.) 515, 521. See § 1138 herein.

As to right to change plan, see §§ 350m–350q herein.

to become entitled to a return of the unexpended portion of the deposit at the expiration of his policy.[1] Where the charter of a life assurance society provides that its business shall be conducted on the mutual plan such provision is judicially declared to contemplate that the premiums paid by each member for insurance constitutes a common fund devoted to the payment of losses as they may occur.[2]

The fact that cash premiums are paid, without further liability, at the election of assured, as well as premiums secured by note does not abrogate the mutual principle.[3] In the cash premium plan each member has an interest in the surplus premium fund remaining after payment of losses and expenses,[4] for all persons insured on that principle are entitled to look to the premium notes of the members as the capital of the company;[5] and a mutual company may, in New York,[6] issue policies for a fixed cash premium, without liability to contribute by the assured.[7] And the charter of a mutual company may clearly provide for the issuance of policies on the cash premium basis.[8] Nor does such company under the Mis-

[1] Sergeant v. Goldsmith Dry Goods Co. (1913) — Tex. Civ. App. —, 159 S. W. 1036.

As to relinquishment of capital stock or deposit notes by mutual company to maker, see N. Y. Ins. Law 1909, c. 33, c. 28 Consol. Laws, secs. 113, 115 (Parker's Ins. Law of N. Y. [ed. 1915] pp. 206, 208).

[2] Lord v. Equitable Life Assur. Soc. 96 N. Y. Supp. 10, 109 App. Div. 252 (*citing* Union Ins. Co. v. Hoge, 21 How. [62 U. S.] 35, 64, 16 L. ed. 61) The principal case also appears on other points in 194 N. Y. 212, 22 L.R.A.(N.S.) 420, 87 N. E. 443.

[3] Union Ins. Co. v. Hoge, 21 How. (62 U. S.) 35, 16 L. ed. 61. See Schwarzwalder v. Tegen, 58 N. J. Eq. 319, 321, 324, 43 Atl. 587.

[4] Sprnance v. Farmers' & Merchants Ins. Co. 9 Col. 73, 77, 78, 10 Pac. 285, under Col. Gen. Stat. sec. 1704.

[5] Hays v. Lycoming Fire Ins. Co. 98 Pa. St. 184; Hummel's Appeal, 78 Pa. St. 320; Lehigh Valley Fire Ins. Co. v. Schimpf, 13 Phila. (Pa.) 515, 521, see Schimpf v. Lehigh Valley Mutual Ins. Co. 86 Pa. 373, 376.

[6] As organized under N. Y. Stat. 1849, c. 308.

[7] Mygatt v. New York Protection Ins. Co. 21 N. Y. 52, 67, s. c. 19 How. Pr. (N. Y.) 61, 77. See Mutual Fire Ins. Co., Matter of, 164 N. Y. 10, 16, 58 N. E. 29; Dickinson v. Continental Trust Co. 52 N. Y. Supp. 672, 673, 23 Misc. 489, 491.

[8] Ely v. Oakland Circuit Judge, 62 Mich. 466, 17 Det. Leg. N. 62, 125 N. W. 375, 127 N. W. 769.

As to cash premium in addition to amount of note to be given by insured in domestic mutual fire insurance company. See N. Y. Ins. L. 1909, c. 33, Consol. Laws, c. 28, sec. 113 (Parker's Ins. L. of N. Y. [ed. 1915] pp. 206, 207); and as to deposit note and cash payment by members of such corporations, and as to relinquishment by corporation to maker of such note after expiration of insurance term, see sec. 115 of same law. (Parker's, pp. 208, 209).

As to corporations doing business on the advance premium plan pursuant to the provisions of art. IX. of N. Y. Ins. Law, relating to Co-operative Fire Ins. Corp. See N. Y. Ins. Law 1909, c. 33, Consol. L. c. 28, sec.

souri statute.[9] expose itself to the charge of doing business upon the joint stock plan, by receiving all cash premiums on all policies running less than six years.[9a] Nor is a combined premium note, assessment, and cash premium plan ultra vires where the company is chartered to do business on the mutual plan only.[10] It is said by the court in a Colorado case [11] that "the principle of mutuality exists when the persons constituting the company contribute either cash or assessable premium notes, or both, as the plan of transacting business may provide, to a common fund, out of which each is entitled to indemnity in case of loss,[12] though where cash is accepted for premiums the insured is held, in Illinois, not to thereby become a member.[13] And under an Iowa decision one who insures his property in a specific amount for a certain premium does not thereby become a member.[14] But in Michigan the holders of policies issued on a cash premium basis become members of the company.[15] Where a New York company was authorized to receive subscriptions payable in cash, and give receipts therefor bearing interest, which receipts showed that the cash was received in advance for premiums only of insurance, but the charter did not provide that those paying such cash should take policies of insurance the premiums on which should equal the cash so paid in, it was held that such plan was not that of mutual insurance under the Illinois laws.[16] Persons so associated are said to be members of the company. They have, or may have, a voice in the management of its affairs, and are practically both insurers and insured. All are interested in what may be termed the profits and losses of the association; for if the assessable note system in any of its forms be adopted, the demands upon each member to meet assessments during the life of his policy or risk are large or small, according to the multi-

267; Parker's N. Y. Ins. L. (ed. 1915) pp. 384 et seq.

[9] Act 1877, Rev. Stat. Mo. 1879, sec. 5988.

[9a] State v. Manufacturers' Mut. Fire Ins. Co. 91 Mo. 311, 318, 3 S. W. 383.

[10] Lehigh Valley Fire Ins. Co. v. Schimpf, 13 Phila. (Pa.) 515; Davis v. Oshkosh Upholstery Co. (Parcher & J. & A. Stewart) 82 Wis. 488, 495, 52 N. W. 771. See Rundle v. Kennan, 79 Wis. 492, 497, 48 N. W. 516.

[11] Spruance ex rel. v. Farmers & Merchants Ins. Co. 9 Col. 73, 77, 78, 10 Pac. 285.

[12] *Citing* Union Ins. Co. v. Hoge, 21 How. (62 U. S.) 35, 16 L. ed. 61; Mygatt v. New York Prot. Co. 21 N. Y. 52, 19 How. Pr. 61; White v. Haight, 16 N. Y. 310; Ohio Mutual Ins. Co. v. Manetta Woolen Factory, 3 Ohio St. 348; May on Insurance, sec. 548; Angell on Insurance, sec. 413.

[13] Illinois Mutual Fire Ins. Co. v. Stanton, 57 Ill. 354.

[14] Mutual Guaranty Fire Ins. Co., In re (Alvord v. Barker) 107 Iowa, 143, 70 Am. St. Rep. 149 note, 77 N. W. 868, 28 Ins. L. J. 205.

[15] Ely v. Oakland Circuit Judge, 162 Mich. 466, 17 Det. Leg. N. 62, 125 N. W. 375, 127 N. W. 769.

[16] Mutual Fire Ins. Co. v. Swigert, 120 Ill. 36, 44, 11 N. E. 410.

plication or diminution of losses; while if a cash premium plan prevail, each member has an interest in the surplus premium fund remaining after payment of losses and expenses, and of course the amount of such surplus is governed by the extent of the losses suffered. The policyholder in the joint stock company is not thus situated. He pays a certain definite sum as a premium, and the company agrees therefor to pay him a certain specific amount in case of loss. He has no voice whatever in the management of the business, and whether the profits or losses are large or small does not concern him, provided the company remains able to liquidate any losses contemplated by his contract. . . . The principle of mutuality has probably been more often recognized and enforced in these associations through the assessable note system in some of its numerous forms, but . . . it is perfectly consistent with the payment of cash premiums." [17] In case of deposit notes, contributions are obtained from the makers for losses and damages by pro rata assessments of a just proportion upon each member liable thereon, and payments thereof are required upon due notice.[18]

Mr. Niblack [19] makes three general divisions of the plans of insurance in mutual benefit societies, as follows: "1. Where the society agrees, upon certain conditions, to pay a certain sum of money on the death of a member; 2. Where the society agrees to pay, on certain conditions, as many dollars as there are members of the society in good standing at the time of the death of a member; 3. Where the society agrees, upon certain conditions, on the death of a member, to levy an assessment upon its members of a certain sum of money, and to pay the proceeds of such assessment to the beneficiary of the member." This division is at once concise and comprehensive.[20]

§ 344. When mutual, etc., societies or associations are and are not insurance companies.—When a mutual benefit society or association contracts for a consideration to pay a sum of money upon the happening of a certain contingency, and the prevalent purpose and nature of such society or association is that of insurance, the organization is a mutual insurance company. This is true whether the society be a voluntary one or incorporated, and whether it be

[17] As to the government and organization of mutual companies in New York, and the statutes of that state down to and including that of 1849, as well as the relations of members, etc., see opinion of Denio, C. J., in White v. Haight, 16 N. Y. 310. See also Parker's N. Y. Ins. Laws (ed. 1915, being c. 28, Consol. Laws and c. 33 of 1909, as am'd) pp. 200 et seq., 342, et seq.

[18] Planters' Ins. Co. v. Comfort, 50 Miss. 662, 668.

[19] Niblack's Mutual Benefit Societies, sec. 384.

[20] See further 16 Am. & Eng. Ency. of Law, 17–19.

known as a relief, benevolent, or benefit society or by some similar name. Nor does the manner or mode of the payment of the consideration or of the loss or benefit affect the question, and make the contract the less one of insurance. The test is, what is the real purpose and nature of such society, and if the prevalent purpose is to make contracts, which are in effect contracts of insurance within the meaning of that word, they are insurance companies. Various factors or elements, however, enter into the consideration of this question as will appear throughout the next following sections.[1] The above rule is also especially subject to those exceptions which arise in favor of such companies by reason of statutory exemptions in some of the states, or other statutory provisions defining or fixing their status.[2] It is held in Arkansas that the rights of persons claiming under a contract must be fixed thereby, without regard to the character of the society, where the statute affords no aid in determining whether it be an insurance contract or not.[3] And it is decided in Maine that if the prevalent purpose be that of insurance, its benevolent or charitable features do not affect its legal status as an insurance company.[4] But a company may be substantially an old-line life company and neither a mutual nor fraternal benefit association even though annual dues instead of premiums are collected to meet obligations.[5]

§ 344a. Same subject: pecuniary profit as a factor.—Under a Missouri decision in fraternal benefit associations where the principal object is social and benevolent the insurance feature is merely an incident.[6] And in another case in that state it is stated in the opinion in discussing the point before the court that in such associations the insurance feature is a mere incident to the fraternal purpose in contradistinction to those companies the one purpose of

[1] *Is a benefit association an insurance company?* I. Where the question is as to "other insurance." II. Where the construction of the certificate is in question. III. Where compliance with state insurance law is required before doing business. IV. Where the question is in regard to jurisdiction. V. Under statute exempting benevolent societies. VI. Where the question is not discussed. VII. Some definitions. VIII. Summary. Note 38 L.R.A. 33–57. *Compare* Peterson v. Manhattan Life Ins. Co. 244 Ill. 329, 18 Am. & Eng. Ann. Cas. 96, 39 Ins. L. J. 817.

[2] See §§ 340, 344a et seq. herein.

[3] Block v. Valley Mutual Ins. Assoc. 52 Ark. 201, 20 Am. St. Rep. 167, 12 S. W. 477.

[4] Bolton v. Bolton, 73 Me. 299.

[5] Filley v. Illinois Life Ins. Co. 93 Kan. 293, 144 Pac. 257. See this case also for definitions and distinction between the above different classes.

[6] Umberger v. Modern Brotherhood of America, 162 Mo. App. 141, 144 S. W. 898, *considered* more fully under § 344b herein.

which is to make a profit for the promoters, and one feature of which is the payment of fixed premiums at stated times by the insured, and the payment of a sum certain by the company to the named beneficiary upon the death of insured.[7] It is declared in Illinois that there is a fundamental distinction between life insurance companies and those organizations generally known as fraternal associations, fraternal beneficiary societies, or mutual benefit societies requiring separate codes for the management and regulation of each, which difference has been continuously recognized by the courts and the legislature of that state. The court, per Cooke, J., said: "Life insurance companies are organized to engage in the business of insuring the lives of persons for profit. They are authorized to combine and frequently do combine, with the contract of insurance other features, such as the payment of annual dividends to the insured, and the payment of the face of the policy, together with dividends, to the insured in case he survives a certain period. The whole scheme of such insurance is that of a business transaction between the company and the insurant in which the object of the company is to obtain profit from the transaction. . . . The primary object of fraternal associations is to obtain social intercourse among the members and to furnish relief and assistance to members and persons dependent upon them—not upon a commercial or business basis, but upon the broad principle of friendship and brotherly love. The insurance feature is but an incident to the main purpose of organization. It is limited to the payment of benefits to members and to persons dependent upon them, and is conducted, not for the purpose of gain or profit to the association, but to further the benevolent purposes of its organization." [8] In Iowa mutual insurance companies, with certain exceptions, are not, under the statute exempt from taxation as organizations not for pecuniary profit.[9] Under the Maryland Code a corporation having a capital stock in which many members do not share, and conducting business for the pecuniary benefit of the stockholders, is not acting "for the sole benefit of its members and their beneficiaries, and not for profit," so as to be entitled to issue fraternal beneficiary certificates.[10] And though by the plan of a

[7] Aloe v. Fidelity Mutual Life Assoc. 164 Mo. 675, 55 S. W. 993, 29 Ins. L. J. 679.

As to fixed premium-profit, etc., and distinctions, see further, § 346b herein.

[8] People v. Commercial Life Ins. Co. 247 Ill. 92, 93 N. E. 90, 40 Ins. L. J. 163, 168, 169.

[9] Iowa Mutual Tornado Ins. Assoc. v. Gilbertsen, 129 Iowa, 658, 106 N. W. 153; Code Supp. 1902, sec. 1333d; Code secs. 1304, 1642.

[10] International Fraternal Alliance v. State, 86 Md. 550, 40 L.R.A. 187, 39 Atl. 512.

mutual benefit unincorporated fire association the accumulation of profits is not intended it may be for mutual protection profit and advantage and not merely one for benevolent, etc., purposes.[11]

§ 344b. Same subject: pecuniary profit as a factor: lodge systems.—In Illinois fraternal beneficiary societies are within the term "insurance company" in its broader meaning; but such orders are not included within that term in a restricted sense and confining it to its literal meaning. And a distinction is made with reference to its statutes, between fraternal orders or beneficiary societies and insurance companies in that the former are not organized for the purpose of profit, and their certificates cannot be used for business purposes nor can their members receive any pecuniary benefit therefrom. Creditors cannot reach such certificates and the only purpose of the society is the benefit of the widows or orphans of its members or persons within the other classes mentioned in the statute; while the latter are ordinary business corporations and their policies are obtained for ordinary business purposes, for investment, for security, and for the benefit of credit, as well as for protection of the family.[12] And in that state the term "contract of insurance" as applied to a mutual or fraternal benefit association with local camps embraces the application for membership, the certificate, and the constitution and by-laws of the association.[13] But in Missouri under a statute similar to that of Illinois relating to societies having a lodge system, etc., and conducted for the sole benefit of its members and their beneficiaries the certificate of incorporation together with the facts as to the manner of conducting business determine whether an association is within the statute, and a company is governed by insurance laws as to misrepresentations rather than by those governing benevolent associations irrespective of the fact whether it is a life company or a mutual benefit association on the assessment plan.[14] Under the Missouri statute fraternal beneficiary associations are voluntary associations organized solely for the benefit of their members and their beneficiaries who are named and not one of the class named can be a beneficiary,[15] such associations have for their

[11] Sergeant v. Goldsmith Dry Goods Co. — Tex. Civ. App. —, 159 S. W. 1036.

[12] Peterson v. Manhattan Life Ins. Co. 244 Ill. 329, 15 Am. & Eng. Ann. Cas. 96, 91 N. E. 466, 39 Ins. L. J. 817. The order was the Modern Woodmen of America organized under the statute of that state with a lodge system, etc., and the above distinction was based thereon. See Catholic Knights of Ill. v. Board of Review of Effingham County, 198 Ill. 441, 64 N. E. 1104.

[13] Love v. Modern Woodmen of America, 259 Ill. 102, 102 N. E. 183.

[14] Thompson v. Royal Neighbors of America, 154 Mo. App. 109, 133 S. W. 146.

[15] Rev. Stat. 1909, sec. 7109.

professed primary object the social and moral benefit of the membership and so take the form of an organized brotherhood the insurance feature being merely an incident. They are essentially benevolent [16] and aim to make no profit. They have lodges, ritual, and a representative form of government.[17] So a fraternal benevolent association is not conducted for profit within the Missouri statute defining a fraternal beneficiary association, where its charter declares that it is not in business for gain and a uniformed rank Knights of Pythias is a fraternal beneficiary association within such statute and not an old line insurance company.[18] And where a fraternal organization, with a lodge system is not conducted for profit but only for the sole benefit of its members and their beneficiaries it is within a statutory definition of a fraternal benefit society.[19] So, a fraternal beneficiary society known as the Modern Woodmen of America organized under the Illinois' laws is not a life insurance company.[20] Again, an association organized under a general act and reincorporated under a special one and designated as the Supreme Lodge Knights of Pythias is a fraternal beneficiary association and is not within a nonforfeiture insurance statute which is limited to regular or old-line insurance companies, where such association is not conducted for profit and its declared charter purpose is fraternal and benevolent with no lawful power to engage in the general life insurance business or to issue ordinary life policies to its members for gain or profit, and it has a representative form of government and ritualistic form of work.[1] In another case the association was organized under the laws of Iowa and licensed to do business in Missouri as a fraternal beneficiary association and under the statutes of the former state it could issue certificates for the benefit of legatees and legal representatives of its members which were classes not designated by the laws of the latter state and it was urged, for that reason, that it should be treated as an old-line insurance company, but the court decided against this contention as the statute of Missouri [2] did not include the above class of persons and defined such associations as those formed or organized and carried

[16] Umberger v. Modern Brotherhood of America, 162 Mo. App. 141, 144 S. W. 898.

[17] See State (ex rel. Supreme Lodge Knights of Pythias) v. Vandiver, 213 Mo. 187, 200, 15 Am. & Eng. Ann. Cas. 283, 111 S. W. 911.

[18] Tice v. Supreme Lodge, 123 Mo. App. 85, 100 S. W. 519, aff'd 204 Mo. 349, 102 S. W. 1043, Rev. Stat. sec. 1408, Ann. Stat. 1906, p. 1111.

[19] Loyd v. Modern Woodmen of America, 113 Mo. App. 19, 87 S. W. 530, under Rev. Stat. 1899, sec. 1408, and Ill. Laws 1893, p. 130, sec. 1.

[20] Almond v. Modern Woodmen of America, 133 Mo. App. 382, 113 S. W. 695.

[1] Westerman v. Supreme Lodge Knights of Pythias, 196 Mo. 670, 94 S. W. 470, 5 L.R.A.(N.S.) 1114n.

[2] Rev. Stat. 1899, sec. 1408 (sec. 7109, R. S. 1909).

on for the sole benefit of its members and their beneficiaries and not for profit, and provided for a lodge system, sick and death benefits, etc. It was declared that the main dividing line between fraternal beneficiary associations and old-line insurance companies is that the former are organized to protect their members and such other persons as are proper subjects of their benevolence, and *not for profit* to the persons organizing or carrying on such associations; while the old-line insurance companies are organized primarily for profit to the persons who own the corporate stock and the court, per Brown, P. J., adds: "We do not think the mere fact that a member of one of these fraternal organizations may procure a certificate payable to some person not specifically designated in the statute, should have the effect of destroying the purposes of the association and putting it in the same class as the old-line companies." [3] In Colorado it is held to be the settled law there that a fraternal beneficiary association, engaged in the business of insuring its members lives through subordinate lodges, is an insurance company, and its contract of indemnity by whatever name called, a life insurance policy, and the holder thereof a policy holder, and that such contract is subject to the same statutory regulations and limitations as those issued by old line and mutual assessment companies, unless expressly exempted therefrom by statute.[4] And under a Nebraska decision such an association is in effect a mutual life insurance company.[5] The Kentucky statutory definition of an insurance company, or insurance corporation; includes any corporation or association engaged in the transactions, in any manner, of insurance business, although it excepts fraternal orders exclusively on the lodge system.[6] Under an Indiana decision, where the pleading showed that the "plan of insurance" of a fraternal order was carried on through and by means of subordinate local lodges and

[3] Armstrong v. Modern Brotherhood of America, 245 Mo. 153, 149 S. W. 459, 41 Ins. L. J. 1544.

[4] Modern Brotherhood of America v. Lock, 22 Colo. App. 409, 125 Pac. 556, 41 Ins. L. J. 1533; Laws 1907, c. 193, c. 73, sec. 1, cl. 1 (Rev. Stat. secs. 3087, 3160), relying upon Head Camp Woodmen of the World v Sloss, 49 Colo. 177, 112 Pac. 49, 31 L.R.A.(N.S.) 831n; Supreme Lodge Knights of Honor v. Davis, 26 Colo. 252, 257, 58 Pac. 595; Chartrand v. Brace, 16 Colo. 19, 12 L.R.A. 209, 25 Am. St. Rep. 235, 26 Pac. 152.

See also Head Camp Pacific Jurisdiction Woodmen of the World v. Sloss, 49 Colo. 177, 31 L.R.A.(N.S.) 831n, 112 Pac. 49; acts 1903, c. 119, (act April 11, 1903); 1 Mills' Ann. Stat. sec. 638.

[5] Modern Woodmen of America v. Colman, 68 Neb. 660, 94 N. W. 814, 96 N. W. 854.

[6] Kentucky Stat. 1903, sec. 641, construed in Grand Lodge Ancient Order United Workmen v. Edwards, 27 Ky. L. Rep. 469, 85 S. W. 701. See also Sims v. Commonwealth, 114 Ky. 827, 24 Ky. L. Rep. 1591, 71 S. W. 929; Ky. Stat. sec. 641.

the complaint showed the parties, subject-matter, insurable interest, amount of insurance, the premium or fees paid, and compliance with conditions requisite to obtaining a certificate, although none was issued, it was held that "an oral contract of insurance" was valid and enforceable and the cases relied upon to support this point were those of insurance, although such contract being one for the protection of its members and their beneficiaries by means of indemnity, and the organization being a fraternal mutual one not seeking profit it was also held that the constitution, by-laws and other writings affecting the parties rights were to be liberally construed to promote the benevolent objects of the corporation. The question, however, whether such a contract was one of insurance was not discussed.[7] Under a Michigan decision a statute relating to the provisions of life insurance policies does not apply to fraternal beneficiary associations carrying on the business of life, health, casualty or accident insurance for profit under the express provisions of another enactment in that state.[8]

The "Golden Cross" was incorporated for the general welfare and not for profit as an insurance order based upon the principle of mutual assessment of its members and is what is known to the Tennessee laws as a fraternal beneficiary association, and such associations have neither capital stock, stockholders, nor property to be used in business for individual profit. Those having an interest therein are not stockholders but members and are so styled by the statutes of that state, nor have such associations either franchises or property which are susceptible of lease or sale, so as to be used and operated by another corporation.[9]

§ 344c. Same subject: lodge system continued.—Under a New York decision an unincorporated association for the promotion of fraternal association and for relief and benefits in which money was no part, and known as the grand united Order of Odd Fellows, is not a pecuniary benefit and mutual assurance society, but a fraternal association, although provision is incidently made for financial assistance and relief derived from dues, stated contributions and fines and also for a specified sum in case of death.[10] Under the Wisconsin statute, an Odd Fellows' association incorporated un-

[7] Brotherhood of Locomotive Firemen & Enginemen v. Corder, 52 Ind. App. 214, 97 N. E. 125, 41 Ins. L. J. 384.

[8] Knights of the Modern Maccabees v. Barry, Comm'r, 155 Mich. 693, 118 N. W. 585; Pub. acts 1893, p. 186, No. 119; acts 1907, p. 243, No. 180. See Howell's Mich. Stat. Annot. (2d ed.) sec. 9022, am'd 1895, act No. 150, 1901, act No. 226.

[9] Knapp v. Supreme Commandery, United Order of the Golden Cross of the World, 121 Tenn. 212, 118 S. W. 390; acts 1875, c. 142, p. 232; Shannon's Code sec. 2524.

[10] Anthony v. Carl, 28 Misc. 200, 58 N. Y. Supp. 1084.

der the laws of another state for the purpose of fraternal benevolent insurance upon the assessment plan, and which confines its membership to persons belonging to its allied order, is held exempt from the state insurance laws relating to life insurance companies, and is one of the "charitable and benevolent orders of . . . Odd Fellows," within the meaning of the statute.[11] In Nebraska a society or order with a lodge system whose objects are social and to furnish aid in case of accident or sickness; to provide for the families of deceased members; to furnish life indemnity, based upon a mutual co-operative or assessment plan; to render mutual assistance, and promote benevolence and charity, is in so far as it seeks to give indemnity to those holding certificates, a mutual life insurance company.[12] In a North Carolina case a benefit order, designated as the Order of Owls, with power of self-perpetuation, and having a head organization with subordinate bodies in various sections of the country with by-laws providing for sick and death benefits, with insurance features, is a fraternal benefit order within the statutes of that state defining such orders, making them subject to the same rules, regulation and supervision as foreign insurance companies, with certain exceptions, and requiring a license from one assuming to act as insurance agent for foreign companies. And the words insurance companies, associations and orders, used in such statutes contemplate both incorporated and unincorporated companies.[13] In Pennsylvania, a benefit society which does business through the lodge system is not an insurance company under the statute of that state.[14]

§ 344d. Same subject: pecuniary profit as a factor: masonic benevolent or relief associations.—A masonic benevolent association is substantially a life insurance company, even though not engaged in business for profit and without capital as an investment, but having for its general purpose mutual protection and the giving of aid, etc., to widows and children of deceased members, and the contract is unilateral the same as life insurance contracts.[15] So in the United States circuit court it is held that a Masonic life indemnity company whose business is on the assessment plan, but which has no

[11] State v. Whitmore, 75 Wis. 332, 43 N. W. 1133, under Laws 1883, c. 94; Laws 1879, c. 204. See also Cal. Stat. 1891, c. cxvi. p. 126, sec. 14, p. 130.

[12] Home Forum Benefit Order v. Jones, 5 Okla. 598, 50 Pac. 165, 27 Ins. L. J. 8.

[13] State v. Arlington, 157 N. C. 640, 73 S. E. 122, 41 Ins. L. J. 319, 2 Revisal, c. 100, secs. 4691, 4706, 4715 (3) 4794–4798, 2 Revisal, c. 81, sec. 3484.

[14] Donlevy v. Supreme Lodge Shield of Honor, 11 Pa. Co. Ct. Rep. 477, 49 Leg. Intell. 145, under act of May 11, 1881.

[15] Clark, Receiver, v. Schromyer, 23 Ind. App. 565, 56 N. E. 785, 29 Ins. L. J. 477.

fraternal, social, or like purposes, is an insurance company.[16] In a Pennsylvania case, however, the association was an Illinois corporation. It was not organized for profit or gain, but its purpose was to secure pecuniary aid to the widows, orphans, heirs and devisees of deceased members of said association. It was incorporated under a statute which expressly provided that associations with such a purpose, where no annual dues or premiums were required and where the members were to receive no money as profit or otherwise should "not be deemed insurance companies." It was held, therefore, that the association was not an insurance company, nor the certificates, issued by it in Illinois, contracts of insurance. In this case the distinction is made between contracts of insurance, which are purely a business adventure the characteristic feature of which is granting an indemnity, or security against loss, for a stipulated consideration, and benevolent societies of a purely philanthropic or benevolent character the object of which is not indemnity or security against loss, but the accumulation of a fund by contributions of members for aid or relief in case of sickness, injury, or death.[17]

§ 344e. Same subject: rules of construction as a factor.—The same rules of construction apply to death benefit certificates as are applicable to contracts of insurance as such certificates are held to be insurance contracts.[18] And in the absence of statutes wherein mutual benefit fraternal and like societies and associations are declared not to be insurance companies, it is determined by the weight

[16] Knights Templar & Masons' Life Indemnity Co. v. Berry, 50 Fed. 511, 1 C. C. A. 561, 4 U. S. App. 353.

That such Masonic relief associations are life insurance companies. See also the following cases:

United States.—Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 104 Fed. 638, 44 C. C. A. 93, 30 Ins. L. J. 230, aff'd 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. 108, 32 Ins. L. J. 57 (holding that a statute forbidding the defense of suicide to an action on a life policy applied to certificates issued by a Mason's life indemnity company, on the assessment plan); Jarman v. Knights Templars' & Masons' Life Indemnity Co. 95 Fed. 70.

Illinois.—Lehman v. Clark, 174 Ill. 279, 43 L.R.A. 648, 51 N. E. 222, 27 Ins. L. J. 745, rev'g 71 Ill. App. 366 (contract expressly held one of life insurance), *quoting* from Rockhold v. Canton Masonic Benevolent Society, 129 Ill. 440, 2 L.R.A. 420, 21 N. E. 794, aff'g 26 Ill. App. 141 (where it is said "That the undertaking evidenced by the certificate is one of insurance . . . cannot be seriously questioned," etc.).

Iowa.—Prader v. National Masonic Accident Assoc. 95 Iowa, 149, 63 N. W. 601.

Maine.—Bolton v. Bolton, 73 Me. 299 (*considered* under § 346 herein).

Minnesota.—Lake v. Minnesota Masonic Relief Assoc. 61 Minn. 96, 52 Am. St. Rep. 538n, 62 N. W. 261.

[17] Northwestern Masonic Aid Assoc. v. Jones, 154 Pa. St. 99, 35 Am. St. Rep. 810, 26 Atl. 253, *quoting* from and *applying* Commonwealth v. Equitable Beneficial Assoc. 137 Pa. 412, 18 Atl. 1112.

[18] Small v. Court of Honor, 136 Mo. App. 434, 117 S. W. 116.

of authority, in so far as the construction of the certificate in general and as to forfeiture, beneficiaries, etc., are concerned, that such societies and associations are to be treated as life insurance companies, and their certificates as life insurance contracts, although under some of the decisions the certificates differ in some respects from ordinary insurance policies in that the constitution and by-laws become part of the contract.[19] So, in Colorado, in an action upon a fraternal benefit policy, the court held that in order to arrive at the intention of the parties, the same rules of construction governed.[20] Again, in a case in the Federal court in an action founded upon a certificate in a Masonic life indemnity company, an assessment association, the court in discussing the question of the company's right to make certain amendments declared that: "All contracts, notwithstanding the general words or phrases they may contain, should receive an interpretation which will accord with the presumed intention of the contracting parties, and will not work an injustice or lead to absurd consequences" and this rule of construction was applied.[1]

[19] See also the following cases:

Arkansas.—Brotherhood of Locomotive Firemen & Enginemen v. Aday, 97 Ark. 425, 34 L.R.A.(N.S.) 126, 134 S. W. 928, 10 Ins. L. J. 737 (construed like any other insurance policy, according to plain and obvious meaning with a view to accomplish purpose for which brotherhood maintained).

Indiana.—Modern Woodmen of America v. Miles, 178 Ind. 105, 97 N. E. 1009 (construed to effect intent); Brotherhood of Locomotive Firemen & Enginemen v. Corder, 52 Ind. App. 214, 97 N. E. 125 (liberally construed).

Minnesota.—Mady v. Switchmen's Union of North America, 116 Minn. 147, 133 N. W. 472 (cannot be given interpretation at variance with clear sense and meaning of language employed).

Missouri.—Brittenham v. Sovereign Camp Woodmen of the World, 180 Mo. App. 523, 167 S. W. 587 (effect should be given to all parts printed or written. See §§ 212, 223 herein); Evans v. Modern Woodmen of America, 149 Mo. App. 166, 129 S. W. 485 (strict interpretation in defense in case of misrepresentations and warranties).

Nebraska.—Modern Woodmen of America v. Coleman, 68 Neb. 660, 94 N. W. 814, rehearing denied 96 N. W. 154 (governed by general rules of law applicable to life insurance companies).

New York.—Weinberg v. Woodward, 67 Misc. 283, 124 N. Y. Supp. 480 (governed by principles which apply insurance contracts).

See also note 38 L.R.A. 34–40, on whether a benefit association is an insurance company where the construction of the certificate is in question; §§ 188 et seq., 207, 220 et seq. herein.

[20] Modern Woodmen of America v. International Trust Co. 25 Colo. App. 26, 136 Pac. 806. See also Supreme Lodge Knights of Honor v. Davis, 26 Colo. 252, 58 Pac. 595; Grand Circle Women of Woodcraft v. Rausch, 24 Colo. App. 304, 134 Pac. 141.

[1] Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 104 Fed. 638, 44 C. C. A. 93, 30 Ins. L. J. 230, case is aff'd in 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. 108.

So the rule, applicable to regular insurance contracts, that the contract should be construed against the insurer and most favorably to insured so as not to defeat a recovery and to prevent a forfeiture applies likewise to mutual and fraternal benefit and like contracts.[2] And a fraternal beneficiary association on the lodge system is not within a nonforfeiture insurance statute which is limited to old-line insurance companies.[3]

§ 344f. Same subject: attachment of copy of application or by-laws.—A fraternal association on the lodge system is not in Massachusetts within a statute requiring attachment of an application to a life insurance policy.[4] But in Kentucky a society is a "fraternal society" under a statute requiring a copy of the application to be

[2] *Arkansas.*—Industrial Mutual Indemnity Co. v. Hawkins, 94 Ark. 417, 29 L.R.A.(N.S.) 635n, 21 Am. & Eng. Ann. Cas. 1029, 127 S. W. 457, quoted from in Brotherhood of Locomotive Firemen & Enginemen v. Aday, 97 Ark. 425, 34 L.R.A.(N.S.) 126, 134 S. W. 928, 40 Ins. L. J. 737.

Illinois.—Zeman v. North American Union, 263 Ill. 304, 105 N. E. 22; Mutual Protective League v. McKee, 122 Ill. App. 376, aff'd 223 Ill. 364, 79 N. E. 25.

Indiana.—Modern Woodmen of America v. Miles, 178 Ind. 105, 97 N. E. 1009 (liberally in favor of assured); Supreme Council Benevolent Legion v. Grove, 176 Ind. 356, 36 L.R.A.(N.S.) 913, 96 N. E. 159.

Kentucky.—Brackett v. Modern Brotherhood of America, 154 Ky. 340, 157 S. W. 690.

Minnesota.—Geronime v. German Roman Catholic Aid Assoc. of Minnesota, 127 Minn. 291, 149 N. W. 291.

Mississippi.—Grand Lodge (colored) Knights of Pythias v. Jones, 100 Miss. 469, 56 So. 458; Masonic Benefit Assoc. v. Hoskins, 99 Miss. 812, 56 So. 169, 40 Ins. L. J. 1671, *quoting* from Morgan v. Independent Order of Sons & Daughters of Jacob, 90 Miss. 864, 44 So. 891, which *cites* Murphy v. Independent Order of Sons & Daughters of Jacob, 77 Miss. 830, 50 L.R.A. 111, 27 So. 624.

Missouri.—Mathews v. Modern Woodmen of America, 236 Mo. 326, 139 S. W. 151; Simmons v. Modern Woodmen of America, 185 Mo. App. 483, 172 S. W. 492; Wintergerst v. Court of Honor, 185 Mo. App. 373, 170 S. W. 346; Brittenham v. Sovereign Camp Woodmen of the World, 180 Mo. App. 523, 167 S. W. 587; Beile v. Travelers Protection Assoc. of America, 155 Mo. App. 629, 135 S. W. 497, 40 Ins. L. J. 1028.

New Jersey.—Coghlan v. Supreme Conclave Improved Order of Heptasophs, 86 N. J. Laws 41, 91 Atl. 132; Johnson v. Grand Lodge Ancient Order United Workmen, 84 N. J. Law 511, 79 Atl. 333, 40 Ins. L. J. 924 (forfeitures not favored, etc.).

Tennessee.—Independent Order of Foresters v. Cunningham, 127 Tenn. 521, 156 S. W. 192 (forfeiture not favored).

Texas.—Haywood v. Grand Lodge of Texas Knights, — Tex. Civ. App. —, 138 S. W. 1194 (construed in favor of insured to prevent forfeiture).

[3] Westerman v. Supreme Lodge Knights of Pythias, 196 Mo. 670, 94 S. W. 470, 5 L.R.A.(N.S.) 1114n.

[4] Attorney Gen'l v. Colonial Life Assoc. 194 Mass. 527, 80 N. E. 455. See §§ 190, 190a herein.

On conflict of laws as to necessity of attaching application or copy thereof to policy, see notes in 63 L.R.A. 867; 23 L.R.A.(N.S.) 982; and 52 L.R.A.(N.S.) 285.

attached to the policy, except as to such societies, where it operates under a lodge system and does not pay commissions to procure members.[5] Although it is also held in that state that a fraternal order exclusively on the lodge system, although excepted under a statute defining an insurance company is within a statute requiring the attachment of the application or a copy thereof to policies issued by assessment or life insurance companies.[6] A certificate of membership of a beneficial association is not an insurance policy under the Pennsylvania statute so as to make its by-laws inadmissible in evidence although not attached to the certificate.[7]

§ 344g. Same subject: other insurance as a factor.—Certificates in mutual aid societies are held in a Federal case not to constitute insurance within the meaning of a question in an application blank of an insurance company as to "existing insurance" in this or any other company.[8] This decision upon the point of other insurance accords with other decisions where the question was directly involved and also where the question was one of estoppel and the question whether such associations are insurance companies or not is not discussed.[9]

§ 344h. Same subject: liability as a factor.—In a case in Arkansas it was claimed that a company was one of mutual fire insurance organized under the laws of another state, and that by virtue of the laws thereof, the articles of incorporation, and the by-laws of the company, its policy holders became members of the company and as such were not subject to certain liabilities, but it was

[5] Yeomen of America v. Rott, 145 Ky. 604, 140 S. W. 1018.

[6] Grand Lodge, Ancient Order United Workmen v. Edwards, 27 Ky. L. Rep. 469, 85 S. W. 801. See also Supreme Commandery of the United Order of the Golden Cross of the World v. Hughes, 114 Ky. 175, 24 Ky. L. Rep. 984, 70 S. W. 405; *examine* Corley v. Travelers Protective Assoc. 105 Fed. 854, 46 C. C. A. 278.

[7] Marcus v. Heralds of Liberty, 241 Pa. 429, 88 Atl. 678, act of May 11, 1881, Pub. L. 20.

[8] Penn Mutual Life Ins. Co. v. Mechanics' Savings Bank & Trust Co. 38 L.R.A. 33, 72 Fed. 413, 19 C. C. A. 286, 37 U. S. App. 692, 73 Fed. 653, 19 C. C. A. 316, 43 U. S. App. 75, 38 L.R.A. 33, and note 33–57. See §§ 2456a et seq. herein.

[9] Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. ed. 341 (question turned on estoppel); McCollum v. Mutual Life Ins. Co. 55 Hun (N. Y.) 103; Peterson v. Manhattan Life Ins. Co. 244 Ill. 329, 91 N. E. 466, 18 Am. & Eng. Ann. Cas. 96, 39 Ins. L. J. 817 (*citing* and *quoting* from the Penn Mut. Life case); Kemp v. Good Templars Mutual Benefit Assoc. 46 N. Y. St. R. 429; White v. National Life Ins. Co. 39 Ohio L. J. 237; Equitable Life Ins. Co. v. Hazlewood, 75 Tex. 338, 7 L.R.A. 217 (question turned on estoppel). *Examine* Clapp v. Massachusetts Benefit Assoc. 146 Mass. 519, 16 N. E. 433 (where question not discussed but only whether under the evidence jury should have been instructed as for a nonsuit).

held that under the statutes of Arkansas the liabilities of a foreign mutual insurance company doing business therein under policies therein issued were the same as those of stock fire insurance companies, thereby placing them on the same basis. But other than as above stated the question whether or not such mutual companies are insurance companies was not discussed.[10]

§ 344i. Same subject: applicability of insurance laws: statutory exemptions.—Whether or not or to what extent mutual benefit, fraternal benefit and like associations or societies are within the meaning of the insurance laws must depend upon the terms of the different statutes, and the various circumstances of each particular case, must also be considered in order to determine whether it is within the intent of the statute or statutes involved. No governing rule can be stated for the reason that there is no common ground upon which to base such a rule, and even though there may be an underlying principle it is difficult to apply it. This undoubtedly accounts for whatever disagreement exists in the decisions.[11] In Colorado a voluntary association issuing benefit certificates is not entitled to the benefit of a statute providing that societies founded under it shall be corporations, and if intended to benefit widows and orphans of members shall not be deemed insurance companies. And a benefit certificate in which the beneficiary may be anyone, even a stranger, dependent upon the holder, is not within a statute providing that societies intended to benefit widows, orphans, heirs, and devisees of members shall not be deemed insurance companies.[12]

[10] Federal Union Surety Co. v. Flemister, 95 Ark. 389, 130 S. W. 574, 39 Ins. L. J. 1485; acts 1905, sec. 4, p. 772, and Kirby's Dig. sec. 4339, as to giving bond as prerequisite to doing business.

As to limitation of liability of members of mutual or assessment fire insurance companies, organized, etc., under Ky. Stat. c. 32, subd. 5, see Ky. act approved March 24, 1910 (c. 93, Stat.).

[11] "*Under statutes exempting benevolent societies from the operation of certain insurance laws*, some cases notwithstanding such statute have defined such associations to be insurance companies owing to the business carried on by such benevolent societies. . . . But other cases hold that most benefit companies are not subject to the general principles of insurance law, or to particular statutes applicable to insurance companies, where such association is not an insurance company, or where it is declared not to be an insurance company, or where it is expressly exempted by statute."

Note 38 L.R.A. 49–53.

See §§ 340, 346b herein.

"*Where the question is in regard to jurisdiction.* It is generally held under statutes providing for jurisdiction in actions against life insurance companies, that benevolent associations are controlled by the general insurance laws, but there are exceptional cases in Illinois."

Note 38 L.R.A. 47–49.

[12] Head Camp Pacific Jurisdiction v. Sloss, 49 Colo. 177, 31 L.R.A. (N.S.) 831, 112 Pac. 49.

In Illinois, a society which sets apart a fund raised by voluntary contributions from its members, and which pays therefor a certain amount to designated beneficiaries of deceased members, and other sums to living members, holding numbers just above or just below that of the deceased, is an insurance company, and is not exempt under the statute providing that societies shall not be deemed insurance companies, the purpose of which is to benefit widows, orphans, heirs, and devisees of deceased members and members receiving permanent disabilities.[13] In an Iowa case it is held that where the prevalent purpose of a secret order is to create a benefit for sickness or disability of members, and to pay a certain sum to a designated person on a member's death, such association is an insurance company within the statutory insurance requirements of that state,[14] and in Kansas a mutual aid association which does business with its members upon a mutual life insurance plan is subject to the control of the insurance department and to the laws relative to insurance companies.[15] In Kentucky, a mutual life association which has the essential elements of a life insurance company comes within the provisions of the insurance statute.[16] Under a Michigan decision fraternal beneficiary societies are exempt from the provisions of the general insurance laws.[17] In Missouri fraternal benefit societies are exempt from all laws governing old-line companies.[18] And a fraternal society which issues a death benefit certificate is not within the general insurance laws of that state.[19] And where the evidence

[13] Golden Rule v. People, 118 Ill. 492, 9 N. E. 342, 7 West. Rep. 219. *Compare* Rockhold v. Canton Masonic Mutual Benefit Soc. 129 Ill. 440, 2 L.R.A. 420, 21 N. E. 794. *Examine* Bastian v. Modern Woodmen of America, 166 Ill. 595, 46 N. E. 1090.

[14] State (ex rel. Graham) v. Nichols, 78 Iowa, 747, 41 N. W. 4. *Examine* Brown v. Modern Woodmen of America, 115 Iowa, 450, 88 N. W. 965; Donald v. Chicago, Burlington & Quincy Ry. Co. 93 Iowa, 284, 33 L.R.A. 492, 61 N. W. 971; State (ex rel. Graham) v. Nichols, 78 Iowa, 747, 41 N. W. 4; State v. Iowa Mutual Aid Assoc. 59 Iowa, 125, 12 N. W. 782.

[15] State v. National Ass'n of the Farmers & Mechanics Mutual Aid Assoc. 35 Kan. 51, 9 Pac. 956; State v. Vigilant Ins. Co. 30 Kan. 585, 2 Pac. 840.

[16] Sherman v. Commonwealth, 82 Ky. 102.

[17] Knights of the Modern Maccabees v. Barry, Commr. 155 Mich. 693, 118 N. W. 585.

[18] Evans v. Modern Woodmen of America, 149 Mo. App. 166, 129 S. W. 485. *Examine* Hudnall v. Modern Woodmen of America, 103 Mo. App. 356; Shotliff v. Modern Woodmen of America, 100 Mo. App. 138, 77 S. W. 84.

The Missouri Statute exempting such associations from general insurance laws is constitutional. Clandy v. Royal League, 259 Mo. 92, 168 S. W. 593.

See also as to exemptions, Schillinger v. Boes, 85 Ky. 357, 9 Ky. L. Rep. 18, 3 S. W. 427.

[19] Claver v. Woodmen of the World, 152 Mo. App. 155, 133 S. W. 153. See Aloe v. Fidelity Mutual Life Assoc. 164 Mo. 675, 55 S. W.

shows a license to do business as a mutual benefit or benevolent society and also that the form of government, constitution and by-laws are on that plan, the company will be held to be such and so not subject to the general insurance laws.[20] But in an earlier case in that state a society known as the Merchants' Exchange Mutual Benevolent Society had executive officers and a board of trustees. It divided its membership into classes, in each of which the fees paid by members of a certain class were kept separately and exclusively for its benefit. Assessments and the interest on a fund raised by initiation fees were resorted to for making payments and furnishing aid to the widows, children, etc., of deceased members. It was determined that the society was a mutual insurance company, subject to the insurance laws of that state.[1] A fraternal benefit association may, however, be exempt from the insurance laws and nevertheless be subject to an ordinance requiring life insurance agents to be licensed.[2] Again, the law exempting fraternal beneficial societies in that state does not include a corporation which transacts its business through the lodge system by assessments and renders aid in sickness, etc., where such company is organized solely for the transaction of insurance business.[3] And, although a fraternal beneficiary corporation may not be exempt from the general insurance laws it may be subject to a statute prohibiting life insurance companies from setting up the defense of suicide.[4] In Pennsylvania a mutual aid association of another state is not a foreign insurance corporation within its statute, and is exempted under the statute relating to beneficial associations from the control of the insurance commissioner.[5] In Texas, a corporation was held to be an insurance company, subject to the provisions of the insurance laws, where it had salaried officers and agents, required an examination by a physician of intending insurers, and which, in consideration of a membership fee and assessments, agreed to provide for members during life and the payment of a certain sum to a member's family upon his decease.[6] The Ontario insurance act[6a] does

993, 29 Ins. L. J. 679, *considered* under § 346b herein.

[20] Missey v. Supreme Lodge Knights & Ladies of Honor, 147 Mo. App. 137, 126 S. W. 559.

[1] State v. Merchants' Exch. Mut. Ben. Soc. 72 Mo. 146, 159.

[2] City of Trenton v. Hunnel, 134 Mo. App. 595, 114 S. W. 1131.

[3] National Union v. Marlow, 74 Fed. 775, 21 C. C. A. 89, 40 U. S. App. 95.

[4] Ordelheide v. Modern Brotherhood of America, 158 Mo. App. 677, 139 S. W. 269, 40 Ins. L. J. 1845; Rev. Stat. 1909, secs. 6945, 7109.

[5] Commonwealth v. National Mutual Aid Assoc. 94 Pa. St. 481, under acts of April 4, 1873, and May 1, 1876.

[6] Farmer v. State, 69 Tex. 561, 7 S. W. 220, under Rev. Stat. Tex. title 20.

[6a] 60 Vict. c. 36, sec. 144.

not apply to certificates to an unincorporated society of workmen of a particular class on the lodge system whose members or their representatives are entitled to certain pecuniary benefits upon compliance with specified conditions and payment of certain assessments.[7]

§ 344j. Applicability of insurance laws continued: right to do business as a factor.[7a]—In a Missouri case an action was treated as being founded on an ordinary policy of life insurance where the defendant, a fraternal beneficiary society, failed to prove that at the time the policy was issued it was authorized to do business in that state, as such a society.[8] So foreign fraternal beneficiary societies while not insurance companies in the broad sense of that term, nevertheless are engaged in the business of insurance and are in one sense insurance companies within a statute authorizing them to do a fraternal life business upon appointment of the state superintendent of insurance to accept process.[9] But the mere fact that, at the time a foreign fraternal insurance company renewed the certificate of a member for the purpose of increasing his benefit, no law existed authorizing it to do business in the state, does not render the contract amenable to the laws governing regular policies of insurance issued by old-line companies.[10] A fraternal benefit association conducts a life insurance business, within the terms of an ordinance requiring life insurance agents to be licensed, where the plan set forth in its prospectus is referred to as, and stated to be that of life in-

[7] Wintemute v. Brotherhood of Railroad Trainmen (Ont. S. C. J. C. A.) 20 Can. Law T. O. C. C. N. 347.

[7a] See §§ 330, 330a herein.

[8] Conner v. Life & Annuity Assoc. 171 Mo. App. 364, 157 S. W. 814, 42 Ins. L. J. 1274, *citing* Schmidt v. Supreme Court United Order of Foresters, 228 Mo. 675, 129 S. W. 653; State (ex rel. Supreme Lodge K. of P.) v. Vandiver, 213 Mo. 187, 15 Am. & Eng. Ann. Cas. 283, 111 S. W. 91; Newland v. Modern Woodmen of America, 168 Mo. App. 311, 153 S. W. 1097; Gruwell v. Natural Council Knights & Ladies of Security, 126 Mo. App. 496, 104 S. W. 884.

Under statutes requiring compliance with state insurance law, a large number of cases "define mutual benefit companies to be insurance companies. Some merely hold that they must comply with the statutes of the state relating to insurance companies before transacting business in the state, and some go further and declare that such mutual benefit companies are not within the saving clause of a statute exempting benevolent societies, but some cases hold that some of these companies are within such exemptions while some cases restrict their attempts to such unauthorized business, where they depart from the benevolent character."

Note 38 L.R.A. 40–47.

[9] Rodgers v. National Council Junior Order United America Mechanics of United States, 172 Mo. App. 719, 155 S. W. 874, under Rev. Stat. 1909, secs. 7109, 7112, 7114.

[10] Westerman v. Supreme Lodge, Knights of Pythias, 196 Mo. 670, 5 L.R.A.(N.S.) 1114, 94 S. W. 470.

surance, and this is so irrespective of the name by which it is called and even though such associations are exempt from the provisions of the insurance laws.[11] In Connecticut, it is held that although a society, organized in another state as a secret and fraternal society, has an insurance plan as one of its corporate purposes, consisting in the participation in a benefit fund by members of local branches, who pay assessments, nevertheless it is not within a statute requiring foreign corporations, organized for the purpose of furnishing insurance on the assessment plan, to obtain authority from the insurance commissioner, in order to do business within the state,[12] but is within the statute excepting from such requirement every "secret and fraternal society." [13] In Iowa, a fraternal benevolent corporation of a sister state which provides a beneficiary fund for the payment of death benefits is a life insurance organization, and subject to the provisions of the statute requiring a guaranty capital as a prerequisite to transacting business in that state.[14] And where a foreign fraternal association has not been licensed to do business in a state as required by statute it must be considered a regular life company so far as the defense, under the statute, of suicide is concerned.[15] A contract whereby a benefit is to accrue upon the death or physical disability of a person, which benefit is or may be conditioned upon the collection of an assessment upon persons holding similar contracts, is a contract of insurance within the meaning of Rhode Island laws respecting business by foreign insurance companies.[16] In Virginia, only such assessment companies are entitled to be licensed, without making the deposit of bonds required under the statute, as make an assessment upon surviving members in order to pay losses.[17] The character of a benefit insurance association as an assessment company is not destroyed, so as to deprive it of the privilege of doing business in Wisconsin on compliance with the provisions of the laws of that state [18] by the facts that it agrees to pay the assured a definite sum, and has established rates of premiums which it is authorized to receive in advance, if it has no "legal reserve," but merely an "emergency fund," and its contracts expressly authorize it to levy assessments beyond those designated

[11] City of Trenton v. Humel, 134 Mo. App. 595, 114 S. W. 1131.

[12] Gen. Stat. Conn. sec. 2892.

[13] Gen. Stat. Conn. sec. 2903; Fawcett v. Supreme Sitting of Order of Iron Hall, 64 Conn. 170, 24 L.R.A. 815, 29 Atl. 614.

[14] State v. Miller, 66 Iowa, 26, 23 N. W. 241.

[15] Loyal Americans of the Republic v. McClanahan, 50 Tex. Civ. App. 256, 109 S. W. 973.

[16] Lubrano v. Imperial Council of Order of United Friends, 20 R. I. 27, 38 L.R.A. 546, 37 Atl. 345, 6 Am. & Eng. Corp. Cas. N. S. 673.

[17] Mutual Benefit Life Ins. Co. v. Mayre, 85 Va. 643, 8 S. E. 481, under Va. act, May 18, 1887.

[18] Laws 1891, c. 418.

in its table.[19] Again, under a Mississippi decision a mutual company without capital stock, incorporated and empowered to insure the property of its members only, which is not subject to the insurance department, and which is not organized under the statutory chapter on "Insurance," and which possesses none of the essentials required by the statute as conditions precedent to the right to transact insurance business in the state cannot compel the issuance to it of a certificate of authority to carry on the general business of insurance. The statute has no reference to the restricted right of a mutual insurance company to insure the property of its own membership.[20]

§ 344k. Applicability of insurance laws: live stock association.—In Nebraska, an association for insuring the live stock of members is an insurance company, and subject to the requirements of the insurance statutes. In this case the membership was unlimited, though certificates of membership were issued and the premium was paid as an admission fee and by assessments.[1] In Texas a company incorporated under the statute for that purpose is a live-stock insurance company on a mutual or co-operative plan without capital stock, and not a "mutual relief association" where the statute expressly excludes such associations.[2]

[19] State (ex rel. Covenant Mutual Benefit Assoc.) v. Root, 83 Wis. 667, 19 L.R.A. 271, 54 N. W. 33.

[20] Farmers Mutual Fire Ins. Co. v. Cole, 90 Miss. 508, 43 So. 949.

[1] State v. Northwestern Mut. Live Stock Ass'n, 16 Neb. 549, 20 N. W. 852. See also State v. Vigilant Ins. Co. 30 Kan. 585, 2 Pac. 840.

[2] State v. Burgess, 101 Tex. 524, 109 S. W. 922, s. c. — Tex. Civ. App. —, 107 S. W. 366; Rev. Stat. 1895, art. 642, subd. 46, art. 3096. See Wright, In re, 18 L.R.A.(N.S.) 193, 157 Fed. 544, 85 C. C. A. 206, s. c. 177 Fed. 579, under Tex. Rev. Stat. 1895, art. 642, subd. 46, when Tex. Laws 1907, p. 291, c. 150, not applicable.

CHAPTER XVIII.

PARTIES—MUTUAL COMPANIES, BENEFIT, ETC., SOCIETIES CONTINUED.

§ 345. What societies or associations are not insurance companies: cases.
§ 346. What societies or associations are insurance companies: cases.
§ 346a. Same subject.
§ 346b. Whether co-operative or assessment plan or old line company: distinctions.
§ 346c. Whether company fraternal beneficial association or mutual assessment company: distinctions.
§ 346d. Whether sick benefit, burial, and beneficial association an insurance company.
§ 346e. Whether railroad relief associations are insurance companies.
§ 346f. Stock associations with beneficiary fund not an insurance company.

§ 345. What societies or associations are not insurance companies: cases.—It is held in Illinois that an association whose policies were payable only to the widow, orphan, heir, or devisee, and whose members might be assessed not to exceed twenty dollars each year, was exempted from the operation of the statute of that state requiring of life insurance companies a guaranty capital.[3] In Kentucky, it is decided that the statute regulating "stock or mutual" insurance companies does not include associations organized before that act without capital stock or premium notes to indemnify against loss of life, the performance of whose obligations is secured by a pledge of the property of each member to the extent of his own insurance, the entrance fees being intended only as a fund for paying the expenses.[4] And in Michigan it is also held that its statute forbids the transaction of insurance business by companies, the policies of which do not distinctly show the amount of life benefits assured, and

[3] Commercial League Assoc. v. People, 90 Ill. 166, under Ill. Rev. Stat. 1874, c. 32, sec. 31, exempting from the operation of act of March 26, 1869.

[4] Louisville German Mut. Fire Ins. Ass'n v. Commonwealth, 9 Bush (72 Ky.) 394, under act of March 12, 1870.

the premiums in which are not fixed nor contingent on losses.[5] In Missouri, the term "insurance purposes" does not include associations which aid families of deceased members.[6] In New York, a benevolent association organized under the general act, and which provides for the payment by the members of one dollar each for the benefit of the widow or minor children of a deceased member, is held not to be a life insurance company,[7] and in the same state it is decided that a society is not governed by the general insurance law where it maintains a relief fund for the benefit of members reaching a certain age, or when they shall become permanently disabled by disease or accident, but is controlled by the statute regulating charitable, benevolent, and beneficiary associations or societies.[8]

§ 346. What societies or associations are insurance companies: cases.—In Dakota, where the principal objects and purposes of an association organized under the general incorporation laws of the state is to secure to the beneficiary, or representative of each member on his death, the payment of a certain sum of money in accordance with the conditions and requirements of the charter and by-laws, such association is a life insurance company, and the relations sustained by the members are based upon contract.[9] In Colorado the Ancient Order of United Workmen, so far as it is engaged in the business of life insurance, is to be treated in law as a mutual life insurance company; and a certificate of membership and insurance therein is to be regarded as a written contract, and, so far as it goes,

[5] People of the National Life Ins. Co. v. State Commissioner, 25 Mich. 321, under Ins. Law 1872, p. 86.

[6] Barbaro v. Occidental Grove, 4 Mo. App. 429.

[7] Durian v. Central Verein Hermann's Soehne, 7 Daly (N. Y.) 168.

[8] Supreme Council Order of Chosen Friends v. Fairman, 10 Abb. N. C. (N. Y.) 162, 62 How. Pr. (N. Y.) 386.

See further on this subject what societies or associations are not insurance companies.

Minnesota.—State (ex rel. Clapp) v. Federal Invest. Co. 48 Minn. 110, 50 N. W. 1028 (held not a life, casualty or endowment company and not subject to the provisions of a statute expressly declaring what companies are included).

Missouri.—Morrow v. National Life Assoc. 184 Mo. App. 308, 168 S. W. 881 (held to be assessment plan insurance).

New York.—Ronald v. Mutual Reserve Fund Life Ass'n, 132 N. Y. 378, 30 N. E. 739, 21 Ins. L. J. 634 (organized as a mutual benefit association upon co-operative assessment plan and so not entitled to notice of due date of dues).

Ohio.—State v. Mutual Protective Soc. 26 Ohio St. 19.

Pennsylvania.—Ogle v. Barron (Supreme Council of the Royal Arcanum) 247 Pa. 19, 92 Atl. 1071; Marcus v. Heralds of Liberty, 241 Pa. 429, 88 Atl. 678; Re National Indem. & Endowment Co. 142 Pa. St. 450, 21 Atl. 879 (not a beneficial association under the act of 1874 so that the court of common pleas had no power to incorporate it).

[9] Masonic Aid Assoc. v. Taylor, 2 S. Dak. 324, 50 N. W. 93.

it is the measure of the rights of all parties.[10] Under an Illinois decision the term "insurance company" includes fraternal beneficiary associations, but not so in its restricted sense.[11] In Indiana, a mutual benevolent society which provides a certain sum for the beneficiary in the event of a member's death, to be paid from a fund raised by assessment on the surviving member's death is in effect a life insurance company.[12] In Kansas where such an association contracts to pay at stated periods certain sums as endowments to living members, or, in case of a member's death, then to pay the benefit to designated beneficiaries, such contracts constitute life insurance, both as to the endowments and the benefits;[13] so in Maine, in the case of Bolton v. Bolton,[14] which was that of a Masonic relief association, the court declares that if the prevalent purpose be that of insurance, such purpose controls, whatever may be the association's name, and that the benevolent or charitable results to the beneficiaries will not change its legal character, and that the association and others of like nature were mutual life insurance companies.[15] In Massachusetts, a contract by which an association, for a consideration, engages to pay money upon the death of a member to one who has an interest in the life, is not the less a contract of insurance, because the amount to be paid is not a gross sum, but is graduated by the number of members holding similar contracts; nor because a portion of the premiums is to be paid upon the uncertain periods of deaths of such members; nor because it provides no means of enforcing payment of the assessments: and the fact that the general objects of the association are benevolent, not speculative, will make no difference. Such an association is within the operation of a statute imposing restrictions upon insurance companies.[16] Under a Missouri decision it is held that the company was not governed by the laws relating to benevolent associations but by those governing life insurance companies.[17]

§ 346a. Same subject.—In Missouri it is held that a contract of insurance existed where there was a promise, based upon a consid-

[10] Chartrand v. Brace, 16 Colo. 19, 25 Am. St. Rep. 235, 12 L.R.A. 209, 26 Pac. 152.

[11] Peterson v. Manhattan Life Ins. Co. 244 Ill. 329, 91 N. E. 466, rev'g 115 Ill. App. 421.

[12] Elkhart Mut. Aid Benevolent & Relief Ass'n v. Houghton, 103 Ind. 286, 287, 2 N. E. 763, 53 Am. Rep. 514, 1 West. Rep. 284.

[13] Endowment & Benefit Assoc. v. State, 35 Kan. 253, 10 Pac. 872. *Examine* State (ex rel. Supreme Lodge of Fraternal Union of America) v. Orear, 144 Mo. 157, 45 S. W. 1081.

[14] 73 Me. 299, 303.

[15] See § 344d herein.

[16] Commonwealth v. Wetherbee, 105 Mass. 149, 161.

[17] Thompson v. Royal Neighbors of America, 154 Mo. App. 109, 133 S. W. 146, considered more fully under § 344b herein.

eration, to pay upon a loss, and where the principal object and purpose of the association was to insure the members under such contracts. In this organization there were salaried officers, and anyone was entitled to membership upon compliance with the required conditions as to age and health. Commissions were also paid by the society to its members on risks obtained for it. It was also decided that the contract could be made none the less one of insurance by the organization calling itself a benevolent society, and obtaining a charter as such, and though the amount payable was not a gross sum, but graduated by the number of persons in a given class at the time of the death of the insured, and though there was no means of compelling the payment of an assessment made upon a member's death, and though the insurer was not liable for the amount actually collected from members upon the happening of the loss, the agreement would nevertheless be an actual contract of insurance under the above facts.[18] It is also decided in that state that an organization does not become a fraternal association by the designation of itself as such nor by being authorized to transact business as such, where it is not within a statutory definition of what constitutes these associations, but it is an insurance company within a statute as to misrepresentations.[19] And where a fraternal beneficiary certificate is assumed by a corporation and a policy substituted therefor it will be deemed an ordinary life policy where there is no proof that it was to be otherwise treated.[20] So the statutes relating to valued policies govern mutual fire companies, not town companies, in Missouri.[1] Again, an association of railway mail clerks is not a mutual benefit association but an accident insurance company where its members are furnished accident insurance upon payment of dues only, without initiation or ritual.[2] In a Nebraska case the contract of a fraternal beneficiary association is construed as to representations and warranties as an insurance risk.[3] In New Jersey the authority conferred upon associations incorporated under an act to incorporate benevolent and charitable associations with further authority, under supplementary enactments to contract with members

[18] State v. Citizens' Benefit Ass'n, 6 Mo. App. 163, under Mo. acts 1874, p. 81, secs. 3, 5.

[19] Herzberg v. Modern Brotherhood of America, 110 Mo. App. 328, 85 S. W. 986, Rev. Stat. 1899, secs. 1408, 7890.

[20] Lowenstein v. Old Colony Life Ins. Co. 179 Mo. App. 304, 166 S. W. 889.

[1] Marshall v. American Guaranty Mutual Fire Ins. Co. 80 Mo. App. 18, 2 Mo. App. Rep. 573.

[2] Young v. Railway Mail Assoc. 126 Mo. App. 325, 103 S. W. 557.

[3] Goff v. Supreme Lodge Royal Achates, 90 Neb. 578, 134 N. W. 239, 41 Ins. L. J. 375, 37 L.R.A.(N.S.) 1191n, *quoting* from Aetna Ins. Co. v. Simmons, 49 Neb. 811, 69 N. W. 125, 135.

for death benefits,[4] is authority to make contracts in the nature of life insurance. Such supplementary statutes are ineffectual, however, to authorize contracts of ordinary life insurance. But so far as they provide for the payment of death benefits as a gratuity to those entitled it is a life insurance having a benevolent purpose.[5] In New Hampshire, a mutual relief association which makes an assessment on surviving members of one dollar each for the payment of a benefit to an appointee of the deceased or a member of his family is a life insurance company.[6] So in that state an ordinary contract of membership in a mutual benefit association is a policy of life insurance within the New Hampshire laws so that insolvency of the estate does not subject the sum insured to payment of debts.[7] In Pennsylvania, it is said that a beneficial association for mutual assistance in sickness or inability to labor is virtually a mutual health insurance company.[8] And in that state it is held that throughout the insurance laws and in insurance parlance the word "policy" is ordinarily used to indicate the contract of insurance upon which there is a fixed premium. It does not usually indicate a contract with a member of a beneficial association or mutual insurance company. It does not indicate a certificate of membership. A "certificate of membership" refers only to the contract between a mutual company or a beneficial association and its members.[9] In Tennessee if a certificate obligates a fraternal order to pay a certain sum where a member's death results from accident and he has also the right to change his beneficiary the contract is one of life insurance.[10] In Texas a certificate of a fraternal benefit society is so far a life insurance policy as to be a chose in action.[11] In Wisconsin, a benevolent mutual aid society was held subject to the same legal principles in determining its liability for a loss as apply to mutual life insurance companies.[12]

[4] Act March 2, 1883, act approved April 2, 1886.

[5] Golden Star Fraternity v. Martin, 59 N. J. L. 207, 35 Atl. 908.

[6] Smith v. Bullard, 61 N. H. 381, under N. H. Gen. Laws, c. 175.

[7] Mellows v. Mellows, 61 N. H. 137, 139.

[8] Franklin v. Commonwealth, 10 Pa. St. 357, 359.

[9] Pennsylvania Mutual Life Ins. Co. (Att'y-Genl's Opinion) 36 Pa. Co. Ct. Rep. 687.

[10] Littleton v. Sain, 126 Tenn. 461, 150 S. W. 423, 41 L.R.A.(N.S.) 1118.

[11] Coleman v. Anderson, — Tex. Civ. App. —, 82 S. W. 1057, aff'd 98 Tex. 570, 86 S. W. 730.

[12] Erdmann v. Mutual Ins. Co. 44 Wis. 376, 379.

See further the following cases in which the company, society, etc., have been held to be life insurance companies:

Alabama.—Supreme Commandery Knights of the Golden Rule v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332.

Colorado.—Head Camp Pacific Jurisdiction Woodmen of the World v. Sloss, 49 Colo. 177, 31 L.R.A. (N.S.) 831n, 112 Pac. 49.

Georgia.—Heralds of Liberty v.

In the following appended cases such societies, etc., have been held life insurance companies although the question is not discussed.[13]

§ 346b. Whether co-operative or assessment plan or old line company: distinctions.—The statute may exclude the application of the insurance laws to mutual insurance companies on the assessment plan.[14] And under a Wisconsin decision an insurance corporation furnishing life or casualty insurance in consideration, in whole or in part, of contributions by its members on a basis of equality, sufficient to meet its expenses and matured memberships, as the necessities therefor arise, is a benefit or beneficiary corporation furnishing casualty or life insurance upon the mutual assessment plan within the statute of that state exempting certain insurance organizations from the general insurance laws of the state.[15] Under a Missouri decision, it is decided that under the statute of 1887 assessment companies were not merely exempt from the laws relating to the insurance department but also from the general insurance laws, and that the company before the court was not an assessment company but a regular or old line company, as the policy was issued for a fixed sum, and the payment thereof was in no degree dependent upon the collection of assessments upon persons holding similar policies, but in consideration of a fixed premium to be paid at stated intervals, based upon the mortality experience of

Bowen, 8 Ga. App. 325, 68 S. E. 1008.

Illinois.—Martin v. Stubbings, 126 Ill. 387, 9 Am. St. Rep. 620, 18 N. E. 657.

Iowa.—Grimes v. Northwestern Legion of Honor, 97 Iowa, 315, 327, 64 N. W. 806, 66 N. W. 183.

Missouri.—McPike v. Supreme Ruling of the Fraternal Mystic Circle, 187 Mo. App. 679, 173 S. W. 71; Edwards v. American Patriots, 162 Mo. App. 231, 144 S. W. 1117; Grnwell v. National Council Knights & Ladies of Security, 126 Mo. App. 496, 104 S. W. 884.

New York.—Alden v. Supreme Tent of the Knights of Maccabees of the World, 178 N. Y. 535, 71 N. E. 104; Weinberg v. Woodward, 26 Misc. 283, 124 N. Y. Supp. 480.

Ohio.—State v. Standard Life Assoc. 38 Ohio St. 281; State v. Moore, 38 Ohio St. 7.

Pennsylvania.—Lane v. American Relief Assoc. 25 Pa. C. C. Rep. 129.

Texas.—National Life Association v. Hagelstein, — Tex. Civ. App. —, 156 S. W. 353.

Virginia.—Cosmopolitan Life Ins. Assoc. v. Koegel, 104 Va. 619, 52 S. E. 166.

[13] McClure v. Johnson, 56 Iowa 620; Expressmen's Aid Society v. Lewis, 9 Mo. App. 412; Mutual Accident & Life Assoc. v. Kayser, 14 Wkly. Not. Cas. (Pa.) 86; Fisk v. Equitable Aid Union, 20 Wkly. Not. Cas. (Pa.) 290.

See note 38 L.R.A. 53.

[14] Ingle v. Batesville Grocery Co. 89 Ark. 378, 117 S. W. 241. As to statutory exemptions see § 344i herein.

[15] State v. National Accident Soc. 103 Wis. 208, 79 N. W. 220, 28 Ins. L. J. 793, Laws Wis. 1891, c. 418. "Benefit" and "beneficiary" not al-

life insurance companies, even though it was conditioned that if the amount specified in the policy was not sufficient, the company reserved the right to increase the premium.[16] In a Federal case it is said: "It is important to understand distinctly what is assessment insurance or insurance on the assessment plan. A general statement of this proposition is that it is an assessment insurance where the benefit to be paid is dependent upon the collection of such assessments as may be necessary for paying the amount insured. In other words, it is assessment insurance if payments to be made by the insured are not fixed—unalterably fixed—by the contract. On the contrary, an old line policy is a contract where the amount to be paid by the insured is fixed, the premiums to be paid are unalterable, and the liability incurred by the defendant company is also fixed, definite and unchangeable."[17] This distinction, thus defined, is adopted in a Missouri decision as accurate and comprehensive and as well supported in the courts of that state. And the court adds: "The character of the policy is to be determined by the nature of the contract it expresses. If the benefit to be paid by the insurer is fixed, and level premiums are charged with no provision in the contract authorizing a raising or lowering of the premiums to meet the demands of changed conditions, the policy will be classed as an old line contract, regardless of the nomenclature of the policy, or the character and avowed purpose of the company that issued it." And the policy in issue in the case was held an old line policy.[18]

ways used in same sense in statutes as descriptive of insurance corporations or societies. Id. 214.

[16] Aloe v. Fidelity Mutual Life Assoc. 164 Mo. 675, 55 S. W. 993, 29 Ins. L. J. 679. See also Jacobs v. Omaha Life Assoc. 146 Mo. 523, 48 S. W. 462. *Examine* Jacobs v. Omaha Life Assoc. 142 Mo. 49, 43 S. W. 375.

As to pecuniary profit as factor, see §§ 344a et seq. herein.

[17] Haydel v. Mutual Reserve Fund Life Assoc. (U. S. C. C.) 98 Fed. 200, case affd. 104 Fed. 718, 44 C. C. A. 169.

For definition of assessment insurance, see § 7a herein.

[18] Knott v. Security Mutual Life Ins. Co. 161 Mo. App. 579, 592, 144 S. W. 178, 41 Ins. L. J. 842, 851, 852. See Tice v. Supreme Lodge Knights of Pythias, 204 Mo. 349, 102 S. W. 1013.

That certificate of assessment company is life policy under Missouri statute forbidding suicide as defense, see Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 104 Fed. 638, 44 C. C. A. 93, 30 Ins. L. J. 230, aff'd 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. 108, 32 Ins. L. J. 57.

What corporations, associations or societies are deemed to be engaged in the business of life or casualty insurance on the co-operative or assessment plan in New York, see act 1909 c. 33, c. 28 of Consol. Laws, sec. 201; Parker's Ins. Law of N. Y. (ed. 1915) p. 306. See People (ex rel. Mount) v. Chapter General of America, Knights of St. John & Malta, 198 N. Y. 15, 90 N. E. 1134.

Policy to indicate assessment plan by printing on face of policy "assessment system." N. Y. Ins. Law, 1909 c. 33, Consol. L. c. 28, sec. 219; L.

In the Michigan case of Rensenhouse v. Seeley [18a] it is said that mutual benefit and co-operative associations, whether corporations or mere voluntary associations, are, strictly speaking, insurance organizations, whenever, in consideration of periodical contributions, they engage to pay the member or his designated beneficiary a benefit upon the happening of a specified contingency. What constitutes life insurance on the assessment plan within the meaning of Ohio Statute, must be determined by the laws of that state; and these contemplate that such insurance must be for the sole benefit of the policy holders, and the principal source of revenue must arise from post mortem assessments intended to liquidate specified losses and if a foreign company complies with the statute it may be admitted to transact business in the state even though it may have capital stock and stockholders for whose benefit it was created.[19]

The test is not the manner or mode of affording insurance but whether the company undertakes and agrees for a consideration to indemnify or give security against loss. And where a fire insurance company conducted on the mutual co-operative plan, relies entirely upon assessments to pay losses, and owns no property and accumulates no fund therefor, it is an assessment insurance company.[20] And the charter powers, by-laws and the laws of the state where the company was organized do not determine the character of the insurance issued, but that is settled by the terms of the policy and the laws of the state where the foreign company takes its risk.[1] So under a Missouri decision the character or terms of the policy which a company issues determines whether or not it is an assessment company, and not the certificate issued by the superintendent of insurance.[2] In Illinois a corporation is one of life insurance, though organized to do business on the assessment plan under the name of a benevolent society.[3] Under an Iowa decision a mutual insurance

1913, c. 28, sec. 219; Parker's N. Y. Ins. L. (ed. 1915) p. 340.

As to provisions affecting assessment corporations only, and N. Y. Ins. Laws, art. IX. relating to Co-operative Fire Ins. Corp. see N. Y. Ins. Law 1909, c. 33, Consol. L. c. 28, sec. 266; Parker's N. Y. Ins. L. (ed. 1915) p. 383.

[18a] 72 Mich. 603, 617, 40 N. W. 765.

[19] State (ex rel. National Life Assoc.) v. Matthews, 58 Ohio St. 1, 39 Ohio L. J. 241, 40 L.R.A. 418, 49 N. E. 1034, 27 Ins. L. J. 614; Rev. Stat. sec. 3630e.

[20] Lee Mutual Fire Ins. Co. v. State, 60 Miss. 395.

[1] Federal Union Surety Co. v. Flemister, 95 Ark. 389, 130 S. W. 574, *citing* Minneapolis Fire & Marine Mutual Ins. Co. v. Norman, 74 Ark. 190, 85 S. W. 229. *Examine* Travelers Protective Assoc. of America v. Smith, — Ind. —, 101 N. E. 817, 42 Ins. L. J. 780.

[2] McDonald v. Bankers' Life Assoc. 154 Mo. 618, 55 S. W. 999, 29 Ins. L. J. 780.

[3] Lehman v. Clark, 174 Ill. 279, 43 L.R.A. 648, 51 N. E. 222, 27 Ins. L. J. 745, rev'g 71 Ill. App. 366.

company organized under a statute authorizing an association of persons making mutual pledges and giving valid obligations to each other for their own insurance on the assessment plan, does not become a stock company by the issuance of shares to the subscribers of a guaranty fund, which shares are secured by obligations of the holders, and are subject to assessments from time to time to meet any deficiency that might arise in the advancements, assessments, and pledges made to pay losses and expenses. Therefore, it cannot do business on the stock plan, cannot write a policy for a fixed amount, accept premiums as such, nor declare dividends.[4] In Kansas, an insurance association organized on the co-operative plan, is exempt from the insurance laws where payments are made to a beneficiary by assessments on living members, but one of the requirements of the company is that each person, before becoming a member, shall make a deposit to form a guaranty fund for the payment of assessments.[5] In Michigan, a mutual or co-operative association is not a life insurance company, under the statutes of that state, although it has initiation fees and assessments, and pays a weekly amount for accidental disability.[6] So a co-operative or mutual benefit associations are life insurance companies and are likewise within the terms of an anti-rebate statute.[7] The Minnesota courts hold that an association for the transaction of the business of life and casualty insurance on the co-operative or assessment plan is, in effect, a mutual benefit society,[8] and that an association which raises a fund by assessment of one dollar each on all the members, for the endowment of the wife of each member, is not a "benevolent society" under the state statute relating to the incorporation of such societies.[9] And an incorporated association for the purpose of obtaining employment for its members while living, and to render pecuniary assistance in a stated amount to the families of deceased members by assessments upon the survivors, is a life insurance company within the meaning of the Minnesota statute.[10] So the laws governing life insurance are held to apply to a mutual benefit company on the assessment plan rather than the laws applicable to ben-

[4] Mutual Guaranty Fire Ins. Co. (In re Assignment) v. Barker (Alvord v. Barker) 107 Iowa, 143, 70 Am. St. Rep. 149, 77 N. W. 868.

[5] State v. Bankers' & Merchants' Mutual Ben. Assoc. 23 Kan. 499, under Laws 1871, p. 248.

[6] Rensenhouse v. Seeley, 72 Mich. 603, 40 N. W. 765, under How. Stat. sec. 4225, Laws 1877, act No. 29.

[7] Citizens Life Ins. Co. v. Commissioner of Ins. 128 Mich. 85, 8 Det. L. N. 544, 87 N. W. 126, 30 Ins. L. J. 919.

[8] Hesinger v. Home Benefit Assn. 41 Minn. 516, 43 N. W. 481.

[9] State v. Critchett, 37 Minn. 13, 32 N. W. 787. See State v. Trubey, 37 Minn. 97, 33 N. W. 554.

[10] Brown v. Balfour, 46 Minn. 68, 12 L.R.A. 373, 48 N. W. 604, Gen. Stat. 1878, c. 34, sec. 368.

evolent associations as defined by the Missouri statute.[11] Again, a commercial travelers' association which has not complied with a statute relating to fraternal associations is a mutual benefit association on the assessment plan and not an old line insurance company.[12]

§ 346c. Whether company fraternal beneficial association or mutual assessment company: distinctions.—A company organized in one state as a fraternal beneficial association, not for profit, but with power, among other things, to establish an indemnity fund to care for disabled members of families, that is to carry certain benefits in the nature of accident insurance, declares itself within the provisions of the statutes of another state governing mutual assessment insurance companies by applying for a license to do business there as such an assessment company, and by issuing policies authorizing assessments of policy-holders.[13] So it is held that it is settled by the weight of authority that the character of the business done by a beneficiary association is to be determined by the laws of each state in which it transacts business and not by the laws of the state of domicil.[14] But it is decided that if all the allegations in the answer of a fraternal benefit association show it is not such, and the policy is held to be an assessment one, the laws of the state where it was organized as a fraternal insurance company are admissible to show the character of the association.[15] In Georgia an assessment fire insurance company is not a fraternal benefit order under a statute as to such orders.[16] The New York laws make a distinction between assessment casualty insurance companies and beneficiary or fraternal societies.[17]

[11] Thompson v. Royal Neighbors of America, 154 Mo. App. 109, 133 S. W. 146.

[12] Western Commercial Travelers Assoc. v. Tennent, 128 Mo. App. 541, 106 N. W. 1073. Association was organized under laws 1878 but did not comply with or take advantage of subsequent statutes.

[13] Travelers Protective Assoc. of America v. Smith, — Ind. —, 101 N. E. 817, 42 Ins. L. J. 1197, act 1897, Burns 1908, secs. 4739–4764. See Federal Union Surety Co. v. Flemister, 95 Ark. 389, 130 S. W. 574; Armstrong v. Modern Brotherhood of America, 245 Mo. 153, 149 S. W. 459 (*considered* under § 344b herein); Easter v. Brotherhood of American Yeomen, — Mo. App. —, 156 S. W. 902; Knott v. Security Mutual Life Ins. Co. 161 Mo. App. 579, 144 S. W. 178; Missey v. Supreme Lodge Knights & Ladies of Honor, 147 Mo. App. 137, 126 S. W. 559. *Compare* McDonald v. Bankers Life Assoc. 154 Mo. 618, 55 S. W. 999, 29 Ins. L. J. 780.

[14] Marens v. Heralds of Liberty, 241 Pa. 429, 88 Atl. 678. See §§ 225 et seq. herein.

[15] Easter v. Brotherhood of American Yeomen, 154 Mo. App. 456, 135 S. W. 964.

[16] Puryear v. Farmers Mutual Ins. Assoc. 137 Ga. 579, 73 S. E. 851, Civ. Code 1910, secs. 2866–2877.

[17] People (ex rel. Mount) v. Chapter General of America, Knights of

§ 346d. Whether sick benefit, burial, and beneficial association an insurance company.—Under an Indiana decision, a contract issued by an association to furnish the holder with burial at death, at a specified cost, the money to be raised by assessments upon members of the association who are secured by solicitation from the general public, is one of life insurance within the meaning of a statute regulating such business.[18] So in Missouri although the object of a fraternal benefit association is to furnish old age, sick and funeral benefits in consideration of stipulated payments, still the nature of its business will be considered irrespective of the name of the association and where the plan set forth in its prospectus is referred to as, and stated to be that of life insurance, it conducts a life insurance business.[19] And in Washington the business of a corporation is that of life insurance where its sole agreement is to furnish funerals and accessories even though no beneficiary is designated, the person who would otherwise be obligated for the burial expenses being the beneficiary.[20] It is held in New Jersey, however, that a benevolent society the aim of which is to help sick members, furnish burial and to help widows and other surviving beneficiaries is not an insurance company even though the members have a right to benefits and an interest in all the property which is in a sense impressed with a trust for the uses of the association and also a trust for all the members. The court per Stevens, V. C. said: "That the contract of a beneficial society with its members is not ordinarily a contract of insurance was decided by the supreme court in State v. Taylor.[1] The constitution and by-laws of this society do not embody the elements of such a contract. The amounts paid in, in fees and dues, bear very slight, if any, relation to the amount to be paid in case of sickness or death. The death payment seems to be derived, in great part, from a special assessment 'of a certain sum' in the case of a member and of 'a less but certain sum' in the case of a member's wife. . . . It is admitted that the fund has been increased by means of picnics, balls, etc.

St. John & Malta, 198 N. Y. 15, 90 N. E. 1134, Laws 1903, c. 450, sec. 235; Laws 1892, c. 690, secs. 207, 235; Laws 1883, c. 175; Laws 1881, c. 256, sec. 1. See also Ins. Laws, act 1909, c. 33, p. 28, Consol. L. sec. 201; Parker's Ins. Law of N. Y. (ed. 1915) p. 306.

[18] State v. Willett, 171 Ind. 296, 23 L.R.A.(N.S.) 197, 86 N. E. 68.

On burial insurance and funeral benefits, see notes in 23 L.R.A.(N.S.) 197, and 47 L.R.A.(N.S.) 299.

Definition of burial insurance, see § 7c herein.

As to burial, etc., associations, see Howell's Mich. Stat. Annot. (2d ed.) secs. 9435, 9436; am'd 1905, act No. 68; am'd 1911, act No. 126.

[19] City of Trenton v. Humel, 134 Mo. App. 595, 114 S. W. 1131.

[20] State (ex rel. Fishback) v. Casket & Undertaking Co. 82 Wash. 124, L.R.A.1915B, 976, 143 Pac. 878.

[1] 56 N. J. L. 49, 27 Atl. 797.

. . . By the contract itself, . . . the amount payable for sick and death benefits, is subject to annual revision. . . . The property of the association is, in a sense, as counsel argues, impressed with a trust for the uses of the association, but the trust is for all the members." [2]

§ 346e. Whether railroad relief associations are insurance companies.—The question whether railroad relief associations or departments are insurance companies has been discussed at length in a case in New Jersey and the authorities reviewed. The relief fund scheme, whereby its employees might enter certain contract relations with the company, based upon a consideration of regular payments, said stipend being taken from their wages as a voluntary contribution, provided for payment of sick and accident benefits to said employees, and death benefits to their relatives and appointees. In case contributions of employees, with legacies, gifts, and interest on investments were insufficient for the company to make the required payments under its contracts, it supplied the deficit. It did not appear that the employees who entered into the offered contract became members of any fraternal organization or acquired any right to govern or control the operations of the relief department, or the investment or expenditure of its moneys. The contract, in the absence of legislation on the subject, was held enforceable between the parties whatever might be the relation of the relief department to the insurance laws of the state, even if in violation thereof, and that a trust fund was exhibited in the case out of which the payments under its contracts were primarily to be made by the company. In its opinion the court, per Stevenson, V. C. says: "The relations of the Voluntary Relief Department established by the Pennsylvania Railroad Company to the company itself and to the employees of the company who become members of this department are disclosed to some extent in the opinion of Vice Chancellor Bergen, in the case of Pennsylvania R. R. Co. v. Warren.[3] The scheme which seems to be a combination of a sick benefit society and a life insurance company, has been adopted by several of the larger railroads of the country. In some states the courts, probably basing their decision upon views of the essential nature of insurance contracts and insurance business which do not obtain in this state, have held that this scheme in its entirety does not involve the prosecution of insurance business.[4] The law of New Jersey in regard to the character of busi-

[2] Piries v. First Russian Slavonic Greek Catholic Benev. Soc. 83 N. J. Eq. 29, 89 Atl. 1036.

[3] 69 N. J. Eq. 706, 60 Atl. 1122. On associations providing relief for railroad employees as insurance companies, see note in 47 L.R.A.(N.S.) 299.

[4] *Citing* Donald v. Chicago, Burlington & Quincy R. R. Co. 93 Iowa,

ness such as this Relief Department is organized to prosecute may be ascertained from the following cases: State v. Taylor,[5] Goldenstar Fraternity v. Martin.[6] Holland v. Supreme Council of Order of Chosen Friends.[7] No legislation in New Jersey has been cited which relieves the defendant corporation from the operation of our general insurance law.[8] Whether in case the whole scheme of the Relief Department of the defendant corporation is violative of the letter and policy of our insurance laws that fact can in any way affect the equities claimed by strangers to the contract between the defendant corporation and its employees, is a question which has not been raised in this case, and will not be considered. Whatever may be the relation of this Relief Department to the insurance laws of the state, the contract with which we have to deal is plainly enforceable between the parties, and will be regarded as enforceable in this court at the suit and on behalf of any party for whose benefit the contract was made.

"1. The contract in this case is in writing, and consists of the application of the employee of the defendant corporation, the acceptance of the superintendent of the Relief Department, an officer of the corporation, and the regulations of the Relief Department approved by the board of directors of the defendant corporation. The written application expressly refers to the regulations and incorporates them into the contract. While the bill alleges that the object of the Relief Department as expressed in the regulations is the establishment and management of a fund for the payment of accident and sick benefits to the employees of the Pennsylvania Railroad Company, and death benefits to 'the relatives (of such employees) or other beneficiaries specified in the applications of such employees,' only two of the regulations and a portion of a third are set forth. It may be that no more light would be thrown on this case if the entire book of regulations had been presented to the court in the bill of complaint, but, if any doubts arise as to the legal or equitable rights of any of the parties to this suit on account of the difficulty of discovering the exact terms of the contract, the solution of such doubts

284, 33 L.R.A. 492, 496 (1895) 61 N. W. 971; Johnson v. Philadelphia R. Co. 163 Pa. 127, 29 Atl. 854 (1894).

[5] 56 N. J. Law, 49, 27 Atl. 797, s. c. aff'd 56 N. J. Law 715, 31 Atl. 771 (1893).

[6] 59 N. J. Law, 207, 35 Atl. 908 (Errors and Appeals 1896).

[7] 54 N. J. Law, 490, 493, 25 Atl. 367 (1892). See note to Penn Mutual Life Ins. Co. v. Mechanics' Savings Bank & Trust Co. 38 L.R.A. 33, 40, 72 Fed. 413, 19 C. C. A. 286, 316, 37 U. S. App. 692, 73 Fed. 653, 19 C. C. A. 316, 43 U. S. App. 75, 38 L.R.A. 33, 70; 1 Bacon on Benefit Societies and Life Insurance, secs. 50, 51, 52.

[8] Laws 1902, pp. 445, 446, secs. 88, 89.

I think must be in favor of the defendants. 'Omnis presumptio contra preferentem.'

"2. In this case we have to deal with contract relations pure and simple, unaffected by any special charter from the state, or any provisions of a statute regulating the creation and operations of benevolent associations, or quasi benevolent insurance departments of corporations. No legislation has been cited at the argument qualifying the above statement. This characteristic of the case before the court distinguishes it from numerous cases such as Britton v. Supreme Council of the Royal Arcanum,[9] Supreme Council Order of Chosen Friends v. Bennett,[10] American Legion of Honor v. Perry,[11] Grand Lodge Ancient Order United Workmen v. Connolly.[12] On account of this distinction, these cases and similar ones in my opinion are destitute of a large part of the force attributed to them by counsel for the complainant in his oral argument and brief." [13]

Under an Ohio decision an association established by a railway company, composed of some or all of its employees and the company, for the purpose of accumulating and maintaining a relief fund created by voluntary contributions from their wages by employees who apply for membership in said fund and are admitted: the railway company to take charge of, and be responsible for, the funds; make up deficiencies in the same, supply facilities for conducting the business, and pay the operating expenses, supply surgical attendance for injuries received in its service and pay the members or their designated beneficiaries the stated share of the benefit fund retained by the company, is not an insurance company or association; and in agreeing to perform and in performing each and all of said acts said railway company is not engaged in the transaction of insurance business.[14] In an Iowa case a relief department of a railroad company to aid employees in case of sickness, accident or death, from a fund raised by assessments upon, supplemented by contributions from the railroad company, resort to which fund shall bar an action against the company, or be barred in turn by such an action, is not an in-

[9] 46 N. J. Eq. 102, 19 Am. St. Rep. 376, 18 Atl. 675.

[10] 47 N. J. Eq. 39, 19 Atl. 785, rev'd 47 N. J. Eq. 563, 24 Am. St. Rep. 416, 14 L.R.A. 343, 22 Atl. 1055.

[11] 140 Mass. 590, 592, 5 N. E. 634.

[12] 58 N. J. Eq. 180, 43 Atl. 286.

[13] Wolfstern v. Pennsylvania Railroad Relief Department, 76 N. J. Eq. 78, 74 Atl. 533, 39 Ins. L. J. 137, per Stevenson, V. C.

Compare Beck v. Pennsylvania Rd. Co. 63 N. J. L. 232, 76 Am. St. Rep. 211, 6 Am. Neg. Rep. 601, 15 Am. & Eng. R. Cas. N. S. 851, 4 Chic. L. J. Wkly. 370, 43 Atl. 908, where a similar contract is held not one of insurance within the meaning of the New Jersey law.

[14] State (ex rel. Sheets) v. Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. 68 Ohio St. 9, 64 L.R.A. 405, 67 N. E. 93, 96 Am. St. Rep. 635.

surance company.[15] And under an Illinois decision an association of like nature is not required to comply with the insurance law.[16] In New York a railroad relief association is not engaged in life or casualty insurance business upon the co-operative or assessment plan so as to be subject to the provisions of the article of the insurance law relating to the latter class of corporations.[17] In a Nebraska case a Voluntary Relief Department in connection with a railroad company is mentioned in the syllabus by the court as a "relief department in the nature of a mutual insurance association" and in the opinion as "somewhat in the nature of a mutual benefit society." The general features of this voluntary association were as follows: it paid to its members stipulated sums during disability caused by sickness or accident, and paid to designated beneficiaries certain sums upon the death of members. The members were employees of the railroad companies operating the department. The employing railroad company contracted to make up deficiencies in the relief fund for the payment of losses accruing to those employees. It also furnished clerks and other employees to conduct the affairs of the department. The department had a superintendent, charged with the general conduct of its business, but subject to the supervisory control of an advisory committee, consisting of the general manager of the railroad, certain members chosen by the directors of that road, and other members chosen by employees of different divisions of the road who were members of the department. The method prescribed for obtaining membership was for the employee to make an application upon a form prescribed by the by-laws, and submit himself to a physical examination by an examiner appointed by the department. His application was then passed upon by the superintendent, and, if approved, a certificate of membership was issued. The principal source of income was by deducting specified amounts monthly from the wages of the members. The railroad company made this deduction and retained the fund, paying interest to the department upon monthly balances in his hands. These are the general features. The court per Ervine, C., said: "While the authorities are very numerous in regard to contracts of mutual insurance and in regard to benefit associations, but little light is derived from them in the solution of the questions here presented. The cases are nearly all inapplicable because of the pecuniary constitution of this associa-

[15] Donald v. Chicago, Burlington & Quincy Rd. Co. 93 Iowa, 284, 33 L.R.A. 492, 61 N. W. 971.

[16] Eckman v. Chicago, Burlington & Quincy R. Co. 64 Ill. App. 444, 1 Chic. L. J. Wkly. 325.

[17] Colaizzi v. Pennsylvania Rd. Co. 208 N. Y. 275, 101 N. E. 859; Consol. Laws 1909, c. 28, sec. 201; Parker's N. Y. Ins. Law (ed. 1915) p. 306.

tion. Most of the mutual benefit associations perform social functions, or are such organizations that the insurance is only an incident of the membership. There the question as to whether one is or is not a member must be solved with a view to other objects of the association. In the case of mutual insurance companies every payment is voluntarily made by the member, and may be with the express or implied understanding that its payment is merely conditional. Here, while the assessments are termed 'voluntary contributions,' they are only voluntary in the sense that an employee of the railroad may enter the association or not, as he sees fit. If he elect to enter, he must in so doing give to his employer and the association the power to seize the assessments without any further exercise of his own volition." [18] In an Indiana case where the point at issue and the one decided was the right to change beneficiaries, it was held that the statute of that state relative to such right [19] did not apply to a railroad relief association which was unincorporated. The contract in this case, which was with a number of railroad companies, provided for the creation of a fund, the ratable contributions of each company and its employees of such sums as might be necessary to meet the expenses of administration and to pay such benefits as became due. It was also provided that the association's affairs should be managed by a joint advisory committee, elected in part, from time to time, by the respective employees of the constituent companies. Fixed death benefits were to be paid to the relatives of the employee or to other designated beneficiaries. As the association had no capital stock, and as its members contributed cash to a common fund, out of which benefits were paid, and as the contributing employees, through their representatives, participated in the administration of the association it was declared to be clearly of a mutual character and not, as above stated and for the reason above stated, within the terms of the statute. It was further declared that the courts recognize a difference between ordinary insurance contracts and the certificates of mutual insurance companies as to the extent of the right of insured to change beneficiaries.[20]

§ 346f. Stock associations with beneficiary fund not an insurance company.—A voluntary unincorporated association combined for the purpose of facilitating the purchase and sale of its stocks and also provides for the creation of a trust fund from which upon death of a member a payment of a certain sum is directed to be made to

[18] Burlington Voluntary Relief Department of Chicago, Burlington & Quincy Rd. Co. v. White, 41 Neb. 547, 43 Am. St. Rep. 701, 59 N. W. 747, 751, 26 Ins. L. J. 224.

[19] Burns 1901, sec. 5050.

[20] Mason v. Mason, 160 Ind. 191, 65 N. E. 585.

such person or objects as he might have designated in writing, or in case of no written designation, then to certain specified persons, such payment to be deemed an absolute donation free from all other claim or control does not constitute a contract of insurance nor is such association doing a life insurance business, but such provision merely constitutes a beneficiary fund incidental to the primary object.[1]

[1] Swift v. San Francisco Stock & Exchange Board, 67 Cal. 567, 8 Pac. 94, *distinguishing* between associations contracting primarily for life insurance with their members and those organized for benevolent, social, etc. purposes to which the purpose of mutual insurance is added for mutual aid.

CHAPTER XIX.

PARTIES—MUTUAL COMPANIES, BENEFIT, ETC., SOCIETIES, CONTINUED POWERS.

§ 350. Power of mutual companies, societies, or associations affecting the contract: ultra vires.

§ 350a. Same subject: powers as to membership.

§ 350b. Same subject: power to classify members: discrimination as to.

§ 350c. Same subject: power to restrict or extend classes of beneficiaries.

§ 350d. Same subject: limitation of amount of risk.

§ 350e. Same subject: limiting liability as to premiums and assessments.

§ 350f. Same subject: contract to return dues.

§ 350g. Same subject: paid-up or extended insurance: non-forfeitable and incontestable insurance.

§ 350h. Same subject: waiver by association, or mutual benefit company.

§ 350i. Same subject: estoppel: defense of ultra vires.

§ 350j. Same subject: reinsurance.

§ 350k. Same subject: power as to other business or risks.

§ 350l. Same subject: contract with amusement company valid.

§ 350m. Same subject: when company or society can change plan: impairment of obligation of contract.

§ 350n. Same subject: when company or society cannot change plan.

§ 350o. Same subject: when change from mutual, etc., to joint-stock or stock plan can be made.

§ 350p. Same subject: when change from mutual, etc., to joint-stock or stock plan cannot be made.

§ 350q. Right to convert friendly society into company: injunction.

§ 350r. Same subject: consolidation or merger.

§ 350s. Same subject: reincorporation or reorganization of mutual company on stock plan.

§ 350t. Same subject: reorganization or reincorporation: impairment of obligation of contract.

§ 351. Same subject: guaranty or reserve fund.

§ 351a. Same subject: guaranty or reserve, "mortuary reserve," "death benefit," "reserve and emergency," funds: trust funds.

§ 352. Benevolent and fraternal organizations subject to laws of state and jurisdiction of courts: conditions precedent to resort to courts.

§ 352a. Same subject.
§ 352b. Same subject: strict construction of such conditions precedent.
§ 352c. Same subject: Kelly v. Trimont Lodge.
§ 353. Absolute right to become member under charter of mutual company.
§ 354. Contributions by subordinate lodge to supreme lodge: specific purpose: power of disposal of funds.
§ 354a. Right of subordinate circles or lodges to funds: rights of member who has withdrawn.
§ 354b. Funds of subordinate circle or lodge: trust funds: cannot be diverted.
§ 354c. Duty of association to protect subordinate circle's funds against diversion.
§ 355. Effect of decision by official body created by constitution of order.
§ 356. Delegation of power by supreme lodge: mutual benefit society.
§ 357. Subordinate association cannot be deprived of charter without hearing.
§ 358. Member or officer of benevolent association cannot be expelled without hearing.

§ 350. Power of mutual companies, societies, or associations affecting the contract: ultra vires.—In mutual companies or societies or associations whether they be incorporated or voluntary organizations, the charter or articles of association must be looked to as the measure of their powers, as these constitute their fundamental and organic law, the compact governing their acts subject to the constitution and laws of the state.[2] So in Illinois the rule is applied to a fraternal beneficiary society that in ascertaining the scope of the powers of a corporation organized under a general law, the court

[2] Chamberlain v. Lincoln, 129 Mass. 70.

See also the following cases:

Illinois.—Golden Rule v. People, 118 Ill. 492, 9 N. E. 342.

Kansas.—State ex rel. v. Bankers' & Merchants' Mutual Benefit Assoc. 23 Kan. 499.

Massachusetts.—Grosvenor v. United Society, 118 Mass. 78.

Minnesota.—Bergman v. St. Paul Mut. Building Assoc. 29 Minn. 275, 13 N. W. 120.

Missouri.—Gibbs v. Knights of Pythias, 173 Mo. App. 34, 156 S. W. 11.

New York.—Austin v. Searing, 16 N. Y. 112, 69 Am. Dec. 69.

Ohio.—State ex rel. v. Monitor Fire Assoc. 42 Ohio St. 555.

Pennsylvania.—Commonwealth v. St. Patrick's Ben. Soc. 2 Binn. (Pa.) 441, 4 Am. Dec. 453.

Tennessee.—Knapp v. Supreme Commandery, United Order of the Golden Cross of the World, 121 Tenn. 212, 118 S. W. 390.

See also 1 Morawetz on Corporations (ed. 1882) c. vii. (2d ed.) c. xv. As to powers of regular or old-line companies: ultra vires. See § 334 herein. As to powers; parol contracts; mutual companies; see § 34 herein.

looks to the certificate of the promoters and the articles of incorporation, and its powers are such only as are therein specifically enumerated and such others as are incidental or necessary to carry the express powers into effect.[3] And the following general rule, governing cases other than mutual etc., companies, is followed in a fraternal beneficiary association case. That is, that a corporation has power to do such business only as it is authorized by its act of incorporation to do and no other. It is not held out by the govenrment, nor by the stockholders, as authorized to make contracts which are beyond the purpose and scope of its charter; also that there is a clear distinction between the exercise of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, and the abuse of a general power, or the failure to comply with prescribed formalities or regulations, in a particular instance, when such abuse or failure is not known to the other contracting party, and it was declared that the correctness of the first proposition was not doubted, and that the second proposition, a rightful limitation of the application of the general principle, was no less firmly established both in sound reason and authority, and said last principle was held decisive in the case before the court.[4] Again, in Nebraska in the case of two mutual fire insurance companies organized under the laws of that state to insure city and village property [5] the court, per Good, C., stated the rule applicable to and governing the case as follows: "It is a well-known and recognized principle of law that a corporation possesses only such powers as are granted to it. This is modified to the extent that all powers which are necessary to the enjoyment of the rights and privileges granted are included in the grant of powers. This is upon the theory that it is essential that the corporation shall have the right to carry out and enjoy the rights and privileges conferred upon it, so that any right or power which is essential to the enjoyment of the powers granted is implied. In Smith v. Steele,[6] it is said: 'But a corporation is a mere creature of the statute, and, being such, it possesses only those properties and powers which the charter of its creation confers upon it.' In State v. Atchison & Nebraska Rd. Com-

[3] National Union v. Keefe, 263 Ill. 453, 105 N. E. 319, 44 Ins. L. J. 125, *citing* Rockhold v. Canton Masonic Benevolent Soc. 129 Ill. 440, 2 L.R.A. 240, 21 N. E. 794.

[4] Timberlake v. Supreme Commandery, United Order of the Golden Cross of the World, 208 Mass. 411, 36 L.R.A.(N.S.) 597 (annotated on liability of insurance company on contracts of another comapny which it has absorbed or attempted to absorb), 94 N. E. 685, 40 Ins. L. J. 1177.

[5] Session Laws 1897, p. 257, c. 45; Cobbey's Ann. Stat. 1903, secs. 6525–6544.

[6] 8 Neb. 115, 118.

pany[7] it is held: 'The powers of a corporation organized under legislative statute are such, and such only, as the statute confers. The charter of a corporation is the measure of its powers, and the enumeration of these powers implies the exclusion of all others.' And in the body of the opinion[8] the following language, taken from Thomas v. Railroad Company[9] is quoted with approval: 'Conceding the rule applicable to all statutes that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that enumeration of these powers implies the exclusion of all others.' In State v. Nebraska Distilling Company[10] it is said: 'Unlawful acts of a corporation are not limited to those which are mala prohibita and malum in se, but include powers which the corporation is not authorized to exercise, and contracts which they are not empowered to make.' " [11]

Such corporations have the right to manage their own affairs and to control their members.[12] and an insurance association is bound by the act of the majority in the absence of restrictions in the articles of association.[13] So a fraternal society has power to make rules for payment of dues and assessments and for forfeiture in case of nonpayment.[14]

A mutual insurance company may borrow money to pay its loss-

[7] 24 Neb. 143, 8 Am. St. Rep. 164 n, 38 N. W. 43.

[8] At page 162 of 24 Nebraska.

[9] 101 U. S. 71, 25 L. ed. 950.

[10] 29 Neb. 700, 718, 46 N. W. 155.

[11] Allison v. Fidelity Mutual Fire Ins. Co. 81 Neb. 494, 129 Am. St. Rep. 694, 116 N. W. 274, 37 Ins. L. J. 602.

"For the purposes of this case we may also admit the entire correctness of the appellee's contention (1) that a corporation may lawfully exercise only such powers as are expressly or impliedly granted by statute; and (2) that as between a corporation and the public any reasonable doubt as to the granting of a corporate power will be resolved in favor of the public." Bankers Mutual Casualty Co. v. First National Bank, 131 Iowa 456, 108 N. W. 1046, 36 Ins. L. J. 10.

"A corporation has power to do such business only as it is authorized by its act of incorporation to do and no other. It is not held out by the government nor by the stockholders, as authorized to make contracts which are beyond the purposes and scope of its charter. It is not vested with all the capacities of a natural person, or of an ordinary partnership, but with such only as its charter confers." Davis v. Old Colony Rd. Co. 131 Mass. 259, 41 Am. Rep. 221, per Gray, C. J. quoted with approval in Memphis Grain & Package Elevator Co. v. Memphis & Charleston Rd. Co. 85 Tenn. 703, 4 Am. St. Rep. 791, 5 S. W. 52; Knapp v. Supreme Commandery United Order of the Golden Cross, 121 Tenn. 212, 118 S. W. 390.

[12] Anacosta Tribe v. Murbach, 13 Md. 911, 71 Am. Dec. 625.

[13] Korn v. Mutual Assur. Soc. of Va. 6 Cranch. (10 U. S.) 192, 3 L. ed. 195; Dean v. Tucker, 2 Cranch (U. S. C. C.) 26, Fed. Cas. No. 3711.

[14] Stone v. Grand Lodge Ancient Order United Workmen, 78 Mo. App. 546, 2 Mo. App. 296.

es, and may give its note for such borrowed money, and a member of the company is liable to an assessment to pay a judgment on the note.[15] But where such power is not expressly conferred by charter, and is not necessary to the exercise of its express powers or to effect the purpose of its creation an incorporated fraternal insurance corporation cannot issue promissory notes.[16]

A contract, whereby a guaranty life association undertakes to pay losses which may accrue or have accrued against another and similar association, is an attempt to divert the funds to objects not authorized by its charter, and is therefore ultra vires and void.[17] Nor can a mutual association appropriate assessments made to pay losses, nor the annual deposits received in view of assessments to the purchase of the assets of another like corporation, including unnecessary real estate, nor may it devote such funds to the payment of losses of the members of such other corporations, as such act constitutes a misapplication of trust funds.[18] But a mutual benefit association may purchase real estate where a statute in force when it was incorporated empowers it so to do, even though a by-law may provide otherwise as to the disposition of its funds.[19]

Where the charter of an insurance company permits it to receive notes for premiums in advance, subject to be used by the company in payment of losses, etc., and requires the notes, so given, to be made payable within twelve months from date," the notes must be drawn in accordance therewith, and used for the purposes mentioned therein.[20] Such mutual company, or its receiver, also has power to allow equitable claims for losses, though no actions to recover the same could be maintained by reason of the neglect of the claimants to bring them within the time prescribed by the charter or by-laws of the company, or that limited by statute; and actions upon premium notes to collect money to pay such claims cannot be defeated on the ground that payment of them might have been avoided.[1]

[15] Orr v. Mercer County Mutual Fire Ins. Co. 114 Pa. St. 387, 6 Atl. 696.

[16] Scott v. Bankers' Union of the World, 73 Kan. 575, 85 Pac. 604.

[17] Twiss v. Guaranty Life Assoc. 87 Iowa, 733, 43 Am. St. Rep. 418, 55 N. W. 8. See §§ 112b et seq. herein.

[18] State v. Monitor Fire Assoc. 42 Ohio St. 555.

As to application or appropriation of funds, see § 1289 herein.

[19] Colaluca v. Società Cooperativa Di Mutuo Soccorso Fratelli Bandiera, 30 R. I. 304, 75 Atl. 265.

As to engaging in building and loan association business, see § 350k herein.

[20] Osgood v. Toplitz, 2 Lans. (N. Y.) 184. See § 1289 herein.

[1] Sands v. Hill, 42 Barb. (N. Y.) 651.

§ 350a. Same subject: powers as to membership.—Under a New Jersey decision a mutual company may insure city corporations as well as individuals where the charters of the company and city both so authorize.[2] But assessment fire associations organized under the Ohio statute have no authority to accept non-residents as members.[3]

§ 350b. Same subject: power to classify members: discrimination as to.—A charter of a mutual insurance company may provide that the corporation can divide applications for insurance into two or more classes, according to the degree of hazard, and that the premium notes shall not in such case be assessed for any losses, except in the class to which they belong, where such provision does not conflict with the terms of the act under which it was formed.[4] When so empowered by statute members may be classified by fraternal beneficiary societies and certificates may be issued in conformity with such classification.[5] But a classification of members under an amended by-law will violate a member's rights when his contract antedates such amendment.[6]

A mutual company cannot in a single instance deal with one of its members on a basis different from that on which all others are dealt with.[7]

§ 350c. Same subject: power to restrict or extend classes of beneficiaries.—A fraternal beneficiary society may restrict the object of its benevolence to classes more limited than those which the statute authorizes it to include, and in such cases persons not within the restricted classes specified cannot receive the benefits of the association. It cannot under the statute extend rights to additional classes, unless

[2] French v. City of Millville, 66 N. J. L. 392, 49 Atl. 465, aff'd (mem.) 67 N. J. L. 349, 51 Atl. 1109. See also St. Paul Trust Co. v. Wampach Manufacturing Co. 50 Minn. 93, 52 N. W. 224.

[3] State (ex rel. Richards) v. Manufacturers Mutual Fire Assoc. 50 Ohio St. 145, 24 L.R.A. 252, 33 N. E. 401; Rev. Stat. secs. 3686–3690.

[4] White v. Coventry, 29 Barb. (N. Y.) 305.

As to assessments where risks are classified, see § 1298 herein.

[5] Ellison v. District Grand Lodge, No. 23, Grand United Order of Odd Fellows, 11 Ala. App. 442, 66 So. 872; Acts 1911, pp. 701, 702, 716, secs. 5, 6, 9, 23a. "The conclusion is that the society had the right to create the separate class of members, of which particular class the member on whose life the appellant held a beneficiary certificate was not a member, and to maintain for the benefit of that other class of members a separate mortuary fund." Id. per Pelham, P. J. See Royal League v. Shields, 251 Ill. 250, 36 L.R.A.(N.S.) 250, 96 N. E. 45, 40 Ins. L. J. 2100.

[6] Parks v. Supreme Circle, Brotherhood of America, 83 N. J. L. 131, 89 Atl. 1042. See § 377a herein.

On validity of retrospective by-law or other rule of benefit association excluding certain class of members from benefits, or reducing benefits of that class, see note in 24 L.R.A. (N.S.) 1030.

[7] Clevenger v. Mutual Life Ins. Co. 2 Dak. 114, 3 N. W. 313. See § 370 herein.

the articles are amended.[8] And an association organized "for the mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of deceased members," has no authority to issue a certificate of membership payable to the beneficiary "or assigns," or, in the event of his death, payable to any other than his family or heirs.[9] So want of authority to issue certificates to a class of beneficiaries within the statute under which a beneficial society is organized cannot be availed of by a rival claimant of the benefit, even though said beneficiaries are not within the classes specified or limited under the society's constitution and by-laws.[10] But where the general purpose of such society is the welfare of its members and their relief in times of sickness and distress, it may extend its benefits to the families of members and provide for widows of deceased members.[11]

§ 350d. Same subject: limitation of amount of risk.—In a Missouri case a mutual insurance company is held to be within the rule that there may be a departure from the particular way in which a thing is required to be done under the power vested in a corporation, and where such departure does not apply to the method, it will be good up to the authorized limit, extent or quantity, but void as to the excess and this applies where the constitution of a mutual company limits the amount of risk which can be taken, and the act of such company is not ultra vires and the entire policy made void if the amount of indemnity is fixed at a greater sum, but the excess will be deducted.[12] But policies for more than a certain, specified

[8] National Union v. Keefe, 263 Ill. 453, 105 N. E. 319, 44 Ins. L. J. 125, revg. 172 Ill. App. 101. *Citing* Norwegian Old Peoples Home Society v. Wilson, 176 Ill. 94, 52 N. E. 41. See Royal League v. Shields, 251 Ill. 250, 36 L.R.A.(N.S.) 208, 96 N. E. 45, 40 Ins. L. J. 2100; Coulson v. Flynn, 86 N. Y. Supp. 1133, 90 App. Div 613, affd. 181 N. Y. 62, 73 N. E. 507.

As to statutes limiting beneficiaries: certain classes: when no waiver of charter provisions, see § 878 herein.

[9] State v. People's Mutual Benefit Assoc. 42 Ohio St. 579 (organized under Ohio Rev. Stat. sec. 3630).

On meaning of word "family" in by-laws, see note in 3 L.R.A.(N.S.) 334.

[10] Tepper v. Supreme Council of Royal Arcanum, 61 N. J. Eq. 638, 80 Am. St. Rep. 449, 47 Atl. 460, rev'g 59 N. J. Eq. 321, 45 Atl. 111. Society was organized under Mass. Stat. 1877.

That by-laws must not contravene terms of charter, see § 375 herein.

[11] Gundlach v. Germania Mechanic's Assoc. 4 Hun (N. Y.) 339, 49 How. Pr. 190. But *compare* National Union v. Keefe, 263 Ill. 453, 105 N. E. 319, rev'g 172 Ill. App. 101 (first case considered under this section); Wagner v. St. Francis Xavier Ben. Soc. 70 Mo. App. 161.

As to designation of beneficiaries: specified classes: equities, see § 728 herein.

Beneficiaries: when mode of exercising corporate power prescribed by charter differs from general rule of law, see § 745 herein.

Where designation of beneficiary invalid, see § 752 herein.

[12] Boulware v. Farmers' & Labor-

amount on one life, when they are policies of insurance such as co-operative assessment associations issue, and not certificates such as fraternal beneficiary associations issue, cannot be lawfully issued by a corporation subject to the Maryland Code, although its charter provides, not only for insurance, but "for social or fraternal beneficial purposes, of both." [13]

§ 350e. **Same subject: limiting liability as to premiums and assessments.**—In an assessment fire association in Ohio the liability of the members is limited only by the amount of the losses, and an attempt to limit that liability, either to the amount of cash premium paid when the policy is issued, or to the amount of three or five annual premiums, is not sanctioned but is expressly forbidden by statute,[14] and mutual insurance companies on the assessment plan have no authority to provide for the payment of an agreed annual deposit during the life of a policy, by which the holder shall be exempt from assessment for losses during the year of the prepayment, as such annual deposit is in fact a premium for carrying the risk, and not a specific assessment authorized by the statute; [15] and an attempt, by contract, of a mutual insurance company to limit the number and amount of assessments for which its members are liable is ultra vires and void. The liability of a member is a continuing one so long as he remains a member and he must respond to any and all assessments, required to satisfy the company's indebtedness.[16] But under a Pennsylvania decision, it is not ultra vires to stipulate in the contract that the premiums and assessments shall, during the life or term of the policy, not exceed a certain sum. The court, per Purdy, P. J., said: "With reference to the contention that the officers of the company have no authority to limit the liability of a policy-holder, it seems to us that this question would largely depend upon circumstances. It may be true that the officers of this insurance company would have no authority to make such a stipulation in a few isolated cases, yet if this course of dealing with its policy-holders is sufficiently extensive to become a system, known, or which may be presumed to be known to members of the company, it seems to us only equit-

ers' Co-operative Ins. Co. 77 Mo. App. 639, 2 Mo. App. Repr. 128, quoting as supporting the rule first above stated, from Farmers & Traders Bank v. Harrison, 57 Mo. 503, 511.

[13] International Fraternal Alliance v. State, 86 Md. 550, 40 L.R.A. 187, 39 Atl. 512; Code art. 26, sec. 128.

[14] State (ex rel. Richards) v. Manufacturers' Mutual Fire Assoc. 50 Ohio St. 145, 24 L.R.A. 252, 33 N. E. 401, Rev. Stat. secs. 3634, 3687.

On liability of members of mutual insurance company, see note in 32 L.R.A. 481.

[15] State v. Monitor Fire Assoc. 42 Ohio St. 555.

[16] Morgan v. Hog Raisers' Mutual Ins. Co. 62 Neb. 446, 87 N. W. 145, Comp. Stat. 1899, c. 43, secs. 130, 137, 140.

able that the company should be estopped from denying the binding force of this limitation as against those who, in good faith, relying upon this provision to protect them from a liability which otherwise, they might be unable to meet, had become members of the company." The case however turned upon the question of liability of insured for losses after surrender of his policy.[17]

§ 350f. Same subject: contract to return dues.—While an association has power to contract to pay sick benefits still it is ultra vires to stipulate that at the expiration of a specified time the amount of dues received during that period will be returned, less the amount if any drawn for sick benefits.[18]

§ 350g. Same subject: paid-up or extended insurance: non-forfeitable and incontestable insurance.—In Missouri it is not lawful for a fraternal beneficiary association to issue life insurance under a twenty-year paid up policy plan, nor under a plan making the policy non-forfeitable after payment of premiums for a certain number of months.[19] But under a Pennsylvania decision an insurance company on the mutual plan, may issue paid up or term policies, instead of life as the mutual principle is not affected thereby, and the term or life of a policy is not a determining factor in respect to the principle upon which insurance is carried on, nor is its charter mandatory on the company as to the manner of conducting its business.[20] And a company organized and doing business on the assessment plan, under the Indiana statute, may contract for extended insurance.[1] But an incontestable clause with an exception for fraud in a certificate of a fraternal benefit society is not ultra vires.[2]

[17] Moore, Receiver, v. Frey, 29 Pa. Co. Ct. Rep. 298. There were sixteen other policies before the court in all of which the policies contained the same provision or limited liability clause.

As to defense to actions: assessments, see § 1311 herein.

[18] Southern Mutual Aid Assoc. v. Watson, 154 Ala. 325, 45 So. 649; Southern Mutual Aid Assoc. v. Cobb, 60 Fla. 198, 53 So. 505.

[19] State (ex rel. Supreme Lodge Knights of Pythias) v. Vandiver, 213 Mo. 187, 15 Am. & Eng. Ann. Cas. 283, 111 S. W. 911. *Citing* (Id. 202) Westerman v. Supreme Lodge Knights of Pythias, 196 Mo. 670, 5 L.R.A.(N.S.) 1114, n. 94 S. W. 470. As holding that there could be no such thing as a paid-up policy issued by a fraternal society.

As to endowment policies: ultra vires, see § 2518 herein.

[20] Commonwealth v. Provident Life & Trust Co. 6 Lack. Leg. N. 140, 9 Pa. Dist. R. 479, 56 Leg. Int. 339, 3 Dauph. Co. Rep. 130.

As to right to issue paid-up insurance, see State (ex rel. Grand Fraternity) v. Lemert, 66 Ohio Bull. 118; Ohio Laws 423, art. 97, sec. 9, Gen. Code 9470.

[1] Federal Life Ins. Co. v. Arnold, 46 Ind. App. 114, 90 N. E. 493, 91 N. E. 357, under Laws 1897, p. 318, c. 195. The case of Mutual Reserve Life Ins. Co. v. Roth, 122 Fed. 853, 59 C. C. A. 63, considered and held in nowise parallel.

[2] Loyal Americans of the Republic v. Mayer, 137 Ill. App. 574.

§ 350h. Same subject: waiver by association, or mutual benefit company.—A waiver by a fraternal beneficiary association under a by-law is not an ultra vires act, where the code provides that such a society shall make provision for payment of benefits in case of death or disability "subject to compliance by its members with its constitution and by-laws." Such statutory statement, however, adds nothing to the general law governing corporate action. The by-law was not prescribed by statute, and such a provision is inherent in the law governing corporate obligations to members of all corporations having a constitution and by-laws.[3] And a corporation itself can waive the compliance by an intended member with any of its requirements not prescribed by its charter or the laws of the state, for his admission to membership and the conclusion of a binding contract of insurance.[4] If a fraternal beneficiary association itself has made a contract within its general powers, knowing it to have been made without compliance with the provisions of its own regulations, and has received the full consideration for which it stipulated it cannot afterwards avoid its contract as ultra vires by reason of such non compliance; this being a rightful limitation of the application of the general principle or rule as to the powers of a corporation being limited to its charter, etc.[5] And a town or county co-operative company will be precluded from contending that a resolution, under which it has extended its limits of business operations, was not regularly passed, when it has acquiesced for several years in dealings with agents and insurers in such extended limits.[6] And by accepting and retaining the dues and fees of a member, with knowledge of the facts, a mutual benefit association waives all irregularity in the organization of a subordinate lodge.[7]

§ 350i. Same subject: estoppel: defense of ultra vires.—Mutual benefit societies are estopped from defending on the ground of ultra vires against one of its contracts where it has received assessments

[3] Johnson v. Modern Brotherhood of America, 114 Minn. 411, 131 N. W. 471, 40 Ins. L. J. 1424, Code sec. 1822.

[4] Timberlake v. Supreme Commandery, United Order of the Golden Cross of the World, 208 Mass. 411, 36 L.R.A.(N.S.) 597n, 94 N. E. 685, 94 N. E. 1177, 40 Ins. L. J. 1177. (The above rule was sanctioned by the court although it was declared not necessary to consider the question.) *Citing* Watts v. Equitable Mutual Life Assoc. 111 Iowa, 90, 82 N. W. 441; Wiberg v. Scandinavian Relief Assoc. 73 Minn. 297, 76 N. W. 37; Morrison v. Odd Fellows Ins. Co. 59 Wis. 162, 18 N. W. 13.

[5] Timberlake v. Supreme Commandery, United Order of the Golden Cross of the World, 208 Mass. 411, 36 L.R.A.(N.S.) 597n, 94 N. E. 685, 40 Ins. L. J. 1177.

[6] Skaneateles Paper Co. v. American Underwriters' Fire Ins. Co. 114 N. Y. Supp. 200, 61 Misc. 457.

[7] Perine v. Grand Lodge of Ancient Order United Workmen, 48 Minn. 82, 50 N. W. 1022, 21 Ins. L. J. 213.

thereon.[8] And if a mutual fire insurance company without power so to do, under the limitations of its charter, insures country property and receives premiums or levies assessments therefor it is estopped to plead ultra vires.[9] Nor can an assessment company defend on the ground of ultra vires an action on an old-line policy, issued by it without authority, where it has received premiums thereon.[10] So, the question of power to contract for an endowment policy cannot be raised where such policy has been issued, and premiums and assessments have been accepted by a mutual benefit association.[11] So, where a fraternal association, consolidates with and assumes the contracts of another association, and issues to one of the members of the latter company, and assumes his contract and accepts his assessments, said member being over the age limited by its charter, it cannot avail itself of the defense of ultra vires.[12] And, the relief department of a railroad company, in the nature of a mutual insurance association, organized for the benefit and protection of railroad employees, in case of sickness or death, and which places an employee's name upon the roll of its members at his solicitation, and deducts from his wages his assessment for benefits, on the basis of membership, with knowledge of the fact that no formal application had been made and no physical examination had, as required by the by-laws, is estopped from disputing such employees membership, upon the suit of a widow to recover a death benefit, notwithstanding a rule of the department, defining and limiting its liability in cases of regular and formal application.[13] Again, if the contract sets forth verbatim a charter clause purporting to authorize such insurance a beneficial association is estopped to deny its power to provide in its contract for payment of a definite specified sum in case of permanent disability, and in such case a provision is not applicable, that benefits should be due until disability ceased.[14]

[8] Matt v. Roman Catholic Protective Soc. 70 Iowa 455, 30 N. W. 799.

On estoppel of corporation to set up plea of ultra vires, see note in 20 L.R.A. 765.

[9] Garner v. Mutual Fire Ins. Co. — Iowa —, 86 N. W. 289.

[10] Knott v. Security Mutual Life Ins. Co. 161 Mo. App. 579, 144 S. W. 178, 41 Ins. L. J. 842, *criticising*, as mere dictum and opposed to the unbroken current of authority, Smoot v. Bankers' Life Assoc. 138 Mo. App. 438, 120 S. W. 719.

[11] Wagner v. Keystone Mutual Benefit Assoc. 8 Pa. Dist. Rep. 231, 56 Leg. Int. 192.

[12] Edwards v. American Patriots, 162 Mo. App. 231, 144 S. W. 1117. See Wood v. Supreme Ruling of Fraternal Mystic Circle, 212 Ill. 532, 72 N. E. 783, rev'g Supreme Ruling of Fraternal Mystic Circle v. Wood, 114 Ill. App. 431.

[13] Burlington Voluntary Relief Department v. White, 41 Neb. 547, 43 Am. St. Rep. 701, 59 N. W. 747, 751, 26 Ins. L. J. 224. See this case under § 346e herein.

[14] Binder v. National Masonic Ac-

Members of a mutual fire and marine insurance company are estopped to dispute the power of such corporation to carry on two separate departments, without recourse by either to the assets of the other, where such act has been fully advertised for more than twenty years, and members have had full knowledge of the arrangement.[15]

§ 350j. Same subject: reinsurance.—Where the purpose of the legislature is to limit the risks, and to confine the business of mutual fire insurance companies to the insurance of tangible property owned by their members a contract of reinsurance made by such company is ultra vires and assessments cannot be collected on account of such policy.[16] But where it is beyond the power of mutual fire insurance companies to reinsure, the law under which they were organized not having specifically granted such authority, but on the contrary had limited the risks which such companies might write, so that none but owners of property might become members and non-members property could not be insured, and such contract of reinsurance is not executed, the reinsuring company is not estopped from urging the defense of ultra vires.[17]

§ 350k. Same subject: power as to other business or risks.—A casualty company on the assessment plan has no power to issue sick benefit certificates where it is restricted by statute to risks of accidental death or disability from accident.[18] So, a corporation of another state, authorized to issue policies on the lives of members, upon the assessment plan, for the benefit of any person who has an insurable interest is not entitled to carry on business under the Ohio statutes, which allow assessment companies to insure lives of mem-

cident Assoc. 127 Iowa 25, 102 N. W. 190.

[15] Doane v. Millville Mutual Marine & Fire Ins. Co. 43 N. J. Eq. 522, 11 Atl. 739. See also Citizens' Mutual Fire Ins. Co. v. Sortwell, 8 Allen (90 Mass.) 217.

[16] Allison v. Fidelity Mutual Fire Ins. Co. 81 Neb. 894, 129 Am. St. Rep. 634, 116 N. W. 274, 37 Ins. L. J. 602. Applies to mutual companies organized under Neb. Laws Sess. 1897, c. 45, p. 257. See §§ 115a, 115b herein.

As to reinsurance by life or casualty corporations on co-operative or assessment plan, see N. Y. Ins. Law 1909, c. 33, Consol. L. c. 28, sec. 209, Parker's N. Y. Ins. L. (ed. 1915) p. 321.

As to contract of reinsurance by fraternal benefit societies by transfer etc. of entire membership or funds of another society, see N. Y. Ins. Law 1909, c. 33, Consol. L. c. 28, sec. 236, L. 1911, c. 198; Parker's N. Y. Ins. L. (ed. 1915) p. 352.

As to diversion of funds, and ultra vires, by paying losses of another association, see Twiss v. Guaranty Life Assoc. 87 Iowa, 733, 43 Am. St. Rep. 418, 55 S. W. 8, *considered* under § 350 herein.

[17] Allison v. Fidelity Mutual Fire Ins. Co. 81 Neb. 494, 129 Am. St. Rep. 694, 116 N. W. 274, 37 Ins. L. J. 602. See §§ 115, 115a, 115b herein.

[18] Knowlton, Att'y Gen. (ex rel.) v. Berkshire Health & Accident As-

bers only for the benefit of their families and heirs, as a company cannot carry on a business not authorized by the laws of the state.[19] And a corporation authorized by its charter to insure against fire, whether caused "by accident, lightning, or any other means," cannot insure against damage by lightning not resulting in fire, although their by-laws provide for their doing so.[20] Nor can a mutual fire insurance company, organized under the general laws of Wisconsin, effect insurances on property other than that mentioned therein.[1] And policies issued by a mutual company on farm property in violation of the express prohibition of the statute are ultra vires, illegal and void.[2] But such company incorporated in New York, and having a general power to insure under its charter, may issue policies on personal property in Canada owned by parties there.[3]

Under the Indiana statute a mutual life company cannot engage in the business of a building and loan association or establish a building and loan department and enter into contracts of that character as such act is ultra vires, even though it is empowered by statute to loan or invest its funds, and so, although it obtains a legalizing act from the legislature where such act contains nothing as to the above ultra vires business.[4]

But where the code authorizes insurance against fire or other casualty and by an amendment burglary insurance is authorized, and prior to said amendment a company, the general nature of whose business was to insure the property only of members against loss or damage by casualty etc., adopted articles of incorporation expressly assuming to transact the business of burglary insurance, and secured

soc. 171 Mass. 458, 50 N. E. 930; Stat. 1890, c. 421, s. c. 171 Mass. 455, 50 N. E. 929.

[19] State (ex rel. Att'y Genl.) v. Western Union Mutual Life Ins. Co. 47 Ohio St. 167, 8 L.R.A. 129, 24 N. E. 392, under Rev. Stat. secs. 3630, 3630e. "Whatever powers such companies possess, are derived exclusively from the laws of this state, and the limitations and restrictions imposed upon them by those laws, both with respect to the classes of business they may transact, and the mode of doing it operate upon them as well when doing business outside of the state, as within it. Their corporate capacity in these respects cannot be enlarged by the laws of any other state in which they are permitted to do business." Id. 172, per Williams, J. See Ordelheide v. Modern Brotherhood of America, 158 Mo. App. 677, 139 S. W. 269.

[20] Andrews v. Mutual Ins. Co. 37 Me. 256. That by-laws must not contravene terms of charter, see § 375 herein.

On nature of risk under insurance against loss by lightning, see note in 26 L.R.A. 267.

[1] O'Neil v. Pleasant Prairie Mut. Fire Ins. Co. 71 Wis. 621, 38 N. W. 345.

[2] Ely v. Oakland Circuit Judge, 62 Mich. 466, 17 Det. Leg. N. 62, 125 N. W. 375, 127 N. W. 769.

[3] Western v. Genesee Mutual Ins. Co. 12 N. Y. 258.

[4] Huter v. Union Trust Co. 153

from the proper authority a finding that such business was authorized by the statute, and that its organization was sufficient for said purpose, and its right to do such business had not been challenged for ten years, the insured cannot escape liability on a premium note on the plea of ultra vires. Such a plea is not favored in law and will not be sustained except when required by the utmost considerations of public policy.[5]

§ 350l. Same subject: contract with amusement company valid.—A contract with an amusement company to furnish an "amusement enterprise" complete at their own cost and expense, except that a suitable location and license were to be supplied by the beneficial association may be validly made by a policemen's beneficial association, for an equal division of the revenue above a given sum.[6]

§ 350m. Same subject: when company or society can change plan: impairment of obligation of contract.—It is held that a mutual benefit society may change its plan of insurance, and such change does not violate its prior contracts.[7] So, legislative authority to change the plan of the business done by a life insurance company from the assessment plan to the legal reserve flat premium plan of "old line" insurance does not work a violation of the contract with those certificate holders who failed to change to the new plan, although their assessments may have increased because of the lesser number subject to the assessment, and the death of members, where the right of amendment was expressly reserved in the articles of association.[8] And a member may consent to a change of plan,

Ind. 204, 54 N. E. 755, 51 N. E. 1071, 1 Repr. 303; acts 1865 (R. S. 1881, sec. 3763, Burns' Rev. St. 1894, secs. 4884, 4895) Horner's Rev. Stat. 1897, sec. 3753; acts 1893, p. 192 (legalizing act).

As to void and illegal insurance and distinctions to be observed, see §§ 2506, 2507 herein.

As to effect of subsequently enacted statutes upon void or illegal insurances, see § 2524 herein.

[5] Bankers Mutual Casualty Co. v. First National Bank, 131 Iowa, 456, 108 N. W. 1046, 36 Ins. L. J. 10; McClains Code, secs. 1685, 1695, am'd act, 28th Gen. Assemb. c. 60, p. 44.

[6] Brindze v. Atlantic City Policemen's Beneficial Assoc. 75 N. J. Eq. 405, 72 Atl. 435.

[7] Supreme Lodge Knights of Pythias v. Knight, 117 Ind. 489, 3 L.R.A. 409, 20 N. E. 479.

As to transfer of risks by life or casualty insurance companies on the co-operative or assessment plan, see N. Y. Ins. Law, 1909, c. 33, Consol. L. c. 28, sec. 209; Parker's N. Y. Ins. L. (ed. 1915) p. 321.

As to plans of mutual insurance, and that payment of cash premiums does not abrogate the mutual principle, see § 343 herein.

On rights of assessment company to change plan or class of policies, see note in 1 L.R.A.(N.S.) 627.

[8] Wright v. Minnesota Mutual Life Ins. Co. 193 U. S. 657, 48 L. ed. 832, 24 Sup. Ct. 549, *cited* in Polk v. Mutual Reserve Fund Life Assoc. 137 Fed. 273, 277; Hinckley v. Schwartz-

from one of assessment to monthly payments, by making payments and surrendering his certificate.[9] It is declared in a Federal Supreme Court case that: "It is not every change in the charter of articles of association of a corporation that will work such a departure from the purposes of its creation as to forfeit obligations incurred to it or prevent the carrying on of the modified business. A radical departure affecting substantial rights may release those who had come into the corporation on the basis of its original charter. There is much discussion in the authorities as to when a charter amendment is of that fundamental character that a majority of the members or stockholders cannot bind the minority by agreeing to a change in the nature of the business to be carried on or the purposes or objects for which the corporation was created. Each case depends upon its own circumstances, and how far the right of amendment has been impliedly or expressly reserved in the creation of corporate rights. It would be unreasonable and oppressive to require a member or stockholder to remain in a corporation whose fundamental purposes have been changed against his will. On the other hand, where the right of amendment is reserved in the statute or articles of association, it is because the right to make changes which the business may require is recognized, and the exercise of the privilege may be vested in the controlling body of the corporation. In such cases, where there is an exercise of the power in good faith which does not change the essential character of the business, but authorizes its extension upon a modified plan, both reason and authority support the corporation in the exercise of the right.[10] In the present case we have by express stipulation the right to amend the articles, with the reservation noted. . . . Nor does it appear that the changes were arbitrarily made without good and substantial reasons. The changes of 1898 to a plan of issuing, in exchange for certificates and upon new business, a policy having some of the features of old line insurance, seems to have been fully justified by the state of the company's business. And the subsequent change to a policy with straight premiums and fixed indemnity was approved by the majority of the members upon proceedings had under the Minnesota statute and has resulted in a successful business and a

schild & Sulzberger Co. 95 N. Y. Supp. 357, 363, 107 App. Div. 470, 478; Green v. Hartford Life & Fire Ins. Co. 139 N. C. 309, 311, 1 L.R.A. (N.S.) 625, 51 S. E. 887. See § 350t herein.

[9] Supreme Ruling of Fraternal Mystic Circle v. Ericson, — Tex. Civ. App. —, 131 S. W. 92.

[10] *Citing* Nugent v. The Supervisors, 19 Wall. (86 U. S.) 241, 251, 22 L. ed. 83; Picard v. Hughey, 58 Ohio St. 577, 51 N. E. 133; Miller v. American Mutual Accident Ins. Co. 92 Tenn. 167, 185, 20 L.R.A. 765, 21 S. W. 39; Supreme Lodge Knights of Pythias v. Knight, 117 Ind. 489, 3 L.R.A. 419, 20 N. E. 479.

considerable change of the members to the new and more stable plan. . . . The business is still that of mutual insurance, notwithstanding changed methods of operation. The new plan has been legally adopted and approved by the insurance commissioner of the state. The argument for appellants in that, having begun as an assessment company, the plan can never be changed without the consent of all interested. But we have seen that the right of amendment was given in the original articles of association. There was no contract that the plan of insurance should never be changed. On the contrary, it was recognized that amendments might be necessary. There was no vested right to a continuation of a plan of insurance which experience might demonstrate would result disastrously to the company and its members. We are cited to the statutes of many states authorizing similar changes and transfer of membership, but to no case holding legislative authorization of a change of this character to work the impairment by the state of the obligation of a contract. The courts are slow to interfere with the management of societies, such as this mutual insurance company. While the rights of members will be protected against arbitrary action, such organizations will ordinarily be left to their own methods of action and management. The changes under consideration were made in good faith and have been accepted by many of the old members as well as those who have taken policies since the changes in plan have been made. In our view of the case the law of Minnesota did not impair the obligation of any contract, nor were the changes in the method and plan of this company beyond its corporate powers. There is much testimony in the record as to the good faith of this proceeding and the motives of the complainants in bringing it, which we do not deem it necessary to consider, as the conclusions announced dispose of the case in favor of an affirmance of the judgment" [11]

§ 350n. Same subject: when company or society cannot change plan.—Under a Missouri decision a company which does business on the assessment plan in conformity with the power conferred by

[11] Wright v. Minnesota Mutual Life Ins. Co. 193 U. S. 657, 664, 665, 48 L. ed. 832, 24 Sup. Ct. 549. The company was organized under Minnesota laws as one on the assessment life insurance plan. Subsequently the provisions of the general laws 1901, c. 143 were accepted whereby the company changed its plan to a regular reserve company with certain premiums and fixed amount.

That certificate of insurance commissioner not conclusive in determining the nature of the business transacted but that the executive officers construction entitled to weight, see Smoot v. Bankers' Life Association, 138 Mo. App. 438, 120 S. W. 719.

As to vested rights: change of by-laws, see § 380 herein.

the statute under which it was organized cannot engage in the business of life insurance or any other plan and an attempt to do so is ultra vires.[12] In Michigan a mutual life insurance company cannot issue a policy payable upon the occurrence of total disability where its articles of association provide only for payment in the event of death of insured and the statute under which it was organized require the articles of association to state definitely the object of incorporation, the classification of members and the purpose of such classification.[13] Under the insurance laws of Pennsylvania no insurance company can be licensed to do more than one class of insurance and a company to which is issued a license to insure on the level premium of legal reserve plan, is not entitled to a certificate of authority also to do business on the assessment basis, and without such certificate it cannot legally do business.[14] And an assessment fire association under the Ohio statute cannot do business on the "contingent liability plan." [15]

In Michigan the statute prohibits a stock company from transacting business on the mutual plan.[16]

§ 350o. Same subject: when change from mutual, etc., to joint-stock or stock plan can be made.—The statute may empower mutual companies to change to joint stock companies upon giving notice but if no method is prescribed for such change other than by proceedings in conformity with charter provisions, corporate action upon special notice to members is required to effect the change.[17]

[12] Smoot v. Bankers Life Assoc. 138 Mo. App. 438, 120 S. W. 719: company organized under Code Iowa, sec. 1784 etc.

An authority to do business on the assessment plan precludes the making of insurance contracts or the issuance of certificates on another plan. Missey v. Supreme Lodge Knights & Ladies of Honor, 147 Mo. App. 137, 126 S. W. 559.

[13] Preferred Masonic Mutual Life Assoc. v. Giddings, 112 Mich. 401, 4 Det. Leg. N. 82, 70 N. W. 1026, company was incorporated under Mich. Gen. Laws 1887, act No. 187, am'd Gen. Laws 1895, act No. 58.

[14] Pennsylvania Mutual Life Ins. Co. of Philadelphia (Att'y Genl's Opinion) 36 Pennsylvania County Court Rep. 687.

[15] State (ex rel. Richards) v. Manufacturer's Mutual Fire Assoc. 50 Ohio St. 145, 24 L.R.A. 252, 33 N. E. 401; Rev. Stat. sec. 3634. See also secs. 3686–3690.

[16] Ely v. Oakland Circuit Judge, 162 Mich. 466, 127 N. W. 769, s. c 125 N. W. 375; Comp. L. sec. 7256, Pub. acts 1909, No. 197.

[17] Schwarzwalder v. Tegen, 58 N. J. Eq. 319, 43 Atl. 587, aff'd 44 Atl. 769; German Mutual Fire Ins. Co. v. Schwarzwalder, 59 N. J. Eq. 589.

As to cash premium plan—mutual, etc. companies, see § 343 herein.

When mutual company is not made a stock company, see Mutual Guaranty Fire Ins. Co. In re (Alvord v. Barker) 107 Iowa 143, 70 Am. St. Rep. 149 n, 77 N. W. 868, 28 Ins. L. J. 205, *considered* under § 341 herein.

When mutual fire insurance corporation may amend charter so as to convert it into stock corporation, see N. Y. Ins. Law 1909, c. 33, Consol. L. c. 28, sec. 125; Parker's N. Y. Ins. L. (ed. 1915) p. 226.

But a mutual insurance company is not changed into a stock company by raising a guaranty fund to secure temporarily the payment of losses when assessments are insufficient, even if such guaranty fund should be held valid.[18]

§ 350p. Same subject: when change from mutual, etc., to joint-stock or stock plan cannot be made.—Whatever power, if any, a mutual company possesses to change into a joint stock company must have its source in some statutory provision, and where the power must be exercised by the corporation itself in accordance with the statute, and not by unauthorized directors it could not be exercised in New Jersey prior to the statute of 1899 against any members will where he had acquired his rights as such prior to said enactment.[19] So, an assessment fire association has no authority under the Ohio statute to do business on the joint-stock plan but is limited to business in which its members insure each other against loss by fire and other casualties and agree to be assessed specifically for payment of losses and for incidental purposes.[20] And if a mutual fire insurance company issues a stock policy contrary to and in violation of an express statutory prohibition such policy is non-enforceable as it is absolutely void.[1] Nor can a mutual company by mere force of a by-law change from a corporation having no capital stock to one which has,[2] and, where the charter of a mutual fire insurance company contemplates the issuance of policies not mutual, for a cash premium it has no power to issue such policies when expressly prohibited by the statute under which it is organized upon

New York laws 1896, c. 850, amd'g Laws 1892, c. 690, sec. 125, as to change by mutual company to stock company and the rights of members as to stock is not unconstitutional because some members do not avail themselves thereof. Grobe v. Erie County Mutual Ins. Co. 57 N. Y. Supp. 290, 39 App. Div. 183, aff'd 169 N. Y. 613, 62 N. E. 1096.

When domestic mutual marine corporation may change its business plan to that of capital stock corporation, see N. Y. Ins. Law, 1909, c. 33, Consol. L. c. 28, sec. 159; Parker's N. Y. Ins. L. (ed. 1915) p. 279.

Stock life insurance corporation may become mutual life insurance corporation. N. Y. Ins. Law 1909, c. 33, Consol. L. c. 28, secs. 16, 95; Parker's N. Y. Ins. L. (ed. 1915) pp. 31, 163.

[18] Corey v. Sherman, 96 Iowa 114, 32 L.R.A. 490, 60 N. W. 232, 64 N. W. 828. See also Mutual Guaranty Fire Ins. Co., In re (Alvord v. Barker) 107 Iowa, 143, 9 Am. & Eng. Corp. Cas. N. S. 774, 77 N. W. 868, 28 Ins. L. J. 205, *considered* under § 350p herein.

[19] German Mutual Fire Ins. Co. v. Schwarzwalder, 59 N. J. Eq. 589, 44 Atl. 769, aff'g Schwarzwalder v. Tegen, 58 N. J. Eq. 319, 43 Atl. 587; 2 Gen. Stat. p. 1744, act Apr. 9, 1875, am'd P. L. 1899, p. 17, act March 6, 1899.

[20] State (ex rel. Richards) v. Manufacturer's Mutual Fire Assoc. 50 Ohio St. 145, 24 L.R.A. 252, 33 N. E. 401; Rev. Stat. secs. 3686–3690.

[1] Smith v. Sherman, 113 Iowa, 601, 88 N. W. 747; Code sec. 1159.

[2] State v. Utter, 33 N. J. L. (4 Vroom) 183.

the mutual plan. But policies of such a company in the standard form containing an additional assessment liability clause are subject to assessment as mutual policies although those issued as cash premium stock plan policies without such additional clause are ultra vires and in violation of the statute and void.[3] Again, where the powers of a mutual company, organized under the assessment plan to insure each other's property and which is expressly prohibited from doing business or taking risks on the stock plan, they do not extend to the insurance of property of non-members or to receiving premiums or declaring dividends, and where such company has no stock, except the shares issued to subscribers of the guaranty fund, it is not made a stock company by the issuance of such shares and the creation of such fund. But the issuance of a non-participating policy for a specified premium to a non-member, contrary to the statute, was held ultra vires and void.[4] And where a company is organized under a statute which authorizes the insurance of property of members only and prohibits a mutual company from taking risks upon the stock plan and it issues policies for specific amounts for an all cash premium to persons who are not bound to pay any assessments such contracts are without authority of law.[5]

§ 350q. Right to convert friendly society into company: injunction.—Where a registered friendly society, in avowed exercise of the powers of Sec. 71 of the Friendly Societies act, 1896,[6] passed a special resolution to convert itself into a company under the companies acts, with a memorandum of association annexed thereto, and obtained registration of itself as a company, and a member of the company, who had been a member of the friendly society, suing on behalf of himself and all other members of the company for a declaration that so much of the business described in the memorandum of association as was larger than that of the Friendly Societies act was illegal and void and moved for an injunction to restrain the company from carrying on such business or exercising any of the powers enumerated in said memorandum of association in excess of those allowed by the Friendly Societies act, 1896. It

[3] Ely v. Oakland Circuit Judge, 162 Mich. 466, 127 N. W. 769, s. c. 125 N. W. 375; Comp. L. sec. 7256, Pub. acts 1909, No. 197.

[4] Mutual Guaranty Fire Ins. Co. In re (Alvord v. Barker) 107 Iowa, 143, 9 Am. & Eng. Corp. Cas. N. S. 774, 77 N. W. 868, 28 Ins. L. J. 205; Code 1873, sec. 1160. At the time this company was organized the law authorized two kinds of mutual insurance companies—one a joint stock company on the mutual plan and one of character stated in the above text. Void and illegal insurances, see § 2506 herein.

[5] Corey v. Sherman, 96 Iowa 114, 32 L.R.A. 490, 60 N. W. 232, 64 N. W. 828. As to cash premium plan, see § 343 herein.

[6] 59 & 60 Viet. c. 25.

was held [6a] that the motion for an injunction was misconceived and should be refused. But, whether, notwithstanding the certificate of incorporation, the validity of the special resolution and of the registration could have been successfully impeached by a member of the old friendly society in a properly constituted action, quaere.[7]

§ 350r. Same subject: consolidation or merger.—The charter of a corporation or the statute under which it is created is the source of power of one corporation to consolidate or merge with another, and such authority must be expressly so granted, for otherwise corporations have no general power to so consolidate or merge. And a fraternal beneficiary association which is organized for general welfare, and has neither capital stock, stockholders, nor property to be used in business for individual profit, and no franchises or property which are susceptible of lease or sale, and in which association those interested are denominated "members" not "stockholders," and which has no express authority under its charter and no power under the statutes to enter into a "merger or union" contract with another company, cannot lawfully make such contract and if such contract is made it is ultra vires and void and cannot be enforced.[8] So, a fraternal beneficiary association incorporated in Massachusetts cannot consolidate or amalgamate with a foreign corporation nor can it transfer its membership to a subordinate council of such foreign corporations, such attempt is inefficacious and void where it does not appear that it was "submitted to and approved by a two-thirds vote of the certificate holders of each corporation, nor that other statutory requirements were complied with." [9] Again, if the statute law of one state undertakes to regulate the consolidation of fraternal beneficiary associations or societies such fact may be taken as a recognition of the power of societies organized under its laws to make such an agreement but it cannot be held to confer such power upon a society organized under the laws of a foreign state, and the domestic asso-

[6a] By Eve, J. and the Court of Appeals.

[7] (Per Cozens-Hardy, M. R. and Buckley, L. J.) McGlade v. Royal London Mutual Ins. Soc. Ltd. [1910] 2 Chancery, Law Rep. 169. Companies (Consolidation) act 1908 (8th Edw. VII. c. 69) sec. 17, subsec. 1.

[8] Knapp v. Supreme Commandery, United Order of the Golden Cross of the World, 121 Tenn. 212, 118 S. W. 390; acts 1875, p. 232, c. 142; Shannon's Code sec. 2524; acts 1887, p. 329, c. 198; acts 1897, p. 144, c. 19; acts 1901, p. 163, c. 113; acts 1905, p. 1021, c. 480.

As to merger, or transfer of substantially the entire membership or funds of domestic fraternal benefit societies, see N. Y. Ins. Law 1909, c. 33, Consol. L. c. 28, sec. 236; Laws 1911, c. 198; Parker's N. Y. Ins. L. (ed. 1915) p. 352.

[9] Conseil Rochambeau No. 128, de L'Union Saint Jean Baptiste d'Amérique v. Lafleur, 215 Mass. 347, 102 N. E. 412; R. L. c. 119, sec. 11, am'd St. 1908, c. 463; St. 1911, c. 628.

ciation is precluded from purchasing the business and assuming the risks of the foreign company and not having the legal capacity, its attempt to assume said obligation is void in both states.[10] But any insurance corporation organized under a Pennsylvania statute is within the terms of the enactment of that state providing for consolidation and merger of corporations.[11]

A consolidation contract whereby the membership of a mutual association is transferred to another which agrees to carry out the former's insurance contracts, does not constitute an agreement to insure and so does not release the latter association from liability on a certificate of a member of the transferring association although he was at the date of such transfer agreement over the age of risk prohibited by statute.[12] And a fraternal beneficiary corporation whose attempted consolidation with another company fails because ultra vires cannot avoid liability upon the certificates of the members of the latter, if upon its invitation they accept membership in it, pay their dues, and meet their other obligations, although they do not follow the procedure prescribed by its rules for the reception of members.[13] If a transfer of risks or membership is made by one mutual benefit association to another in conformity with statutory requirements providing the manner in which such transfers may be made, the legal result is that all members of the transferring association become ipso facto members of the latter association where such members have not asked in writing, as provided by statute, to be transferred to some other association. But nothing can alter the express terms of the original contracts of the members of such transferring association, if not surrendered and exchanged for certificates in the transferee association.[14]

[10] Starr v. Bankers' Union of the World, 81 Neb. 377, 129 Am. St. Rep. 684, 116 N. W. 61, 37 Ins. L. J. 746.

As to rights of stockholders upon consolidation or merger of mutual associations or companies of different states, see Southern Mutual Aid Assoc. v. Blount, 112 Va. 214, 70 S. E. 487, 40 Ins. L. J. 1091.

[11] Guardian Fire Ins. Co. In re, 32 Pa. Co. Ct. Rep. 494; act May 29, 1901.

[12] Catheart v. Equitable Mutual Life Assoc. of Waterloo, 111 Iowa 471, 82 N. W. 964; McClain's Code, sec. 1767, prohibiting such association from insuring a person over sixty-five years of age.

[13] Timberlake v. Supreme Commandery, United Order Golden Cross of the World, 208 Mass. 411, 36 L.R.A.(N.S.) 597 (annotated on liability of insurance company on contracts of another company which it has absorbed or attempted to absorb), 94 N. E. 635.

[14] Robinson v. Mutual Reserve Life Ins. Co. (Scovill v. Mutual Reserve Life Ins. Co. (U. S. C. C.) 182 Fed. 850, 40 Ins. L. J. 190 (transfers were made under Illinois statute regulating life and accident insurance on assessment plan. Hurd's Rev. Stat. Ill. 1909, p. 1320, Art. 245), s. c. 189 Fed. 347, 111 C. C. A. 79, 40 Ins. L. J. 2091, s. c. (U. S. C. C.) 175 Fed. 624, 39 Ins. L. J. 442, s. c. (U. S. C. C.) 175 Fed. 629. As to incorpora-

§ 350s. Same subject: reincorporation or reorganization of mutual company on stock plan.—If a statute provides for reincorporation or reorganization of mutual fire companies on the stock plan and such a company succeeds, as to form, in an attempt to so reorganize and carries on the business ostensibly as such new creation using the old company's assets and good will, still, if such attempt is ineffectual because of the enabling act being void, such continued business will be regarded as really that of the old corporation; that is, as belonging to it.[15]

§ 350t. Same subject: reorganization or reincorporation: impairment of obligation of contract.—In a Federal Supreme Court case it appeared that a beneficial association was originally incorporated under the New York laws of 1875,[16] for the purpose of providing benefits for families and others dependent and to provide a fund for the common and exclusive benefit of all members. It reincorporated under the laws of 1883,[17] which provided for the incorporation and regulation of co-operative and assessment life and casualty insurance corporations, and its charter declared that the business was to be conducted as upon that plan: said law was subject to alteration and repeal. Thereafter said association accepted the provisions of the Insurance Law of 1892,[18] which repealed previous laws upon the subject, and was expressed to be applicable to all corporations authorized by law to make insurances. An amendatory law was passed in 1901,[19] providing for reorganizations of existing corporations and amendment of certificates.[20] Said association accepted the provisions of that law, amended its charter, changed its name to that of a regular company and also the character of its business to that of life and health insurance of every kind. One of the questions before the court was whether the incorporation of the company and the transfer to it of the assets, property and membership of the association impaired any con-

tion and reincorporation of same company. See § 350t herein.

[15] Huber v. Martin, 127 Wis. 412, 3 L.R.A.(N.S.) 653n, 115 Am. St. Rep. 1023, 7 Am. & Eng. Ann. Cas. 400, 105 N. W. 1031, 35 Ins. L. J. 334.

As to reincorporation as a stock corporation under existing corporate name, by life or casualty insurance corporations upon co-operative or assessment plan, see N. Y. Ins. Law 1909, c. 33, Consol. L. c. 28, sec. 217; Parker's N. Y. Ins. L. (ed. 1915) p. 339.

Existing fraternal benefit societies, not required to reincorporate, see N. Y. Ins. Laws 1909, c. 33, Consol. L. c. 28, sec. 235; L. 1911, c. 198; Parker's N. Y. Ins. L. (ed. 1915) p. 351.

[16] C. 267.

[17] C. 175.

[18] N. Y. Ins. Laws, 1892; Laws 1892, p. 1930.

[19] C. 722, am'd sec. 52, L. 1892.

[20] See also N. Y. Ins. Laws 1909, c. 33, Consol. L. c. 28, sec. 52; Parker's N. Y. Ins. L. (ed. 1915) p. 68.

tract obligation between the association and its policyholders, possibly implying by such question that a new corporation was created by said reincorporation. It was decided that the corporation was not changed to a stock, but continued as a mutual company, that the old corporation was still in existence, under a new name, and with added powers, but with unchanged membership, and was bound to perform all its existing obligations, and that none of the contract obligations of the associations to its members were impaired by the reorganization. It was also decided that the law which authorized the reincorporation did not impair the obligation of contracts between the association and its policy holders or deprive them of their property without due process of law and was not unconstitutional in these respects.[1]

§ 351. Same subject: guaranty or reserve fund.—It is held in Wisconsin that in the absence of a charter provision therefor, or of a general power to raise a fund for losses and expenses, the act of a mutual company in contracting with its members for establishing a guaranty fund for its existing and future indebtedness is ultra vires and void.[2] In a New Jersey case a mutual insurance company without authority by charter, established a guaranty fund of bonds secured by mortgages. It was held that as the company had no power to make the contract with the guarantors, it was absolutely void, and that the fund could not be reached in law or equity by a creditor of the company after its insolvency.[3] But it is held in other states that an insurance company has inherent power in the absence of positive restrictions to establish a guaranty fund,[4] and to receive a promissory note from one of its trustees as a part of such fund. Such note is a valid security in the hands of a receiver, for the benefit of the company's creditors. The act of the company in undertaking business in another state, under an act of the legislature thereof requiring other and special security, does not exoner-

[1] Polk v. Mutual Reserve Fund Life Assoc. 207 U. S. 310, 55 L. ed. 222, 28 Sup. Ct. 65 (*following* Wright v. Minnesota Mutual Life Ins. Co. 193 U. S. 657, 24 Sup. Ct. 549, 48 L. ed. 832, *considered* under § 350m herein). The power to alter, amend or repeal charters was reserved in the N. Y. Constitution, although it was held that the legislative power to alter, amend and repeal charters was equally effective whether so reserved or not.

[2] Kennan v. Rindle, 81 Wis. 212, 51 N. W. 426.

[3] Trenton Mutual Life & Fire Ins. Co. v. McKelway, 12 N. J. Eq. (1 Beas.) 133.

When investment of part of beneficiary association's emergency fund may be legally attached by creditor, see Attorney General v. Massachusetts Ben. Life Assoc. 173 Mass. 110, 53 N. E. 879; Mass. Pub. acts 141, sec. 3.

[4] Hope Mutual Life Ins. Co. v. Perkins, 2 Abb. Dec. 383, 38 N. Y. 404; Hope Mutual Life Ins. Co. v. Weed, 28 Conn. 51.

ate the signer of such a guaranty from liability thereon, at least in respect to policies not issued in such state. The inducement held out to the public to insure by reason of the security afforded by the guaranty is a sufficient consideration, or furnishes the ground for an estoppel.[5]

§ 351a. Same subject: guaranty or reserve, "mortuary reserve," "death benefit," "reserve and emergency," funds: trust funds.—If a mutual fire insurance company is expressly so authorized by its charter it may create a guaranty fund by the issuance of certificates for money loaned, and where it reserves the rights to pay off said loans it may when so authorized by a resolution of the board of directors give notes to certificate holders, and the execution thereof by the company is not ultra vires, when it does not violate the statute regulating such companies.[6] A fraternal benefit society, the amended charter of which authorizes the creation and maintenance of reserve or surplus funds in support of its certificates has power to provide for a "Mortuary Reserve Fund" and also a further reserve or surplus fund as a "Death Benefit Fund," the former to meet extraordinary demands and the latter, ordinary demands.[7] A statute construed with those to which it is related may authorize the creation of a reserve or guaranty fund from initial cash payments, from surplus money accruing from lawful assessments to maintain a reserve and pay expenses and losses, and interest on the invested reserve and such other lawful sources as may, with those above specified, aid in accumulating funds which it may not be necessary to resort to to recruit the reserve or pay losses and expenses.[8] A mutual life insurance company on the assessment plan, under the Indiana statute, is not limited in fixing premiums, to merely a sufficient sum to create a death benefit fund but it may create an unlimited reserve, and contract for extended insurance.[9]

In construing the term "reserve and emergency fund," in the Missouri statute, the words "reserve" and "emergency" are there both used as adjectives qualifying the same noun, and, as such, are convertible terms, and by the use of the term "reserve" fund, what

[5] Hope Mutual Life Ins. Co. v. Perkins, 2 Abb. App. Dec. 383, 38 N. Y. 404; Russell v. Bristol, 49 Conn. 251.

[6] Ainley v. American Mutual Fire Ins. Co. 113 Iowa 709, 84 N. W. 504; Code 1873, tit. 9, c. 4.

[7] Kane v. Knights of Columbus, 84 Conn. 96, 79 Atl. 63.

[8] Smith v. Republic County Mutual Fire Ins. Co. 82 Kan. 697, 109 Pac. 390, 39 Ins. L. J. 1323; Gen. Stat. 1909, art. 5, c. 55; Gen. Stat. 1909, secs. 4216, 4227, limiting liability to assessments on premium notes (1) to maintaining a reserve fund equal to a certain per cent of notes in force; (2) to pay losses which may accrue and defray expenses.

[9] Federal Life Ins. Co. v. Arnold, 46 Ind. App. 114, 90 N. E. 493, 91 N. E. 357; Laws 1897, c. 195, secs. 4, 6.

is called the reserve in its strict technical sense of life insurance was not intended by the legislature. The above interpretation applies to fraternal beneficiary associations, and the purpose of the statute was to enable them to provide in advance and hold in reserve a fund for an emergency such as some unusual occurrence which might render them unable to meet death losses.[10]

Surplus or reserved funds established by a fraternal benefit society in conformity with its charter and by-laws are trust funds of which the society is trustee.[11] An emergency fund of a fraternal beneficiary association is a trust fund and when the beneficiary has established any right to the death benefit certificate the corporation comes under a fiduciary relation to the beneficiary as one of the persons entitled to share in the emergency fund. But that does not affect the relation between the corporation and the beneficiary named in the certificate, so far as the question is concerned whether anything is due under the certificate as a contract so far as that question is concerned, the only relation between the two is that growing out of contract with the member for the payment of money which, if due, is due to the beneficiary.[12] A mortuary reserve fund of a fraternal benefit society, created for extraordinary purposes, must be preserved to answer such purposes until it definitely appears that those have failed or that the fund will never be required therefor when it may be distributed.[13] So, where a mutual insurance asociation transfers its membership to another association under a contract entitling the transferred members to full rights as members of such transferee and the transferring company's certificates required a levy of a per capita assessment at a member's death and the application thereto of the proceeds, not exceeding a certain specified sum, a beneficiary cannot compel said transferee to apply property transferred to it in trust to fulfill the terms of the transfer contract where it does not appear that such application was neces-

[10] State (ex rel. Supreme Lodge Knights of Pythias) v. Vandiver, 213 Mo. 187, 15 Am. & Eng. Ann. Cas. 283, 111 S. W. 911; Act 1897, sec. 1408; Rev. Stat. 1899.

Reserve or emergency fund: life corporations, associations or societies on co-operative or assessment plan, see N. Y. Ins. Laws 1909, c. 33, Consol. L. c. 28, sec. 205; Parker's N. Y. Ins. L. (ed. 1915) p. 313.

[11] Kane v. Knights of Columbus, 84 Conn. 96, 79 Atl. 63.

[12] Attorney General v. Supreme Council American Legion of Honor, 206 Mass. 158, 166, 92 N. E. 136. Emergency fund here was to meet an emergency which might arise if assessments did not realize enough to pay death benefits. See also Attorney General v. American Legion of Honor, 206 Mass. 131, 92 N. E. 134.

[13] Kane v. Knights of Columbus, 84 Conn. 96, 79 Atl. 63.

sary to pay the claim of the beneficiary.[14] But a transferee mutual insurance association which has drawn from its mortuary fund, acquired before consolidation, to pay death benefits of members of the transferring association, may reimburse said fund from assessments levied upon said members, as against their beneficiaries.[15]

If no authority is given a mutual fire insurance company to levy a direct guaranty fund assessment it cannot be done; and an assessment of premium notes, not necessary to maintain the reserve fund at the per cent specified under the statute and not necessary to pay losses or expenses, but levied merely for purposes to be developed in the future is illegal.[16] But an emergency fund cannot be created by an assessment insurance association, by deducting a certain per cent from the amount agreed to be paid under the certificate, even though the statute authorizes the creation of an emergency fund, and such deduction was authorized by a subsequently enacted by-law, and the promise, under the certificate, to pay was based upon a consideration of compliance with existing and future by-laws.[17] A mortuary reserve fund of a fraternal benefit order, created to meet extraordinary demands, cannot be transferred under a new plan, to, or merged in, the common fund as such act constitutes an unwarranted change in the object of the trust and an illegal diversion of the fund, although this does not apply to a surplus death-benefit fund, created for ordinary purposes.[18]

Although a contract of consolidation between a foreign fraternal beneficiary society and a domestic association is ultra vires and void the latter cannot defend an action for conversion of the former's funds on the ground that its acts in obtaining such funds were not within its corporate power.[19]

§ 352. Benevolent and fraternal organizations subject to laws of state and jurisdiction of courts: conditions precedent to resort to courts.—It may be stated generally that all benevolent and fraternal organizations or associations are subject to the laws of the state, and in all proper cases, where property rights are involved, the

[14] Catheart v. Equitable Mutual Life Assoc. 111 Iowa 471, 82 N. W. 964.

[15] Catheart v. Equitable Mutual Life Assoc. 111 Iowa 471, 82 N. W. 964.

[16] Smith v. Republic County Mutual Fire Ins. Co. 82 Kan. 697, 109 Pac. 390, 39 Ins. L. J. 1323; Gen. Stat. 1909, art. 5, c. 55; Gen. Stat. 1909, secs. 4216, 4227.

[17] Newhall v. Supreme Council American Legion of Honor, 181 Mass. 111, 63 N. E. 1, 31 Ins. L. J. 389.

[18] Kane v. Knights of Columbus, 84 Conn. 96, 79 Atl. 63.

As to wrongful transfer or diversion of safety funds of assessment company, and liability of directions, see Ridley v. Paillard, 26 Misc. 513, 57 N. Y. Supp. 693.

[19] Starr v. Bankers Union of the World, 81 Neb. 377, 129 Am. St. Rep. 684, 116 N. W. 61, 37 Ins. L. J. 746, *citing* National Bank v. Gra-

courts may entertain jurisdiction and afford relief.[20] And a statutory exemption does not operate to exempt an assessment company from all laws, decisions and rules thereunder but relates only to the business of said company.[1] So, the court can control the payment of funds, for beneficiaries, in accordance with the rules of law.[2]

The courts will, however, take into consideration the objects and purposes of the organization in granting relief. They will further consider the modes provided by the charter, constitution, and by-laws for determining the rights of members. Courts, however, ordinarily leave all questions involving policy or discipline to be settled in the manner pointed out by the regulations of the order. These organizations are formed by a purely voluntary association of individuals for the accomplishment of agreed-upon purposes. The selection of the purposes intended and the determination of the means of accomplishment of those purposes are peculiarly matters within the decision of the association alone. And it is an established rule that the courts are reluctant to interfere with a matter of internal management of a benefit association, unless the order itself refuses or neglects to perform its duty.[3] Thus, the grand

ham, 100 U. S. 699, 25 L. ed. 750; Mendel v. Boyd, 3 Neb. (unoff.) 473; Cook on Corp. (5th ed.) sec. 15b.

[20] Reno Lodge No. 99, I. O. O. F. v. Grand Lodge I. O. O. F. 54 Kan. 73, 80, 26 L.R.A. 98, 37 Pac. 1003, per Allen, J. *Citing* Bauer v. Samson Lodge No. 32, Knights of Pythias, 102 Ind. 262, 1 N. E. 571; Goodman v. Jedidjah Lodge, No. 7, 67 Md. 117, 9 Atl. 13, 13 Atl. 627; Genest v. L'Union St. Joseph, 141 Mass. 417, 6 N. E. 380; Dolan v. Court Good Samaritan, No. 5910, I. O. O. F. 128 Mass. 437; Torrey v. Baker, 1 Allen (83 Mass.) 120; Austin v. Searing, 16 N. Y. 112, 69 Am. Dec. 665 and note. See also Patron's Mutual Fire Ins. Co. v. Attorney General, 166 Mich. 438, 131 N. W. 1119.

As to jurisdiction, see §§ 3502, 3520 herein.

[1] Murray v. Superior Court of Los Angeles County, 129 Cal. 628, 62 Pac. 191. As to statutory exemptions, see §§ 340, 344i herein.

[2] Royal League v. Shields, 251 Ill. 250, 36 L.R.A.(N.S.) 208, 96 N. E. 45, 40 Ins. L. J. 2166.

[3] Kane v. Knights of Columbus, 84 Conn. 96, 79 Atl. 63, 40 Ins. L. J. 874, *citing* Wright v. Minnesota Mutual Life Ins. Co. 193 U. S. 657, 48 L. ed. 832, 24 Sup. Ct. 549.

See also the following cases:

Kentucky.—Wallace v. Grand Lodge of United Brothers of Friendship, 32 Ky. L. Rep. 1049, 107 S. W. 724 (case of expulsion of members).

Missouri.—Stone v. Grand Lodge Ancient Order United Workmen, 78 Mo. App. 546, 2 Mo. App. 296 (benefit societies may adopt and enforce reasonable rules, etc., and except for most urgent reasons courts will not interfere).

North Carolina.—See Kelly v. Trimont Lodge, 154 N. C. 97, 52 L.R.A.(N.S.) 823, 67 S. E. 764, 40 Ins. L. J. 768, *considered* under § 352c herein.

Texas.—Lone Star Lodge No. 1,935, Knights of Ladies of Honor v. Cole, — Tex. Civ. App. —, 131 S. W. 1180 (courts cannot decide, direct or control as to questions of internal policy or of discipline of members); Thompson v. Grand Inter-

lodge of the state of Kansas of a certain order had for one of its fundamental objects the care of orphans of deceased members. In order to make use of certain property conveyed to it in trust, it levied an assessment of so much per capita on all the subordinate lodges in Kansas, to pay off an indebtedness and make certain improvements for the benefit of a home for the maintenance and education of orphans of deceased members of the order. The right to do this was not in violation of any law of the state. An appeal existed from the grand lodge to the sovereign grand lodge, either with or without the consent of the grand lodge, and such sovereign grand lodge was conceded to have full legislative and judicial power in determining matters relating to the order. No appeal was taken to the latter lodge, and an injunction was sought to prevent the levy of the assessment, which was refused, it being held that the question of methods and amount to be raised was a matter of policy for the association to determine, and that courts will not undertake to direct or control the internal policy of such societies.[4]

So it is held in Connecticut that remedies within the order must first be exhausted where property rights are not involved, and that this rule is universally accepted.[5] The circumstances or the nature of

national Brotherhood of Locomotive Engineers, 41 Tex. Civ. App. 176, 91 S. W. 834 (courts will not ordinarily interfere, yet under facts case should have been submitted to jury; expulsion of member).

Washington.—Kelly v. Grand Circle Women of Woodcraft, 40 Wash. 691, 82 Pac. 1007 (expulsion of member; courts will not interfere where jurisdiction regularly and lawfully exercised except laws of association invalid or procedure irregular and injustice thereby results).

[4] Reno Lodge No. 99, I. O. O. F. v. Grand Lodge, I. O. O. F. 54 Kan. 73, 26 L.R.A. 98, 37 Pac. 1003, per Allen, J., *citing* Harrington v. Workingmen's Benevolent Assoc. 70 Ga. 340; Osceola Tribe No. 11, Independent Order of Red Men v. Schmidt, 57 Md. 98; Oliver v. Hopkins, 144 Mass. 175, 10 N. E. 776; Chamberlain v. Lincoln, 129 Mass. 70; Lafond v. Deemes, 81 N. Y. 507; Niblack's Mutual Benefit Societies, secs. 79, 130; Bacon's Benefit Societies, sec. 94.

[5] Mead v. Stirling, 62 Conn. 586, 23 L.R.A. 227, 27 Atl. 591, *citing* and *considering* Hawes v. Oakland, 104 U. S. 450, 26 L. ed. 827; Hall v. Supreme Lodge Knights of Honor, 24 Fed. 450; Schmidt v. Abraham Lincoln Lodge, 84 Ky. 490, 8 Ky. Law R. 655, 2 S. W. 156; Oliver v. Hopkins, 144 Mass. 175, 10 N. E. 776; Chamberlain v. Lincoln, 129 Mass. 70; McAlees v. Supreme Sitting Order of The Iron Hall (Pa. 1888) 13 Atl. 755, 12 Cent. Rep. 415, 10 Sad. 188. See Grand Grove of the United Ancient Order of Druids v. Duehein, 105 Cal. 219, 226, 38 Pac. 947, per Harrison, J., that acts under jurisdiction by rules of the order properly conferred are not subject to review.

The following decisions also support the text:

Delaware.—King v. Wynema Council No. 10, Daughters of Pocohontas Improved Order of Red Men, 25 Del. (2 Boyce's) 255, 78 Atl. 845.

Iowa.—Byram v. Sovereign Camp of Woodmen of the World, 108 Iowa, 430, 79 N. W. 144 (expulsion of member).

the case, however, may be such that a resort to the courts may be had without exhausting in the first instance the remedies provided for within the order.[6] Even though a beneficiary under a certificate in a fraternal association cannot sue in court until remedies prescribed by its constitution are exhausted, still, where an attempt to do this

Kentucky.—Brotherhood of Railroad Trainmen v. Swearingen, 161 Ky. 665, 171 S. W. 455 (and if remedies are exhausted may appeal to courts).

Michigan.—Allen v. Patrons' Mutual Fire Ins. Co. 165 Mich. 18, 130 N. W. 196, 40 Ins. L. J. 970; Conley v. Supreme Court Independent Order of Foresters, 158 Mich. 190, 122 N. W. 567, 39 Ins. L. J. 1112; Monger v. New Era Assoc. 156 Mich. 645, 24 L.R.A. 1027n, 121 N. W. 823; Fillmore v. Great Camp of Maccabees, 109 Mich. 13, 2 Det. L. News, 1012, 66 N. W. 675.

Minnesota.—Kulberg v. National Council of Knights & Ladies of Security, 124 Minn. 437, 145 N. W. 120 (expulsion of member); Marcus v. National Council of Knights & Ladies of Security, 123 Minn. 145, 143 N. W. 265 (expulsion of member).

Oregon.—Montour v. Grand Lodge Ancient Order of United Workmen, 38 Ore. 47, 62 Pac. 524 (expulsion of member).

Pennsylvania.—Wick v. Fraternities Accident Order, 21 Pa. Sup. Ct. Rep. 507; Mustin v. Grand Fraternity, 50 Leg. Intell. 350, 12 Dist. Rep. 468.

Texas.—Lone Star Lodge No. 1935, Knights & Ladies of Honor v. Cole, — Tex. Civ. App. —, 131 S. W. 1180.

Wisconsin.—Loeffler v. Modern Woodmen of America, 100 Wis. 79, 75 N. W. 1012.

On necessity of exhausting remedies within order against decision expelling or suspending a member from a mutual benefit association, see note in 52 L.R.A.(N.S.) 817.

[6] *Illinois.*—Supreme Lodge, Order of Mutual Protection v. Meister, 204 Ill. 527, 68 N. E. 454 (beneficiary).

Indiana.—Voluntary Relief Department v. Spencer, 17 Ind. App. 123, 46 N. E. 477.

Maryland.—Dague v. Grand Lodge Brotherhood of Railroad Trainmen, 111 Md. 95, 73 Atl. 735 (when society estopped).

Minnesota.—Malmsted v. Minneapolis Aerie, No. 34, Fraternal Order of Eagles, 111 Minn. 119, 126 N. W. 486 (expulsion of member).

New York.—Brown v. Independent Order of Foresters, 72 N. Y. Supp. 806, 66 App. Div. 259 (courts will protect the rights of such member where an unjust and unreasonable burden is put on the member of a fraternal society by its laws or constitution); Hollomany v. National Slavonic Society, 57 N. Y. Supp. 720, 39 App. Div. 573.

Pennsylvania.—Tucker v. George Shiffler Council Jr. O. U. A. M. 68 Leg. Intell. 18 (there was nothing in the constitution or by-laws requiring appeal and member was entitled to sue without appealing to society's tribunal).

Tennessee.—Benson v. Grand Lodge of B. of L. F. — Tenn. Ch. —, 54 S. W. 132 (constitution did not prohibit resort to courts).

Texas.—St. Louis Southwestern Ry. Co. v. Thompson, — Tex. Civ. App. —, 108 S. W. 453 (expulsion of member).

Wisconsin.—State (ex rel. Weingart) v. Board of Officers of Gegenseitige Unterstuetzungs Gesellschaft Germania, 144 Wis. 516, 129 N. W. 630, 40 Ins. L. J. 453 (when officers wrongfully removed not required to exhaust remedies within society as condition precedent to resort to courts).

has been made in good faith in accordance with the rules of the association and it arbitrarily refuses to act upon the claim an action may be brought in a court of competent jurisdiction to enforce the claim.[7] So, the certificate of membership issued to a member of a mutual benefit society is a contract of insurance, and his right to recover upon it does not depend upon the action of the officers of the society, for if he has performed his part of the contract and is totally disabled by disease or accident, he has a complete cause of action. A refusal by the officers of the society to allow the claim will not defeat a recovery.[8] And a beneficial association or society cannot, by force of a by-law make itself a judge in its own case by requiring that all claims or cases shall be tried by its board, in the first instance.[9] So, a beneficiary may resort to the courts without exhausting his remedy under the rules and by-laws where they attempt to make an officer or officers of the association the arbiter or tribunal to whom the claim shall be submitted for adjudication as a condition precedent.[10] Nor is it necessary to take an appeal within the society before resorting to the courts for redress, when such appeal would be unavailing and fruitless because it could not be heard in time to afford any relief.[11] And a beneficiary may seek a remedy in the courts where the right of appeal provided for by the association is denied.[12] Again, remedies need not be exhausted within the order, even though so stipulated, where the question involved is one of property rights.[13]

§ 352a. Same subject.—Resort to the internal tribunals of a fraternal benevolent association may be validly imposed as a condition precedent to resort to the courts against the association.[14] It

[7] Brotherhood of Railroad Trainmen v. Swearingen, 161 Ky. 665, 171 S. W. 455; Haag v. Good, 7 Pa. Sup. Ct. 425, 42 Wkly. Not. Cas. 530. See Caine v. Benevolent & Protective Order of Elks, 34 N. Y. Supp. 528, 88 Hun (N. Y.) 154.

[8] Supreme Council of The Order of Chosen Friends v. Forsinger, 125 Ind. 52, 21 Am. St. Rep. 196, 9 L.R.A. 501, 25 N. E. 129.

[9] Placa v. Polizzi Generosa Soc. 138 N. Y. Supp. 822.

[10] Great Hive, Ladies of Modern Maccabees v. Hodge, 130 Ill. App. 1.

[11] State (ex rel. Weingart) v. Board of Officers of Gegenseitige Unterstuetzungs Gesellschaft Germania, 144 Wis. 516, 129 N. W. 636, 40 Ins. L. J. 453.

[12] Rose v. Supreme Court, Order of Patricians, 126 Mich. 577, 85 N. W. 1073.

[13] Kelly v. Trimout Lodge, 154 N. Car. 97, 52 L.R.A.(N.S.) 823, 69 S. E. 764, 40 Ins. L. J. 268; see Lone Star Lodge No. 1935, Knights & Ladies of Honor v. Cole, — Tex. Civ. App. —, 131 S. W. 1180; see §§ 372, 2503, 3502, 3520 herein.

[14] Ocean Castle, Knights of the Golden Eagle v. Smith, 58 N. J. L. 545, 33 Atl. 498. See also Cotter v. Grand Lodge A. O. U. W. 23 Mont. 82, 57 Pac. 650.

On validity of requirement by mutual benefit society that remedies within the order must be exhausted before resort to the civil courts, see note in 8 L.R.A.(N.S.) 916.

is also competent for a mutual benefit society to provide for the presentation of claims to officers designated in its by-laws, and it may also prescribe a mode of procedure, provided that such mode is not such as to deprive parties of property rights.[15] So, a member must exhaust his remedies within a mutual benefit order before resorting to the courts, where he has voluntarily submitted himself to the laws of such order which so provide.[16] And a person voluntarily submits himself to the society's jurisdiction so long as it does not exceed its authority, where he accepts membership.[17] Nor will equity aid a member who refuses to avail himself of his remedies provided for in the order in case of grievance.[18]

§ 352b. Same subject: strict construction of such conditions precedent.—A restriction upon the rights of members of fraternal association to resort to the courts must be imposed in the clearest and most express terms, mere inference is insufficient.[19] And the rule of strict construction, even to a strained interpretation, will be applied to the constitution or by-laws when they require remedies and an appeal within the society, provided therein, to be exhausted before resorting to the courts.[20]

§ 352c. Same subject: Kelly v. Trimont Lodge.—The following extract from the opinion in the case of Kelly v. Trimont Lodge [1] is important in connection with the subject under consideration herein.[2] The court, per Manning, J., said: "It is contended by the defendant that the stipulation contained in the application for membership in the defendant lodge by the deceased, that he would seek the remedy for all his rights on account of such membership, in the tribunals of the order, precludes any resort to the established courts of the state for the enforcement of any right, however just or however plainly established by contract, unless the tribunals of the order deliberately refuse to act, or their action is fraudulently taken.

[15] Supreme Council of the Order of Chosen Friends v. Forsinger, 125 Ind. 52, 21 Am. St. Rep. 196, 9 L.R.A. 501, 25 N. E. 129.

[16] Cohen v. Superior Lodge No. 516, I. O. B. A. 35 R. I. 94, 85 Atl. 653.

[17] Holmes v. Royal Fraternal Union, 222 Mo. 556, 26 L.R.A. 1080n, 121 S. W. 100.

[18] Loefiler v. Modern Woodmen of America, 100 Wis. 79, 75 N. W. 1012. See also Finerty v. Supreme Council Catholic Knights of America, 115 Iowa, 398, 88 N. W. 834. See § 3520 herein.

[19] Supreme Lodge, Order of Select Friends v. Raymond, 57 Kan. 647, 49 L.R.A. 373n, 2 Chi. L. J. Wkly. 128, 47 Pac. 533.

[20] Brotherhood of Railroad Trainmen v. Powell, 79 Ill. App. 500.

[1] 154 N. C. 97, 52 L.R.A.(N.S.) 823, 69 S. E. 764, 40 Ins. L. J. 268. On conclusiveness of decisions of tribunals of associations or corporations, see notes in 49 L.R.A. 353; 2 L.R.A.(N.S.) 672; and 52 L.R.A. (N.S.) 806, 823.

[2] §§ 352–352b. See also §§ 372, 3205, 3520 herein.

The precise question was considered and determined by the Supreme Court of Illinois, in the case of Railway Passenger & Freight Conductors' Mutual Aid & Benefit Association v. Robinson[3] in which case the court said: 'That it is competent for members of societies of this character to so contract that their rights as members shall depend upon the determination of some tribunal of their own choice, may be conceded. But where the designated tribunal is the society itself, one of the parties to the controversy, or what is substantially the same thing, the board of directors, which is its official and organic representative, the courts will hesitate and even refuse to treat its decisions as final and conclusive, unless the language of the contract is such as to preclude any other construction. The judicial mind is so strongly against the propriety of allowing one of the parties, or its special representative, to be judge or arbitrator in its own case, that even a strained interpretation will be resorted to, if necessary to avoid the result.' In Pearson v. Anderburg,[4] the Supreme Court of Utah having announced the same conclusion as the Illinois court said: 'To hold otherwise would be an attempt to clothe such voluntary association with power to create judicial tribunals, which would be contrary to the law of the land.[5] We therefore hold that plaintiff was not required to exhaust the remedy provided by the tribunals of the association as a condition precedent to the bringing of this action. We have no doubt of the power of members of a voluntary association to restrict themselves, as to matters incidental to the operation of the association, to remedies before tribunals created by the association, the nature and kind of which we need not here consider. We are, however, of the opinion that this case does not fall within such rule. The right to the moneys due here was a property right, and was created by and growing out of a contract.' In 2 Bacon on Benefit Societies and Life Insurance,[6] the learned author, after quoting from many cases, says: 'It seems to us that the reasoning of the Supreme Court of Illinois is most logical and in accordance with the principles of justice. It is certainly abhorrent to a sense of justice that a corporation should be judge and jury when defendant, and should decide upon the validity of claims against itself, to the exclusion of the civil courts of any rights on the part of the claimant to have a review by the courts of such judgment.' Limiting the stipulation in the application to an agreement to submit to the decisions of the tribunals of the order upon all questions of a legislative or admin-

[3] 147 Ill. 138, 159, 35 N. E. 168, 176.

[4] 28 Utah, 495, 80 Pac. 307.

[5] *Citing* Daniher v. Grand Lodge, Ancient Order of United Workmen, 10 Utah, 110, 37 Pac. 245.

[6] Sec. 400a, p. 1016.

istrative nature, and to their judgment upon controversies of members with one another within the order, we think the stipulation can be sustained, and we would say that upon a question involving one of the above matters, the member had by such stipulation precluded himself from a resort to the court, in the absence of charges of fraud or misconduct. But where the question involved is the enforcement of a property right, such as is presented in this case, we hold that the courts can be invoked by a member to aid him in the enforcement or protection of such rights, without resorting, in the first instance, to the tribunal of the order. The Supreme Court of Maine, in Stephenson v. Insurance Company,[7] thus tersely stated the principle: 'The law, and not the contract, prescribes the remedy, and parties have no more right to enter into stipulation against a resort to the courts for their remedy in a given case, than they have to provide a remedy prohibited by law.'[8] Our court has uniformly held to the doctrine that when a cause of action has arisen, the courts cannot be ousted of their jurisdiction by agreements previously entered into, to submit the liabilities and rights of the parties to the determination of other tribunals named in the agreement; but it has been, also, generally held that the agreement to submit the particular question of the amount of loss or damage of the assured under an insurance policy, is not against public policy and is sustained. That is simply a method for the ascertainment of a single fact and not the determination of the legal liability of the insurer."[9]

§ 353. Absolute right to become member under charter of mutual company.—If the charter of a mutual insurance company makes it the absolute right of a certain class of persons in a certain locality to become members, the conditions being subscribing the articles and applying for insurance on the terms and requirements of the charter and by-laws, upon compliance with the conditions such right may be insisted on, and cannot be cut off by an officer of the corporation, for he has no option on the subject.[10]

§ 354. Contributions by subordinate lodge to supreme lodge: specific purpose: power of disposal of funds.—If the supreme lodge of a benevolent society receives, in response to a "distress call," funds by way of contributions from subordinate lodges, it has no power to withhold any part of such fund from the persons for whom intended, even though the approximation of the persons in-

[7] 54 Me. 55.

[8] *Citing* Braddy v. New York Bowery Fire Insurance Company, 115 N. C. 354, 20 S. E. 477.

[9] *Citing* Manufacturing Company v. Phœnix Assurance Company, 106 N. C. 28, 10 S. E. 1057.

[10] Gay v. Farmers' Mutual Ins. Co. 51 Mich. 245, 16 N. W. 392.

jured and intended to be benefited is of a greater number than actually injured.[11] In this case the court, per Bennett, C. J., said: "We agree that when contributions are made to the common fund of a society, or as a special fund, to be used in whole or in part by it, at its discretion, for the benefit of such members as it might select, or in such proportion as it might agree, a court of equity cannot control its judgment either as to the amount or as to the proportion of the donation among the members. But, as said, the contributors raised a fund and placed it in the hands of appellant, as trustee, for a specific purpose, and the trustee was not given the power to pay the money or withhold it, or a part of it, at its discretion, but the only discretion given it was the power to distribute it according to the necessities of the donees. It was the trustee of an express trust for that purpose alone, and had no power to withhold any part of the fund from distribution, because it was not delegated to it. The whole was contributed for their benefit, and they, as far as the appellant is concerned, are entitled to it."

§ 354a. Right of subordinate circles or lodges to funds: rights of member who has withdrawn.—Under a Connecticut decision, where a fraternal beneficial association with subordinate circles, incorporated by special charter,[12] has power thereunder to establish local circles and govern and manage them by laws of its making, and requires said circles, under the constitution prescribed for them, to maintain a general fund for sick benefits and general expenses and a mortuary fund for death and funeral benefits, such funds so accumulated by said subordinate body, belong to it; but a member who has withdrawn therefrom loses his interest and rights over said funds.[13] The above decision, however, seems to be in conflict with one rendered in Colorado.[14]

§ 354b. Funds of subordinate circle or lodge: trust funds: cannot be diverted.—As soon as paid in by members of a subordinate circle of a fraternal beneficiary association, the general fund for sick benefits and general expenses and the mortuary fund for death

[11] Supreme Lodge Knights & Ladies of Honor v. Owens, 94 Ky. 327, 20 L.R.A. 347, 22 S. W. 327.

[12] Conn. Special Laws, 1907, p. 402.

[13] National Circle, Daughters of Isabella v. Hines, 288 Conn. 676, 92 Atl. 401, 45 Ins. L. J. 132. *Citing* as to rights of member who has withdrawn, Grand Lodge, A. O. U. W. of Conn. v. Grand Lodge, A. O. U. W. of Mass. 81 Conn. 189, 70 Atl. 617; Fawcett v. Supreme Sitting of Order of Iron Hall, 64 Conn. 170, 24 L.R.A. 815, 29 Atl. 614; Freundschaft Lodge, No. 72, D. O. H. v. Achlemberger, 235 Ill. 438, 85 N. E. 653. *Examine* Grand Lodge A. O. U. W. of Conn. v. Grand Lodge A. O. U. W. of Mass. 81 Conn. 189, 70 Atl. 617.

[14] Die Gross-Loge Des Ordens der Hermanns-Sochne v. Wolfer, 42 Colo. 393, 94 Pac. 329, *considered* under § 356b herein.

and funeral benefits become impressed with a trust the terms of which are found in the charter of the association and in the constitutions and laws of the subordinate body.[15] As the general fund and mortuary fund of a subordinate circle of a fraternal beneficiary association are trust funds they cannot be diverted from the purposes of the trust as specified by the charter and laws of the association and equity will enforce the trust and prevent such diversion.[16] Nor does any power exist in such subordinate circle nor in its members, whether a majority or a minority, to divert said funds from the purposes of the trust to another organization. Said funds also remain impressed with the trust which immediately attaches upon creation of the fund.[17] Under a Colorado decision, the funds or assets of a subordinate lodge, even though incorporated, are held by it and its members in trust for the benefit of the grand lodge and may be followed by it into the hands of officers who with the members have diverted and appropriated it.[18]

If the funds of a fraternal benefit order are being diverted, contrary to law, from the purposes contemplated, such illegal act will be restrained.[19]

§ 354c. Duty of association to protect subordinate circle's funds against diversion.—It is the duty of a fraternal beneficiary association, where its charter under a special statute provides for the establishment of subordinate circles and the creation of a general fund and a mortuary fund, to protect the members of said circle in their right to such funds against their diversion to uses and pur-

[15] National Circle, Daughters of Isabella v. Hines, 88 Conn. 676, 92 Atl. 401, 45 Ins. L. J. 132 *citing* Grand Lodge, A. O. U. W. of Conn. v. Grand Lodge A. O. U. W. of Mass. 81 Conn. 189, 203, 70 Atl. 617; note 47 L.R.A.(N.S.) 927, 931, on right to property of local branch by benefit society in event of secession or attempted secession.

[16] National Circle, Daughters of Isabella v. Hines, 88 Conn. 676, 92 Atl. 401, 45 Ins. L. J. 132, *citing* Grand Lodge A. O. U. W. of Conn. v. Grand Lodge A. O. U. W. of Mass. 81 Conn. 189, 203, 70 Atl. 617; Penfield v. Skinner, 11 Vt. 296, 298; High on Injunctions (4th ed.) sec. 1192, p. 1193.

As to application or appropriation of funds by society or lodge, see § 1289 herein.

[17] National Circle, Daughters of Isabella v. Hines, 88 Conn. 676, 92 Atl. 401, 45 Ins. L. J. 132, *citing* Koerner Lodge, No. 6, Knights of Pythias v. Grand Lodge, Knights of Pythias, 146 Ind. 639, 655, 45 N. E. 1103; McFadden v. Murphy, 149 Mass. 341, 342, 21 N. E. 868.

As to want of power of directors of a benefit association to transfer from reserve to mortuary fund, see Farmers Loan & Trust Co. v. Aberle, 46 N. Y. Supp. 10, 19 App. Div. 79, modifying 41 N. Y. Supp. 638, 18 Misc. 257.

[18] Die Gross-Loge Des Ordens der Hermanns-Soehne v. Wolfer, 42 Colo. 393, 94 Pac. 329. *Compare* § 354a herein.

[19] State v. Bankers Union of the World, 71 Neb. 622, 99 N. W. 531.

poses other than those of its charter and law, by an appeal to equity. And even if the charter had not conferred such power it would exist by reason of the fact that the circle owed its origin to the association and existed under its laws and government and secured and maintained said funds for purposes prescribed by said association.[20]

§ 355. Effect of decision by official body created by constitution of order.—Where the endowment rank of an order is separate from the lodge, and is for insurance purposes only, and the constitution creates a board of control having entire control over the endowment rank, subject to certain restrictions by the supreme lodge, with authority to hear and determine all appeals, a record made by said board in pursuance of this authority and consequent upon certain other acts which it was authorized to do, operates as an authoritative construction of its regulations; the courts will follow its ruling, and it is not a decision res inter alios acta.[1] A member of an unincorporated Masonic lodge cannot, while he has the right of redress within the order, obtain the aid of the state courts.[2]

§ 356. Delegation of power by supreme lodge: mutual benefit society.—Although the supreme lodge of a mutual benefit society may have the fullest power under its charter to pass all such reasonable laws as it may deem proper for the establishment and government of an endowment rank, and to enact general laws, yet where its charter vests that power alone in the supreme lodge, it cannot abdicate its authority and delegate the power to a board of control or other agency.[3]

§ 357. Subordinate association cannot be deprived of charter without hearing.—If a corporation passes a by-law which authorizes a subordinate association to be deprived of its charter without a hearing, such by-law is unreasonable and void. The opinion of the court in this case is important and we quote therefrom as follows: "The plaintiff is the supreme tribunal of Druidism in California, and the defendant, Garibaldi Grove, No. 71, is a subordinate grove of Druids, of which the appellant, Duchein, is the treasurer. The relation between the plaintiff and the subordinate grove is established by the constitution and by-laws of the order, by virtue of which the grand grove is given 'sole right and full power to grant

[20] National Circle, Daughters of Isabella v. Hines, 88 Conn. 676, 92 Atl. 401, 45 Ins. L. J. 132, *citing* General Hospital Soc. v. New Haven Rendering Co. 79 Conn. 581, 585, 118 Am. St. Rep. 173, 9 Am. & Eng. Ann. Cas. 168, 65 Atl. 1065.

[1] Supreme Lodge Knights of Pythias v. Kalinski, 6 U. S. C. C. 373, 57 Fed. 348, 13 U. S. App. 574, 23 Ins. L. J. 44.

[2] Lawson v. Hewell, 118 Cal. 613, 49 L.R.A. 400n, 50 Pac. 763.

[3] Supreme Lodge Knights of Pythias v. La Malta, 95 Tenn. 157, 158, 30 L.R.A. 838, 31 S. W. 493.

charters to subordinate groves, to receive appeals and redress grievances, and, in its discretion, for good cause shown, to suspend groves, arrest charters', etc. By section 15 it is provided that when any subordinate grove shall violate the terms of its charter, or refuse or neglect to obey the direction and laws of the grand grove, or the general laws of the order, charges thereof may be preferred in writing to the grand grove, and a copy thereof shall be furnished to the grove complained of, and notice when and where to appear for trial. The grand grove holds an annual session on the third Tuesday of June in each year, and it is provided in section 9 of article 20 that 'during the recess of the grand grove the noble grand arch may, whenever he shall deem it necessary, suspend a delinquent or offending grove, such suspension to hold good until annulled by the grand grove.' On the 5th of September, 1892, the noble grand arch of the plaintiff suspended Garibaldi Grove, No. 71, for the reason that he considered it was an 'offending grove,' and issued a proclamation of this fact to the other subordinate groves within the state. Article 19 of the rules of the order provides that the trustees shall be the custodians of the property of the grand grove, and that 'it shall be their duty to execute all orders of the noble grand arch, to receive, by legal process or otherwise, all moneys, papers, and other property of dissolved or suspended groves in this jurisdiction,' etc. In December, 1892, the noble grand arch reported this suspension to the trustees of the plaintiff, and directed them to commence the present action for the possession of the books and records of the suspended grove, and for the moneys belonging to it. The court found that the appellant, Duchein, as treasurer of Garibaldi Grove, had in his possession nine hundred and fifty-four dollars and fifteen cents, moneys belonging to said grove, which he refused to deliver upon the demand of the trustees therefor, and rendered judgment directing him to pay the said money to the plaintiff herein or to its trustees. From this judgment and an order denying a new trial Duchein has appealed." As to the law the court says: "It is a principle of natural justice that no one shall be condemned without an opportunity to be heard in his defense. Whoever would claim the right to deprive another of property or privilege, without giving him an opportunity to defend the same, must show some consent on his part to such action . . . . ; there is no distinction in principle between expelling a member from a subordinate grove and revoking the charter of the grove itself or suspending its charter. . . . . We are of the opinion, however, that the rules of the plaintiff do not authorize an arbitrary suspension of the grove by him (the noble grand arch), but that whenever he proposes to take such action the grove which is charged

with an offense for which he is authorized to suspend it has the right to be informed of such charge, and to be heard in its defense before he can act. . . . . The limitation upon the power of the grand grove to itself suspend a subordinate grove 'for good cause shown' implies that formal charges must be presented and sustained, and the provision in section 15, that when charges are made against a subordinate grove a copy of the charges shall be furnished to it, and an opportunity given to be heard, show that the general principles under which a suspension may be had require such notice and hearing. The power of suspension which is conferred upon the noble grand arch is to be exercised by him only during the recess of the grand grove, and, in the absence of express terms, ought not to be construed as greater than that of the grand grove itself, or to be exercised in any other mode than that provided for the grand grove. The authority given to this officer is not limited to a suspension until the next session of the grand grove, but holds good 'until annulled' by the grand grove. This provision indicates that it is to have the same effect as if the suspension had been made by the grand grove, since unless some action in the nature of an appeal is taken from the act of the noble grand arch, the grand grove is never required to exercise its will upon the subject. . . . . We hold, therefore, that the action of the noble grand arch in suspending Garibaldi Grove, No. 71, was not in accordance with the rules of the order." [4]

The charter of a subordinate lodge cannot be revoked without a hearing and if there is an unauthorized revocation of the charter of a subordinate lodge a recourse to the courts may be had without exhausting a remedy by appeal where the charter of the association does not provide for an appeal by such lodge.[5]

§ 358. Member or officer of benevolent association cannot be expelled without hearing.—It is well settled that a member of a benevolent association cannot be expelled without being given notice or a hearing, and that a by-law which authorizes such a course is unreasonable and void.[6] This rule is qualified, however, under a

[4] Grand Grove Ancient Order of Druids v. Duchein, 105 Cal. 219, 38 Pac. 947, per Harrison, J. See Supreme Sitting of the Order of Iron Hall v. Moore, 47 Ill. App. 251. As to power of subordinate lodge of benevolent society to appropriate funds for support of lodge under the same jurisdiction, see Lady Lincoln Lodge No. 702, Knights & Ladies of Honor v. Faist, 52 N. J. Eq. 510, 28 Atl. 555.

[5] Golden Star Lodge No. 1 v. Watterson, 158 Mich. 696, 133 Am. St. Rep. 404, 123 N. W. 610. See Swain v. Miller, 72 Mo. App. 446; St. Patricks Alliance of America v. Byrne, 59 N. J. Eq. 20, 44 Atl. 716.

[6] Grand Grove United Ancient Order of Druids v. Duchein, 105 Cal. 219, 225, 38 Pac. 947, per Harrison, J., *citing* Fritz v. Muck, 62 How. Pr. (N. Y.) 69; Wachtel v. Noah Wid-

New Jersey decision to the extent that unless the member would be deprived of a possible benefit from the hearing, a by-law is not invalid which authorizes a member's expulsion without an opportunity to defend.[7] And under a Wisconsin decision if a certificate of insurance issued by an order to one of its members provides that no liability shall accrue unless the member shall in every particular, while a member, comply with all the by-laws of the order, and he is afterward guilty of an offense against the by-laws, for which he might have been expelled, his right to insurance is forfeited, though no proceeding was taken for his expulsion.[8] An arbitrary exercise by the ruler, of the power of removal of officers is not justified when made without notice or an opportunity to appear and be heard.[9]

ows' & Orphan's Beneficial Soc. 84 N. Y. 28, 60 How. Prac. 424, 38 Am. Rep. 478; People v. Musical Mutual Protective Union, 118 N. Y. 101, 108, 23 N. E. 109; Bacon's Benefit Societies, sec. 101. See §§ 1456, 3502, 3520 herein.

See also the following cases:

Indiana.—Federal Life Ins. Co. v. Risinger, 46 Ind. App. 146, 91 N. E. 533 (member with privileges or property rights must have notice and privilege of a hearing).

Iowa.—Finerty v. Supreme Council Catholic Knights of America, 115 Iowa, 358, 84 N. W. 969, 88 N. W. 834 (notice necessary); Byram v. Sovereign Camp Woodmen of the World, 108 Iowa, 430, 79 N. W. 144 (charges in writing required to be preferred and served on accused, expulsion by vote on motion alone, void).

Kentucky.—Rogers v. Union Benevolent Soc. No. 2, 111 Ky. 598, 55 L.R.A. 605, 64 S. W. 444 (fair and impartial trial required).

Massachusetts.—Horgan v. Metropolitan Mutual Aid Assoc. 202 Mass. 524, 88 N. E. 890 (entitled to notice and hearing); Kidder v. Supreme Commandery United Order of the Golden Cross, 192 Mass. 326, 78 N. E. 469, 35 Ins. L. J. 778 (notice required but none given).

Minnesota.—Kulberg v. National Council Knights & Ladies of Honor, 124 Minn. 437, 145 N. W. 120 (expulsion without opportunity to be heard, invalid).

Missouri.—See Wanek v. Supreme Lodge of Bohemian Slavonic Benevolent Soc. 84 Mo. App. 185 (service of notice of expulsion required).

Washington.—Dubcich v. Grand Lodge A. O. U. W. 33 Wash. 651, 74 Pac. 832 (member entitled to be represented by competent authority to protect rights).

[7] Berkhout v. Supreme Council Royal Arcanum, 62 N. J. L. 103, 43 Atl. 1.

[8] Langnecker v. Trustees of Grand Lodge A. O. U. W. 111 Wis. 279, 87 Am. St. Rep. 860, 55 L.R.A. 185, 87 N. W. 293.

[9] Caine v. Benevolent & Protective Order of Elks, 34 N. Y. Supp. 528, 88 Hun (N. Y.) 154.

As to rights of officers wrongfully expelled without a hearing; need not exhaust remedies within order before resort to courts, see State (ex rel. Weingart) v. Board of Officers of Gegenseitige Unterstuetzungs Gesellschaft Germania, 144 Wis. 516, 129 N. W. 630, 40 Ins. L. J. 453.

CHAPTER XX.

MUTUAL COMPANIES—BENEFIT, ETC., SOCIETIES—BY-LAWS.

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§ 374. By-laws against public policy are void.
§ 375. By-laws must not contravene terms of charter, constitution, or articles of association.
§ 376. Enforcement of by-laws: penalty.

§ 364. Definition of by-laws.—By-laws are the rules and regulations for the government and conduct of the affairs of the society, association, or corporation enacted within the limits and by virtue of the power conferred by the charter or articles of association.[10]

[10] See Smoot v. Bankers Life Users' Assoc. 68 Ore. 402, 137 Pac. 719; Griffith v. Klamath Water Assoc. 138 Mo. App. 438, 465, 120 S. W. 226; 1 Morawetz, Private Corp. (2d ed.) secs. 491, et seq.; Id. (ed. 1882)

Where a subordinate branch or order of a beneficial society is incorporated and the certificate of incorporation does not recognize any obligation to or dependence upon or connection with the order at large, the constitution and laws of said order so far as adopted by said branch are only by-laws. It is in legal contemplation an independent entity and its by-laws must stand or fall upon that assumption.[11]

sec. 366; 1 Thompson on Corp. (2d ed.) sec. 976; 8 Id. (White's Supp.) sec. 975; 1 Words & Phrases, pp. 936–938; 8 Id. p. 594; 1 Id. (2d series) p. 548.

"By-laws of a corporation are the laws for the regulation of its affairs and the management of its property. They have much the same force and effect when applied to the members and officers in the conduct of the affairs of the corporation that a public statute has." J. P. Lamb & Co. v. Merchants National Mutual Fire Ins. Co. 18 N. Dak. 253, 259, 119 N. W. 1048, 1050, per Spalding, J.

"'A by-law is a rule or law adopted by a corporation or association for the regulation of its own action and concerns, and of the rights and duties of its members among themselves.' Am. & Eng. Ency. of Law vol. 5, p. 87. 'This term (by-law) has a peculiar and limited signification, being used to designate the orders and regulations which a corporation, as one of its legal incidents, has power to make, and which is usually exercised to regulate its own actions and concerns, and the rights and duties of its members among themselves.' Per Shaw C. J., in Commonwealth v. Turner, 55 Mass. 493. . . . Again, the by-laws, rules and regulations of a corporation are essentially legislative in their character." Hayes v. German Beneficial Union, 35 Pa. Super. Ct. 142, 148, 149, per Head, J.

"By-laws are only a means of regulating the corporate powers, not of surrendering or suspending them. . . . By-laws are properly restrictions on the manner of the use of the corporate powers." Colalucca v. Societa Co-operativa di Mutuo Soccororio Fratelli Bandiera, 30 R. I. 304, 307, 75 Atl. 265.

"The term 'by-law' has a well known but limited and peculiar meaning. It is used to designate those regulations which as one of its legal incidents a corporation is empowered to make affecting the management of its business, the control of its officers and agents, and the rights and duties of members of the corporation." Cheney v. Canfield, 158 Cal. 342, 348, 32 L.R.A.(N.S.) 16, 111 Pac. 92, 93, 94, per Lorigan, J.

"Angell & Ames, sec. 110, recites that by-laws are considered as private statutes for the government of the corporate body. 2 Blackstone, 475, describes them in the same way. Cook, 6th edition, speaks of them as 'a permanent rule of action.' Thompson, secs. 935, 936, 937, broadly distinguishes them from resolutions and regulations. Bouvier's definition runs throughout in the same line. In no way can they be held analogous to the hasty proceedings of the executive committees or of the directors which have been laid before us." Per Putnam, Cir. J., in Hayes v. Canada Atlantic & Plant Steamship Co. 181 Fed. 289, 296, 104 C. C. A. 271, 278.

[11] Grand Court Foresters of America v. Court Cavour No. 133, Foresters of America, 82 N. J. Eq. 89, 88 Atl. 191, aff'd 83 N. J. Eq. 343, 91 Atl. 1068. See Supreme Lodge Knights of Pythias v. Kutscher, 179 Ill. 349, 70 Am. St. Rep. 115, 53 N. E. 620, s. c. 72 Ill. App. 462; Dornes v. Supreme Lodge Knights of Pythias

§ 365. Power to enact by-laws inherent: how exercised.—The power to enact by-laws is inherent in every private corporation or association,[12] for it cannot be otherwise than reasonable that the power to prescribe rules and regulations as to the manner in which the corporate powers shall be exercised should reside in the corporation or association, subject to such limitations as exist in the charter or articles of association and the constitution and laws of the state.[13]

Such power is generally exercised by the majority in the absence of a provision in the charter or articles of association, or some general statute to which the charter is subject, providing otherwise.[14] If the president and directors are empowered to make by-laws, the power may be exercised by the president and a majority of the directors;[15] but where neither the statute nor charter gives the exclusive right to the directors to make by-laws, they may be duly passed by the members at a proper meeting.[16]

§ 365a. Same subject.—This power to adopt a constitution and by-laws and to provide reasonable rules and by-laws for relief within the association also exists in unincorporated secret fraternal beneficiary association or societies.[17] And such association may validly

of the World, 75 Miss. 466, 1 Miss. Dec. (No. 14) 106, 23 So. 191.

When resolutions of a benevolent society constitute by-laws under a by-law making such resolutions binding as by-laws, see Flaherty v. Portland Longshoremen's Benevolent Soc. 99 Me. 253, 59 Atl. 58. See quotation from Hays Case, 181 Fed. in note 10 herein under this section.

[12] Supreme Lodge Knights of Pythias v. Knight, 117 Ind. 489, 20 N. E. 479, 3 L.R.A. 409; 1 Blackstone's Commentaries, 496; "By-laws," 3 Salk. 76; Morawetz on Private Corp. (ed. 1882) sec. 366; 1 Id. (2d ed.) sec. 491; Angell & Ames on Corp. (9th ed.) sec. 345; 8 Thompson on Corp. (White's Supp.) secs. 965, 967, 985; Cook on Corp. (6th ed.) sec. 4a.

As to power to amend by-laws, etc.: How exercised, see §§ 378–378d herein.

As to delegation of power, see § 378c herein.

[13] See Commonwealth v. St. Patrick's Benevolent Soc. 2 Binn (Pa.) 441, 4 Am. Dec. 453.

[14] See Morawetz on Corporations, (ed. 1882) sec. 366; 1 Id. (2d ed.) sec. 491; Angell & Ames on Corporations, (9th ed.) sec. 327.

[15] Cahill v. Kalamazoo Mutual Ins. Co. 2 Doug. (Mich.) 124, 43 Am. Dec. 457.

"To pass and make effective such by-laws the consent of all parties, as in actual and ordinary contracts, is not necessary, as a bare majority of the stockholders of the corporation may do so. Civ. Code, sec. 301. While in a general sense the by-laws with the articles of incorporation constitute a contract under which the reciprocal rights and duties of the corporation and its stockholders are measured, the by-laws themselves do not constitute such a contract so as to make the provision with reference to directors' meetings an act to be performed under a contract within the contemplation of the code section." Cheney v. Canfield, 158 Cal. 342, 348, 32 L.R.A.(N.S.) 16, 111 Pac. 92, 93, 94, per Lorigan, J.

[16] Bogards v. Farmer's Mutual Ins. Co. 79 Mich. 440, 44 N. W. 856.

[17] Brotherhood Railroad Trainmen

impose rules, terms and conditions, and may provide for suspension and reinstatement, and a member will be bound thereby where such rules etc. are not contrary to law.[18] And a resolution of a mutual benefit society adopted by unanimous vote may be abrogated by a majority vote of the members where it constitutes no part of the contract of a member.[19]

§ 365b. When statutory power to adopt by-laws is exclusive.—The sole power to adopt by-laws for the management of a mutual insurance corporation may be vested by statute in the policy holders and the prescribed mode must be followed.[20]

§ 365c. Association may be estopped to assert by-law not properly adopted.—A mutual benefit association may be estopped to assert that certain of its by-laws have not been approved by the supreme council and properly adopted.[1]

§ 366. Charter provisions concerning by-laws.—Where the charter prescribes the mode of enactment of by-laws, that mode must be followed.[2] The charter may, however, restrict legislative power to the supreme lodge and thereby limit the power of a mere minis-

v. Swearinger, 161 Ky. 665, 171 S. W. 455. *Examine* also §§ 352–352e herein.

[18] Gifford v. Workmen's Ben. Assoc. 105 Me. 17, 72 Atl. 680.

[19] McKean v. Biddle, 181 Pa. 361, 37 Atl. 528.

[20] Empire State Supreme Lodge of Degree of Honor, In re (Seymour v. Belden) 103 N. Y. Supp. 465, 118 App. Div. 616, 53 Misc. 344, aff'd (mem.) 103 N. Y. Supp. 1124; N. Y. Insurance Law, sec. 209, Laws 1892, p. 2013, c. 690; Parker's N. Y. Ins. L. (ed. 1905) pp. 321–323, under art. VI. relating to life or casualty insurance corporations upon the co-operative or assessment plan. See § 373 herein.

As to amendments under same statute, see Robinson v. Mutual Reserve Life Ins. Co. (U. S. C. C.) 159 Fed. 564 under § 378b herein.

[1] Dowdall v. Supreme Council of Catholic Mutual Benefit Assoc. 196 N. Y. 405, 31 L.R.A.(N.S.) 417n, 89 N. E. 1075, 39 Ins. L. J. 87, rev'g 122 N. Y. Supp. 1130, 123 App. Div. 913. In the principal case the court, per Bartlett, J. said: "The plaintiff received from the defendant a certificate insuring his life for $2,000, which contained a single covenant, as follows: 'This certificate is issued upon the express condition that the said Michael Dowdall shall, in every particular while a member of said association, comply with all the laws, rules and requirements thereof.' The defendant also delivered to the plaintiff a printed book or pamphlet containing the constitution and by-laws of the association. Section 6 of article 3 of the constitution provided, in substance, that all members should be assessed according to their age when admitted. The defendant asked the trial court to find that said section 6 of article 3 so appearing in the printed constitution had not been adopted, nor had it been approved by the Supreme Council, and its publication in said pamphlet was unauthorized. This request was very properly refused in view of the fact that some thousands of the pamphlet had been sent to members."

As to amended by-laws—Waiver and Estoppel, see §§ 380f et seq. herein.

[2] Dunston v. Imperial Gas Co. 3 Barn. & Adol. 125.

terial committee of an endowment lodge with administrative functions only.[3] And a charter provision binds a member under a contract issued after its amendment.[4] But a charter which authorizes by-laws which give an association an entirely indefinite power of expulsion over members cannot be sustained in that respect although it is common to found the right of expulsion upon the result of a trial in court.[5]

§ 367. Adoption of by-laws by custom or usage.—Where an association or corporation, or its officers and agents, have invariably and uniformly, for a sufficient length of time pursued a certain course of procedure in a matter which could properly have been regulated by a valid by-law, such custom and usage of the society is evidence of the adoption of a by-law, and while it might not strictly be construed into a by-law, yet it may have the force and effect of one in determining the rights of members or the obligations of the organization,[6] although a by-law will not be assumed to exist from a custom to pursue a particular course in regard to suspensions.[7] But the adoption of a code of by-laws in the regular manner excludes any presumption as to the existence or adoption of by-laws from custom or usage;[8] and in case the by-law provides for the specific manner of payment of assessments, payment in accordance with this requirement is sufficient even though there be a custom contrary thereto, inasmuch as the company cannot avail itself of a custom, as against a by-law, to declare a forfeiture.[9] Again, a usage of a mutual benefit association, constituting a part

[3] Supreme Lodge Knights of Pythias v. Stein, 75 Miss. 107, 37 L.R.A. 775, 65 Am. St. Rep. 589, 21 So. 559, 26 Ins. L. J. 557. See also Supreme Lodge Knights of Pythias v. Kutscher, 179 Ill. 340, 70 Am. St. Rep. 115, 53 N. E. 620, s. c. 72 Ill. App. 462.

[4] Harrison v. Philadelphia Contributionship for Insurance of Houses from Loss by Fire, 171 Fed. 178, aff'd 176 Fed. 323, 99 C. C. A. 613.

[5] Butchers' Beneficial Assoc. No. 1, In re 38 Pa. St. 298; Butchers' Beneficial Assoc. In re, 35 Pa. St. 151; Roehler v. Mechanics' Aid Soc. 22 Mich. 86, 89; Queen v. Saddlers' Co. 10 H. of L. Cas. 404.

[6] State v. Curtis, 5 Nev. 325; Angell & Ames on Corporations, 9th ed. secs. 328, 329; Morawetz on Private Corporations, sec. 369.

See also the following cases:

Georgia.—Georgia Masonic Mutual Life Ins. Co. v. Whitman, 52 Ga. 419.

Illinois.—District Grand Lodge v. Cohn, 20 Ill. App. 335, 344.

Maryland.—Union Bank of Md. v. Ridgely, 1 Har. & G. (Md.) 413.

New York.—American Ins. Co. v. Oakley, 9 Paige Ch. (N. Y.) 496, 38 Am. Dec. 561.

Pennsylvania.—Hamilton v. Lycoming Mutual Ins. Co. 5 Pa. St. 339, 344.

Vermont.—Henry v. Jackson, 37 Vt. 431, 432.

[7] District Grand Lodge v. Cohn, 20 Bradw. (Ill.) 335.

[8] District Grand Lodge v. Cohn, 20 Ill. App. 335.

[9] As to custom relating to payment of assessment, see § 1361 herein.

of the contract with each of its members, that Masonic questions shall be decided by Masonic tribunals, with respect to whether the members are Masons or not under the requirements of the by-laws of the association, is as conclusive on the association as though it provided in terms that the question of being or continuing to be a Mason in good standing should be decided by the Masonic officers.[10]

§ 368. Incorporated societies: unreasonable by-laws.—In incorporated societies by-laws will not be upheld which are oppressive, vexatious, unequal, or arbitrary, and contrary to the provisions of its charter, for by-laws in such societies must be reasonable, and the power to enact them be exercised with discretion, and not in a manner manifestly detrimental to corporate interest,[11] for by-laws which are unreasonable are void.[12] In determining the reasonableness of a by-law, the objects and purposes of the society must be considered, as this constitutes an important factor, for what might be reasonably necessary to effectuate the corporate purposes of one society and promote its welfare, might be unreasonable as outside the general purposes of another organization, and detrimental to its interest.[13]

§ 369. Unincorporated societies: unreasonable by-laws.—The rule that by-laws must be reasonable does not apply to unincorporated societies or voluntary associations. The question of their reasonableness will not be inquired into by the courts, nor will the

[10] Connelly v. Masonic Mutual Benefit Assoc. 58 Conn. 552, 9 L.R.A. 428, 20 Atl. 671.

[11] People ex rel. Stewart v. Young Men's Father Matthew Total Abstinence Benevolent Soc. 41 Mich. 67, 1 N. W. 931; Angell & Ames on Corporations, sec. 347; Cartan v. Father Matthew United Benevolent Soc. 3 Daly (N. Y.) 20. But see Coleman v. Supreme Lodge Knights of Honor, 18 Mo. App. 189, "By-laws must be reasonable, and all which are nugatory and vexatious, unequal, oppressive, or manifestly detrimental to the interests of the corporation, are void;" Angell & Ames on Corporations (9th ed.) sec. 347; Morawetz on Private Corporations, sec. 368.

That amendments of by-laws must be reasonable, see §§ 379k et seq. herein.

[12] *Kentucky.*—Schmidt v. Abraham Lincoln Lodge, 84 Ky. 490, 8 Ky. L. Rep. 655, 2 S. W. 156.

Michigan.—Samberg v. Knights of Modern Maccabees, 158 Mich. 568, 133 Am. St. Rep. 396, 16 Det. Leg. N. 677, 123 N. W. 25, 39 Ins. L. J. 34; People (ex rel. Stewart) v. Young Men's Father Matthew Total Abstinence Benevolent Soc. 41 Mich. 67, 1 N. W. 931; Allnutt v. High Court of Foresters, 62 Mich. 110, 28 N. W. 802.

Missouri.—Mulroy v. Supreme Lodge Knights of Honor, 28 Mo. App. 463.

New York.—Kent v. Quicksilver Mining Co. 78 N. Y. 159.

North Carolina.—Duffy v. Fidelity Mutual Life Ins. Co. 142 N. Car. 103, 7 L.R.A.(N.S.) 238, 55 S. E. 79.

That amended by-laws must be reasonable, see §§ 379k et seq. herein.

[13] Commonwealth v. St. Patrick's Benevolent Soc. 2 Binn. (Pa.) 441, 449, 4 Am. Dec. 453; Dickenson v Chamber of Commerce, 29 Wis. 49

court declare invalid a by-law of a voluntary association, agreed upon by its members, even though in the opinion of the court, it is unreasonable;[14] and a member is bound by all by-laws which are legal, so long as he remains in the society. The act is considered as voluntary on his part, and the terms of the contract his own to the extent, at least, that he may withdraw at any time and determine his relations with the society.[15]

§ 369a. When by-laws reasonable: continued.—By-laws have been held reasonable under the following decisions: A by-law which requires an initiation of the member in addition to a proposition fee and being elected, notwithstanding that the initiation ceremony is secret;[16] a constitutional provision of a local lodge precluding admittance to membership of a person engaged in retailing intoxicating liquors as a beverage;[17] a by-law which provides that a member who has not paid his dues may be suspended without notice other than said by-laws;[18] which provides for forfeiture where death is caused by intemperance;[19] for forfeiture when member engages in a prohibited occupation;[20] prohibiting as an occupation the sale at retail of intoxicating liquors as a beverage and providing for expulsion or suspension of members engaging therein after a certain date, and that the forfeiture would be self-executing and could not be waived by thereafter receiving assessments;[1] providing that misstatement as to age is an offense, and also fixing the penalty as expulsion and the procedure for trial and appeal:[2] when the intent is to prevent fraud, as where a period of six months is required to elapse after paying up dues in arrears before benefits can be claimed;[3] that benefits cannot be had for six months after reinstatement, where by-law limits new members benefits to same period;[4] which limits relief in a benefit society from the time of

[14] Kehlinbeck v. Logeman, 10 Daly (N. Y.) 447.

[15] Grosvenor v. United Society of Believers, 118 Mass. 78; Kehlinbeck v. Logeman, 10 Daly (N. Y.) 447.

[16] Matkin v. Supreme Lodge Knights of Honor, 82 Tex. 301, 27 Am. St. Rep. 886, 18 S. W. 306.

[17] Nickum v. Grand Lodge Ancient Order N. W. 37 Pa. Co. Ct. Rep. 104.

[18] Nelson v. Modern Brotherhood of America, 78 Neb. 429, 110 N. W. 1008.

[19] St. Mary's Benevolent Soc. v. Burford, 70 Pa. St. 321; Harrington v. Working Men's Benevolent Assoc. 70 Ga. 340.

[20] Quinn v. North American Union, — Ill. App. —, 42 Nat. Corp. Rep. 593.

As to clause prohibiting change of occupation—construction of, see § 2236 herein.

[1] Nickum v. Grand Lodge Ancient Order N. W. 37 Pa. Co. Ct. Rep. 104.

[2] Marcus v. National Council of Knights & Ladies of Security, 123 Minn. 145, 143 N. W. 265.

[3] Stanton v. Eccentric Assoc. of Firemen, Local Union No. 56, of I. B. of S. F. 114 N. Y. Supp. 480, 130 App. Div. 129.

[4] Hart v. Adams' Cylinder & Webb Press Printers' Assoc. No. 51, 75 N.

the application therefor;[5] which provides for the investigation by a committee of the condition of a member who applies for such benefits;[6] requiring the presentation of claims to subordinate officers, and, in case of a decision adverse to the claimant, that an appeal be taken to the governing body of the society, and such by-law is not invalidated by a further distinct invalid provision assuming to make the decision on such appeal final and conclusive:[7] providing that members of a railroad relief association shall release the railroad from damages before claiming relief from the society;[8] a time limitation of six months, by a fraternal society, for giving notice of death;[9] providing for arbitration, and that award shall be final and precluding resort to law or equity;[10] limiting the amount of benefits in case of suicide;[11] and a by-law or rule of a board of fire underwriters, a voluntary unincorporated association, prohibiting any member from taking an agency of a company with an existing agency represented in the city.[12]

§ 369b. Same subject: police power.—A by-law is reasonable which is within what has been denominated by the court as the police power of a beneficial association, as where expulsion is provided for doing certain acts, such as defamation, causing dissension, etc.[13]

Y. Supp. 110, 69 App. Div. 578, *cited* as to by-law being reasonable.

[5] Brennan v. Franklin Beneficial Assoc. 3 Watts & S. (Pa.) 218.

[6] Van Poucke v. Netherland St. Vincent de Paul Soc. 63 Mich. 378, 29 N. W. 863. See Lucas v. Thompson, 146 Pa. St. 315, 23 Atl. 321; Harrington v. Workingmen's Benevolent Assoc. 70 Ga. 340.

[7] Supreme Council Order of Chosen Friends v. Forsinger, 125 Ind. 52, 21 Am. St. Rep. 196, 9 L.R.A. 501, 25 N. E. 129, see §§ 372 et seq. herein.

[8] State v. Baltimore & Ohio Rd. Co. 36 Fed. 655. See also Fuller v. Baltimore & Ohio Employees' Relief Assoc. 67 Md. 433, 10 Atl. 237.

[9] Halas v. Narodni Slovenssky Spolok, — Ill. App. —, 43 Nat. Corp. Repr. 286.

As to by-laws as to notice of death, etc. see § 3298 herein.

[10] Russell v. North American Benefit Assoc. 116 Mich. 699, 5 Det. Leg. N. 113, 75 N. W. 127. See Patrons Mutual Fire Ins. Co. of Mich. Ltd. v. Attorney General, 166 Mich. 438, 131 N. W. 1119.

As to by-laws excluding resort to civil courts, see §§ 372 et seq. herein.

As to arbitration and award clauses and validity; generally, see §§ 3731 et seq. herein.

[11] Scow v. Royal League, 223 Ill. 32, 79 N. E. 42.

As to suicide clauses, see §§ 2635, et seq. herein.

[12] Louisville Board of Fire Underwriters v. Johnson, 133 Ky. 797, 24 L.R.A.(N.S.) 153 (annotated on legality of combination among underwriters), 119 S. W. 153.

[13] Del Ponte v. Societa Italiana Di M. S. Guglielmo Marconi, 27 R. I. 1, 70 L.R.A. 188, 114 Am. St. Rep. 17n, 60 Atl. 237. The court per Dubois, J. said: "The power of expulsion in a corporation is included in what may be denominated its police power, which is derived from the law of self-preservation."

As to expulsion of member: ter-

§ 369c. When by-laws unreasonable: continued.—A by-law is unreasonable which provides that the mailing of notices of assessments may be conclusively shown by the certificate of an officer of the corporation who is not required to be personally cognizant of the fact;[14] which precludes member from benefits of order when he is sick after he is in arrears even though he makes payment thereof and the association thereafter continues to accept his dues;[15] which limits the time of commencing action to six months after death of insured where the company's final determination as to payment of the claim is not made until within a few days of the expiration of said limited period.[16] So provisions of the constitution and by-laws are unreasonable where they deny the right to resort to civil courts until remedies within the order are exhausted and the next meeting of the tribunal to which an appeal can be made, is in a foreign country at a date three years after the claim in question accrues.[17]

§ 369d. When member bound by unreasonable by-laws.—It is held that an unreasonable by-law may be good as a contract.[18] So, by-laws existing when a person becomes a member may obligate him, notwithstanding they are unreasonable, where he voluntarily agrees to be bound by becoming a member.[19]

§ 370. By-laws must not be unequal: discrimination.—A by-law must apply equally and be capable of like operation as to all members. By-laws which discriminate against, or in favor of, certain members, to the exclusion of others, are invalid.[20] But members

mination of risk: jurisdiction, see §§ 1456, 3502, 3520 herein.

[14] Duffy v. Fidelity Mutual Life Ins. Co. 142 N. C. 103, 7 L.R.A. (N.S.) 238, 55 S. E. 79.

[15] Phœnix Council No. 85, Junior Order United American Mechanics v. Bennett, 26 Ohio Cir. Ct. Rep. 110; Bennett v. Phœnix Council No. 85, Junior Order United American Mechanics, 14 Ohio Dec. 593.

[16] Magner v. Mutual Life Assoc. 44 N. Y. Supp. 862, 17 App. Div. 13, aff'd in 162 N. Y. 657, 57 N. E. 1116.

[17] Lindahl v. Supreme Court, Independent Order of Foresters, 100 Minn. 87, 8 L.R.A.(N.S.) 916n, 117 Am. St. Rep. 666, 110 N. W. 87.

On the validity of requirement that remedies within the order must be exhausted before resort to civil courts, see notes in 49 L.R.A. 382; 8 L.R.A. (N.S.) 916; and 52 L.R.A.(N.S.) 840.

[18] Purdy v. Bankers Life Assoc. 104 Mo. App. 91, 74 S. W. 486.

[19] Stanton v. Eccentric Association of Firemen, Local Union No. 56 of I. B. of S. F. 114 N. Y. Supp. 480, 130 App. Div. 129.

[20] People (ex rel. Stewart) v. Young Men's Father Matthew Total Abstinence Benevolent Soc. 41 Mich. 67, 1 N. W. 931; Taylor v. Griswold, 14 N. J. L. 223. See Clevenger v. Mutual Life Ins. Co. 2 Dak. 114, 3 N. W. 313.

Power of mutual, etc., companies or associations to classify members: discrimination, see § 350b herein.

As to amended by-laws, etc.: classification: discrimination, see § 380e herein.

may be classified by fraternal benefit societies where the statute so provides.[1]

§ 371. By-laws, rules, and regulations: when valid.—A by-law is not invalid which is fairly within the scope of the general purposes of the organization, and it has been held that in determining what are the purposes of an association the courts will liberally construe its articles, especially if the provisions are meritorious;[2] and a by-law of a fraternal order is not void, even though not adopted in conformity with prescribed rules of procedure where it is otherwise lawfully enacted.[3] So, a mutual insurance company, unless prevented by the terms of its charter, may enact a by-law that if an assessment on a premium note is not paid within thirty days after demand, the policy for which said note is given shall be void until the assessment is paid.[4]

By-laws are also valid which provide a self-executing rule for suspending a member in case of failure to promptly pay assessments and dues;[5] which give procedure for expulsion of members when such rules and regulations are not so grossly unfair as to be contrary to public policy;[6] by-laws of a fraternal order providing that misstatement as to age is an offense, also fixing the penalty as expulsion, and the procedure for trial and appeal;[7] which provide for notice of assessment by mail;[8] that remedies within the order be exhausted before resorting to the courts;[9] for arbitration, that award shall be final, and wholly precluding resort to law or

[1] Ellison v. District Grand Lodge No. 23, United Order of Odd Fellows, 11 Ala. App. 442, 66 So. 872; acts 1911, pp. 701, 702, 716, secs. 5, 6, 9, 23a.

[2] Gundlack v. Germania Mechanics' Assoc. 4 Hun (N. Y.) 339, 341, 49 How. Pr. (N. Y.) 190.

[3] Supreme Lodge Knights of Pythias v. Kutscher, 179 Ill. 340, 53 N. E. 620, rev'g 72 Ill. App. 462.

[4] Fogel v. Lycoming Ins. Co. 3 Grant Cas. (Pa.) 77.

[5] Gifford v. Workmen's Benefit Assoc. 105 Me. 17, 72 Atl. 680; Oldham v. Supreme Lodge Modern Brotherhood of America, 110 Mo. App. 564, 157 S. W. 92. *Compare* §§ 1261, 1264 herein.

On necessity for compliance with by-laws as to payment of assessment, see note in 38 L.R.A.(N.S.) 571.

[6] Kulberg v. National Council, Knights & Ladies of Security, 124 Minn. 437, 145 N. W. 120.

[7] Marcus v. National Council of Knights & Ladies of Security, 123 Minn. 145, 143 N. W. 265.

[8] Dudley v. Fidelity Mutual Life Ins. Co. 142 N. Car. 103, 7 L.R.A. (N.S.) 238, 55 S. E. 79, s. c. 143 N. Car. 697, 55 S. E. 1047.

As to service of notice by mail, see § 1336 herein.

[9] King v. Wynema Council No. 10, Daughters of Pocohontas, Improved Order of Red Men, 25 Del. (2 Boyce's) 255, 78 Atl. 845; Supreme Council of the Order of Chosen Friends v. Forsinger, 125 Ind. 52, 9 L.R.A. 501, 21 Am. St. Rep. 196, 25 N. E. 129; Cotter v. Grand Lodge Ancient Order U. N. 23 Mont. 82, 57 Pac. 650.

On validity of requirement that remedies within the order must be ex-

equity;[10] that a decision of a tribunal created by a mutual benefit association shall be final and shall bar a suit in law or equity to recover claims;[11] and prescribing a rule necessitating proof of actual death, irrespective of time of absence or disappearance of member.[12] Again, a by-law or rule of a board of fire underwriters, a voluntary association which prohibits a member from taking an agency with an existing agency represented in the city is neither arbitrary, oppressive nor illegal.[13]

§ 371a. By-law providing wedding gift valid: ultra vires.—A by-law which provides for a specified sum of money as a wedding gift, after the continuance of membership for one year, upon marriage between persons of a certain faith, if necessary, to pay the wedding gifts or presents according to the circumstances of the society, is valid and not ultra vires, and is within one of the objects of the society "to elevate the moral and social standing of its members," and is also valid upon the ground that its purpose was to encourage marriage on the part of its members in accordance with such forms and ceremonies as would tend to promote the religious faith of its members.[14]

§ 371b. When by-laws invalid.—As stated elsewhere herein unreasonable by-laws are void,[15] as are also by-laws or amendments thereto which impair contract obligations or vested rights.[16] So,

hausted before resort to the courts, see notes in 49 L.R.A. 382; 8 L.R.A. (N.S.) 916; and 52 L.R.A.(N.S.) 840.

Compare §§ 352–352c herein.

[10] Russell v. North American Benefit Assoc. 116 Mich. 699, 5 Det. Leg. N. 113, 75 N. W. 137. See also Patrons' Mutual Fire Ins. Co. of Mich. Ltd. v. Attorney General, 166 Mich. 438, 131 N. W. 1119.

As to arbitration and award clauses and validity: generally, see §§ 3731 et seq. herein.

[11] Hembeau v. Great Camp of Knights of Maccabees, 101 Mich. 161, 49 L.R.A. 592, 45 Am. St. Rep. 400, 59 N. W. 417.

On conclusiveness of decisions of tribunals of associations or corporations, see notes in 49 L.R.A. 353; 2 L.R.A.(N.S.) 672; and 52 L.R.A. (N.S.) 806, 823.

But *compare* as to by-laws excluding resort to civil courts, § 372 herein.

[12] Kelly v. Supreme Council of Catholic Mutual Benefit Assoc. 46 App. Div. 79, 61 N. Y. Supp. 394. Contra, Samberg v. Knights of Modern Maccabees, 158 Mich. 568, 133 Am. St. Rep. 396, 16 Det. Leg. N. 677, 123 N. W. 25, 39 Ins. L. J. 34.

On validity of by-law of mutual benefit society refusing to pay indemnity upon presumption of death from seven years' absence, see note in L.R.A.1915B, 793.

As to presumption of death: evidence, see § 3772 herein.

[13] Louisville Board of Fire Underwriters v. Johnson, 133 Ky. 797, 24 L.R.A.(N.S.) 153 (annotated on legality of combination among underwriters), 119 S. W. 153.

[14] Merin v. Minsker Young Men's Commercial Aid Assoc. 147 N. Y. Supp. 440.

[15] See § 368 herein.

[16] See §§ 380 et seq. herein.

amendments to by-laws even under a reserved power to adopt the same must be reasonable to be valid.[17]

By-laws which prohibit a mutual benefit organization from doing that which it has power to do, as in case of waiver of its by-laws, are void.[18] So, a by-law of a beneficial association is held invalid where it attempts to invest an officer thereof with powers which usurp judicial functions of government by authorizing him to construct a law as to limitation of the association's liability and making such construction binding upon a member.[19] And a by-law is invalid which provides that the receipt and retention of unpaid delinquent dues and assessments in case a suspended member is not in good health shall not have the effect of reinstating such member or entitle him or his beneficiaries to any rights under his certificate; especially so where such delinquent dues and assessments are received and retained by the association.[20] A by-law is also void which provides that the members of an insurance company shall bring a suit in a certain county where their claims are disallowed by the directors.[1] So, a provision of a by-law as to proximity of risks will be rejected where it is meaningless and unintelligible as to what risks it intends to prohibit,[2] and a by-law is void which limits the number of days within which an assessment must be paid to one-tenth the period required for notice thereof under the constitution.[3]

§ 371c. By-laws valid in part and void in part.—A by-law which consists of several distinct and independent parts may be valid as to one part, though void as to the others;[4] but it is otherwise where the by-law constitutes an entirety, each part of which depends upon the other parts, for it is void as to the whole if void in a material part.[5] A by-law providing for expulsion without any right on the part of the member to be heard in defense is void only to the ex-

[17] See § 379k herein.

[18] Cline v. Sovereign Camp Woodmen of the World, 111 Mo. App. 601, 86 S. W. 501.

[19] Fraternal Aid Assoc. v. Hitchcock, 121 Ill. App. 402.

[20] Godwin v. National Council Knights & Ladies of Security, 166 Mo. App. 289, 148 N. W. 980, 41 Ins. L. J. 1393 (question of waiver of forfeiture was also involved, although the point in the text as to invalidity was directly adjudicated); Schuster v. Knights & Ladies of Security, 60 Wash. 42, 110 Pac. 680.

[1] Nute v. Hamilton Mutual Ins. Co. 6 Gray (72 Mass.) 174. Whether by-law is void, see Matt v. Roman Catholic Mutual Protective Soc. 70 Iowa, 455, 30 N. W. 799.

[2] Boulware v. Farmers' & Laborers' Co-operative Ins. Co. 77 Mo. App. 639, 2 Mo. App. Repr. 128.

[3] Illinois Commercial Men's Assoc. v. Wahl, 68 Ill. App. 411.

As to validity of provisions as to assessments, see § 1249 herein.

[4] Amesbury v. Bowditch Mutual Fire Ins. Co. 6 Gray (72 Mass.) 596.

[5] State v. Curtis, 9 Nev. 325; Angell & Ames on Corporations, sec. 358.

tent that it deprives him of a right which might result to his benefit.[6]

§ 372. By-laws excluding resort to civil courts: constitutional provisions.—That by-laws may not by their provisions wholly exclude members from resorting to the civil courts for remedies under contracts of insurance is substantially and by analogy held in several cases.[7] although cases to the contrary are numerous.[8] A distinction, however, should be made between those by-laws, or constitutional provisions which have reference to disputes of members among themselves, and those which apply to contests with the order over payment of losses under the contract.[9] In Indiana, it is held

[6] Berkhout v. Supreme Council Royal Arcanum, 62 N. J. L. 103, 43 Atl. 1.

[7] *California.*—Grimbley v. Harrold, 125 Cal. 24, 73 Am. St. Rep. 19, 57 Pac. 558.

Indiana.—Supreme Council Catholic Benevolent Legion v. Grove, 176 Ind. 356, 36 L.R.A.(N.S.) 913, 96 N. E. 159; Supreme Council Order of Chosen Friends v. Garrigus, 104 Ind. 133, 54 Am. Rep. 298, 3 N. E. 818; Bauer v. Sampson Lodge, 102 Ind. 262, 1 N. E. 571; Elkhart Mutual Aid Benevolent & Relief Assoc. v. Houghton, 98 Ind. 149; Kestler v. Indianapolis & St. Louis R. R. Co. 88 Ind. 460; Voluntary Relief Department v. Spencer, 17 Ind. App. 123, 46 N. E. 477.

Maine.—Stephenson v. Piscataqua Fire & Marine Ins. Co. 54 Me. 70.

Massachusetts.—Wood v. Humphrey, 114 Mass. 185.

Michigan.—Russell v. North American Benefit Assoc. 116 Mich. 699, 5 Det. Leg. N. 113, 75 N. W. 137.

Missouri.—McMahon v. Supreme Tent Knights of Maccabees, 151 Mo. 522, 52 S. W. 384; Mulroy v. Knights of Honor, 28 Mo. App. 463.

Pennsylrania.—Sweeney v. Rev. Hugh McLaughlin Benevolent Soc. 14 Wkly. N. Cas. (Pa.) 466; Myers v. Fritchman, 6 Pa. Super. Ct. 580.

Rhode Island.—Pepin v. Societe St. Jean Baptiste, 23 R. I. 81, 49 Atl. 387.

West Virginia.—Kinney v. Baltimore & Ohio Employees' Relief Assoc. 35 W. Va. 385, 15 L.R.A. 142, 14 S. E. 8, 21 Ins. L. J. 176.

As to jurisdiction of tribunals of mutual benefit, etc., societies or associations, see §§ 3502, 3520 herein.

[8] *California.*—Robinson v. Templar Lodge No. 17, Independent Order of Odd Fellows, 117 Cal. 370, 49 Pac. 170.

Maryland.—Anacosta Tribe v. Murbach, 13 Md. 911, 71 Am. Dec. 625.

Michigan.—Hembeau v. Great Camp of Knights of Maccabees, 101 Mich. 161, 45 Am. St. Rep. 400, 49 L.R.A. 592, 59 N. W. 417; Canfield v. Great Camp of Knights of Maccabees, 87 Mich. 626, 24 Am. St. Rep. 186, 13 L.R.A. 625, 49 N. W. 875; 21 Ins. L. J. 3.

Minnesota.—Rigler v. National Council Knights & Ladies of Security, 128 Minn. 51, 150 N. W. 178 (expulsion: finality of judgment).

New York.—Wilcox v. Supreme Lodge Royal Arcanum, 210 N. Y. 370, 52 L.R.A.(N.S.) 806, 104 N. E. 624, aff'g 136 N. Y. Supp. 377, 151 App. Div. 297 (when judgment of expulsion not reviewable).

Ohio.—Cincinnati Lodge No. 3, Independent Order Odd Fellows v. Littlebury, 6 Cin. L. Bul. 237, 8 Ohio Dec. 194, 8 Wkly. L. Bul. 237.

England.—Scott v. Avery, 5 H. of L. Cas. 811.

[9] Bukofzer v. United States Grand Lodge, Independent Order Sons of

that a by-law of a mutual benefit society which provides that a member claiming benefits must make proof of loss before certain subordinate officers, and, if their decision is against him, appeal to higher officers, whose decision shall be final, is valid in so far as it requires such an appeal to be taken before suit may be brought on the membership certificate, and void in so far as it declares the decision of the appellate tribunal final so as to bar a resort to the courts.[10]

§ 372a. Same subject: when courts will not intervene: decisions. —A provision of the laws of a mutual benefit society formed by the voluntary association of its members, that the determination of the tribunals of the society upon an endowment certificate payable on the death of a member shall be conclusive, and that no suit at law or in equity shall be commenced by any member or beneficiary, is not invalid as against public policy, in ousting the courts of jurisdiction.[11] And where, in conformity with the associations by-laws making its finding final, a claim is voluntarily submitted to such association's tribunal the party submitting said claim is bound where the decision is made in good faith.[12] So, it is held that where the plaintiff in pursuance of a judgment of the state court has presented his demands to the courts of the defendant order, he is not permitted to take the judgment of these tribunals, and thereafter, the judgment being adverse and in fraudulent conduct being charged or relied on, pursue his remedy in the state courts.[13] Nor will the state court interfere in a direct attack by a local council to vacate the judgment whether final or not, of the state council on appeal regularly taken and decided as provided by the rules of the order.[14] Again, where a by-law of a beneficial association, consti-

Benjamin, 15 N. Y. Supp. 922, 40 N. Y. Lt. R. 653, aff'd (mem.) 139 N. Y. 612, 35 N. E. 204. See also Patrons' Mutual Fire Ins. Co. v. Attorney General, 166 Mich. 438, 131 N. W. 1119 (*considered* under § 372a herein); Kelly v. Trimont Lodge No. 249; Independent Order Odd Fellows, 154 N. Car. 97, 52 L.R.A.(N.S.) 823, 69 S. E. 764, 40 Ins. L. J. 268. See § 352c herein.

[10] Supreme Council of Order of Chosen Friends v. Forsinger, 125 Ind. 52, 9 L.R.A. 501, 25 N. E. 129.

On conclusiveness of decisions of tribunal of mutual benefit associations upon claims for benefits, and duty to exhaust remedies within association, see note in 52 L.R.A.(N.S.) 823.

[11] Canfield v. Great Camp of Knights of Maccabees, 87 Mich. 626, 13 L.R.A. 625n, 24 Am. St. Rep. 186, 49 N. W. 475. See also Hembeau v. Great Camp of Knights of Maccabees, 101 Mich. 161, 49 L.R.A. 592, 45 Am. St. Rep. 400, 59 N. W. 417.

[12] Derry v. Great Hive, Ladies of Modern Maccabees, 135 Mich. 494, 98 S. W. 23; Barker v. Great Hive, Ladies of Modern Maccabees, 135 Mich. 499, 98 N. W. 24.

[13] Monger v. New Era Assoc. 171 Mich. 614, 137 N. W. 631, 41 Ins. L. J. 1788. See Monger v. New Era Assoc. 156 Mich. 645, 24 L.R.A. (N.S.) 1027, 121 N. W. 823.

[14] Lincoln Council No. 1, Junior

tuting part of the contract between the council of the association and assured provides that should any person feel aggrieved at the action of the council for failing to pay benefits claimed to be due, such person may appeal, upon notice given, etc. and if such person still feels aggrieved he may appeal to the board of appeals and if he fails to do so the action of the council shall be final and conclusive. includes and binds both members and beneficiaries, and must be complied with before resorting to the courts for relief.[15] And a beneficiary is precluded from obtaining the aid of the courts where the deceased had been suspended and was not in good standing at the time of his decease, and an appeal had not been prosecuted by his representative or said beneficiary and the latter had failed to appeal from the rejection of her claim; and. therefore. the remedies provided for under the by-laws have not been exhausted the decision of the order was final.[16] So, by-laws of a mutual fire insurance company providing for a board of arbitration to report on the loss and claim of assured and providing that its jurisdiction shall be exclusive and its decision final are valid and do not conflict with a statute authorizing suits in sixty days from the date a claim shall become due. And as no claim can become due until such board awards it, the by-law does not oust the courts of jurisdiction, and the board's decision is final when there is no bad faith in its decision. So it is declared. per Bird. J., that: "The doctrine is well established in this state that members of a voluntary society may set up a tribunal to adjust the differences that arise between the association and its members, and make its decision final in the absence of bad faith or a refusal to act or to pay after an adjudication has taken place." [17]

§ 372b. Same subject: when courts will intervene: decisions.— A provision of a by-law for reference to the directors for final adjustment where the adjuster and assured disagree does not have the effect of making such director's decision final so as to preclude a resort to the courts,[18] and if the right of appeal within the order is denied, resort may be had to the civil courts.[19] So, "valid rea-

Order United American Mechanics v. State Council Junior Order United American Mechanics, 78 N. J. L. 111, 73 Atl. 245.

[15] King v. Wynema Council, No. 10, Daughters of Pocohontas, I. O. of R. M. 25 Del. (2 Boyce's) 255, 78 Atl. 845.

[16] Conley v. Supreme Court Independent Order Foresters, 158 Mich. 190, 122 N. W. 567, 38 Ins. L. J. 1112.

[17] Patrons' Mutual Fire Ins. Co. v. Attorney General, 166 Mich. 438, 131 N. W. 1119.

On conclusiveness of decisions of tribunals of associations or corporations, see notes in 49 L.R.A. 353; 2 L.R.A.(N.S.) 672; and 52 L.R.A. (N.S.) 806, 823.

[18] Downing v. Farmers' Mutual Fire Ins. Co. 158 Iowa, 1, 138 N. W. 917.

[19] Ruterbusch, v. Supreme Court

sons" for which, under his contract, a person may be reinstated in a benefit association after failure to pay an assessment, are not to be arbitrarily determined by its officers, but their determination is subject to review in the courts.[20]

In a Nebraska case involving a relief department in the nature of a mutual insurance association maintained in connection with a railroad company, its employees being the members, the court, per Irvine, C., said: "A section of the rules of the department provides that all questions or controversies of whatsoever character arising in any manner or between any parties or persons in connection with the relief department, or operation thereof, whether as to the construction of language or the meaning of the regulations of the relief department, or as to any right, decision, instruction, or acts in connection therewith, shall be submitted to the determination of the superintendent of the department, whose decision shall be final and conclusive, subject to the right of appeal to the advisory committee. Based upon this rule, the defendant requested an instruction that if the jury believed that the superintendent had passed upon this claim, and rejected the same, such decision was conclusive, unless an appeal had been taken to the advisory committee. This instruction was properly refused. We have no doubt of the power of members of voluntary associations to restrict themselves, at least as to matters incidental to the operation of the association, to remedies before tribunals created by the association. It is only to this extent that the rule seems to apply." And it was held that such rule did not preclude an action to enforce payment of a death benefit.[1]

§ 373. By-laws must not be contrary to laws of state or United States.—All by-laws must be consistent with the constitution and laws of the state and of the United States, as well as with particular statutes which relate to the corporation and which do not impair the charter obligation.[2] And where a statute empowers mutual benefit associations to make regulations for their own government not contrary to United States or state laws, the Federal and state constitutions are included within the term "laws."[3] So, the charter

Independent Order Foresters, 162 Mich. 213, 127 N. W. 288.

[20] Dennis v. Massachusetts Ben. Assoc. 120 N. Y. 496, 9 L.R.A. 189, 24 N. E. 843.

[1] Burlington Voluntary Relief Department of Chicago, Burlington & Quincy Railroad Co. v. White, 41 Neb. 547, 43 Am. St. Rep. 701, 59 N. W. 747, 751, 26 Ins. L. J. 224.

[2] In re Butchers' Beneficial Assoc. 35 Pa. St. 151; Lange v. Royal Highlanders, 75 Neb. 188, 121 Am. St. Rep. 786, 10 L.R.A.(N.S.) 666, 106 N. W. 224, 110 N. W. 1110; Angell & Ames on Corporations (9th ed.) secs. 332 et seq.

[3] Kern v. Arbeiter Unterstuetzungs Verein, 139 Mich. 233, 102 N. W. 746; Fed. Const. art. 1, sec. 10; 14th

and by-laws of a fraternal benefit society must be in harmony with the statute law of the state where it is located.[4] And in case of conflict the by-laws must yield to the statute.[5] A by-law which is against the laws of the state or government is void and totally inoperative, and an act relative to the contract cannot be permitted under a by-law when such act would contravene the laws of the state.[6] Nor can the powers of an association be extended by a by-law, and the powers derived from the statute may be limited but not increased by articles of association.[7]

A by-law is therefore void which requires that a member shall take part in a strike.[8] And a by-law is void which renders nugatory a statute as to presumption of death from seven years absence.[9] Nor can insured be deprived of his guaranteed and valuable statutory rights by a by-law inconsistent with the statute and which in effect operates to repeal it, as in case of provisions as to venue.[10] Again, it is held that a mutual insurance company created without any capital stock cannot create a capital stock by virtue of a by-law passed for that purpose, and thereby withdraw from the class of mutual corporations without capital stock to which it belongs;[11] and where a mutual insurance company in Massachusetts was authorized to do business as a stock company, a by-law which prohibited the continuance of the stock department and makes a division of the surplus accumulated thereunder is contrary to the general insurance laws of that state, and void.[12]

By-laws, however, as to adjustment and arbitration are held not to conflict with a statute as to prosecution of claims by a suit at law.[13] Nor do by-laws limiting the time during which sick bene-

amd't Mich. Const. art. 4, sec. 43; Howell's Stat. 164, sec. 4.

[4] Supreme Colony United Order of the Pilgrim Fathers v. Towne, 87 Conn. 644, 89 Atl. 264.

[5] Finnell v. Franklin, 55 Colo. 156, 134 Pac. 122.

[6] Price v. Supreme Lodge Knights of Honor, 68 Tex. 361, 4 S. W. 633. See also Briggs v. Earl, 139 Mass. 473, 1 N. E. 847; Angell & Ames on Corp. secs. 333 et seq.

[7] National Union v. Keefe, 263 Ill. 453, 105 N. E. 319, 44 Ins. L. J. 125. See Cerney v. Sesterka Podpornjici Jednota, 146 Ill. App. 590; Cerney v. Jednota Cesky Dam, 146 Ill. App. 518; Wagner v. St. Francis Xavier Benefit Soc. 70 Mo. App. 161.

[8] People v. New York Benevolent Society of Operative Masons, 3 Hun (N. Y.) 361. See Snow v. Wheeler, 113 Mass. 179.

[9] Bamberg v. Knights of the Modern Maccabees, 158 Mich. 568, 133 Am. St. Rep. 396, 16 Det. Leg. N. 677, 123 N. W. 25, 39 Ins. L. J. 34. But *compare* Kelly v. Supreme Council Catholic Mutual Benefit Assoc. 61 N. Y. Supp. 394, 46 App. Div. 79.

[10] Eaton v. International Travelers' Assoc. of Dallas (1911) — Tex. Civ. App. —, 136 S. W. 817.

[11] State (ex rel. Mutual Benefit Life Ins. Co.) v. Utter, 34 N. J. L. 489.

[12] Traders & Mechanics' Ins. Co. v. Brown, 142 Mass. 403, 5 N. E. 134.

[13] Patrons' Mutual Benefit Fire

fits shall be paid conflict with a statute requiring every policy or certificate to specify the exact sum of money which is promised to be paid upon the happening of the contingency insured against.[14] If the statute of incorporation of mutual benefit societies empowers them to establish rules for the regulation of the corporate affairs not contrary to the Federal or state laws and to decide the necessary qualifications of membership, such societies may prohibit, by a by-law, members from being connected with other societies not approved by a particular church.[15]

§ 374. By-laws against public policy are void.—That a by-law which is contrary to public policy is void, is well settled. So, rules and regulations as to expulsion of members must not be so grossly unfair as to be against public policy.[16] And a provision in a mutual benefit certificate making conclusive the decision of the association upon the question whether or not a member is entitled to the benefit provided is void as against public policy, under an Indiana decision.[17] But a constitutional provision of a benefit society, that decisions of its tribunals as to claims for benefits are conclusive, is held not contrary to public policy in California.[18] And a by-law is held not contrary to public policy where it precludes resort to the civil courts until remedies within the order are exhausted, and also prescribes a time limitation for suing after a claim is rejected.[19] So, a by-law is held not to be against public policy although it contravenes the rule as to presumption of death from absence, etc.[20] Again, a rule or by-law of a board of fire underwriters prohibiting a member from taking an agency of a company already represented in the city and which, while it denies certain privileges to and imposes certain restraints upon members is not arbitrary or oppressive or injurious to the public, is not against

Ins. Co. of Mich. Ltd. 166 Mich. 438, 131 N. W. 1119.

[14] Courtney v. Fidelity Mutual Aid Assoc. 120 Mo. App. 110, 94 S. W. 768; Rev. Stat. Mo. 1899, sec. 7903.

[15] Mazurkiewicz v. St. Adelbertus Soc. 127 Mich. 145, 54 L.R.A. 727, 86 N. W. 543.

[16] Kulberg v. National Council of Knights & Ladies of Security, 124 Minn. 437, 145 N. W. 120.

[17] Supreme Council Catholic Benevolent Legion v. Grove, 176 Ind. 356, 36 L.R.A.(N.S.) 913, 96 N. E. 159.

[18] Robinson v. Templar Lodge No. 17, Independent Order Odd Fellows, 117 Cal. 370, 49 Pac. 170. *Examine* Berlitski v. St. Peter & St. Paul Society (Pa.) 21 Lancaster L. Rev. 62. *Compare* §§ 372–372b herein.

[19] Timmerhoff v. Supreme Tent of the Knights of Maccabees of the World, 155 Ill. App. 395, 40 Natl. Corp. Repr. 337. *Compare* §§ 352–352c, 355 herein.

[20] Kelly v. Supreme Council of Catholic Benevolent Assoc. 46 App. Div. 79, 61 N. Y. Supp. 394. But *compare* Samberg v. Knights of Modern Maccabees, 158 Mich. 568, 133 Am. St. Rep. 396, 16 Det. Leg. N. 677, 123 N. W. 25, 39 Ins. L. J. 34.

As to presumption of death; evidence, see § 3772 herein.

public policy.[1] And a by-law of a railroad relief association which requires the release of the railroad from any claim for damages before a member can apply to the association for relief is not invalid as against public policy.[2]

§ 375. By-laws must not contravene terms of charter, constitution, or articles of association.—By-laws are not valid which conflict with the charter or articles of association, for to acknowledge the power to enact such by-laws would admit the power of a corporation to re-create itself on such basis and for such purposes as it might desire, and wholly defeat the object of its original creation:[3] nor is a member bound by his consent to by-laws which are invalid for the above reasons.[4] So, by-laws only regulate, but do not surrender or suspend corporate powers.[5] And if a statute of the state of a fraternal association is in effect an amendment to the charter subsequent contracts must conform thereto.[6] So, a by-law which materially conflicts with the constitution of an unincorporated society is invalid, and must yield to the constitution.[7] Where a particular mode for obtaining funds for the payment of losses and expenses is provided by charter, a by-law is void which changes such specific provision and provides an entirely different mode therefor.[8] But the courts will not sustain an action by a member of a corporation to restrain it from enforcing against him a by-law of a

[1] Louisville Board of Fire Underwriters v. Johnson, 133 Ky. 797, 24 L.R.A.(N.S.) 153n, 119 S. W. 153.

[2] Owens v. Baltimore & O. R. R. Co. 35 Fed. 715, 1 L.R.A. 75; State v. Baltimore & Ohio R. Co. 36 Fed. 655; Fuller v. Baltimore & Ohio Employees' Relief Assoc. 67 Md. 433, 10 Atl. 237.

On contracts requiring servant to elect between acceptance of benefits out of a relief fund, and a prosecution of his claims in an action for damages, see notes in 11 L.R.A. (N.S.) 182, and 48 L.R.A.(N.S.) 440. On validity of provision in contract of railroad relief department for forfeiture of benefits in case of suit against company for damages, see note in 10 L.R.A.(N.S.) 198.

[3] Diligent Fire Co. v. Commonwealth, 75 Pa. St. 291; Presbyterian Assurance Fund v. Allen, 106 Ind. 593, 7 N. E. 317; Bergmann v. St. Paul Mutual Building Assoc. 29 Minn. 278; Angell & Ames on Corporations (9th ed.) secs. 343 et seq. See also Cerney v. Sesterska Podpornjici Jednota, 146 Ill. App. 599; Cerney v. Jednota Cesky Dam, 146 Ill. App. 590; Roulo v. Schiller Bund, 172 Mich. 557, 138 N. W. 244; Lange v. Royal Highlanders, 75 Neb. 188, 10 L.R.A.(N.S.) 666, 121 Am. St. Rep. 786, 106 N. W. 224, 110 N. W. 1110; Wagner v. St. Francis Xavier Ben. Soc. 70 Mo. App. 161.

[4] People v. Benevolent Soc. 24 How. Pr. (N. Y.) 216.

[5] Colaluca v. Società Co-operativa Di Mutuo Soccorso Fratelli Bandiera, 30 R. I. 304, 75 Atl. 265.

[6] Finnell v. Franklin, 55 Colo. 156, 134 Pac. 122.

[7] Sherry v. Operative Plasterers' Mutual Union, 139 Pa. St. 470, 20 Atl. 1062; Powell v. Abbott, 9 Week. Not. Cas. 231. See Roulo v. Schiller Bund, 172 Mich. 557, 138 N. W. 244.

[8] State (ex rel.) v. Monitor Fire Assn. 42 Ohio St. 555.

mutual society which provides that it shall be the duty of every member to refuse to perform in any orchestra in which are any persons not members in good standing, and that it shall be deemed a breach of good faith between members to employ a suspended or nonmember, or to assist in a public performance given wholly or in part by amateurs, and which impose a penalty for their violation;[9] and a by-law cannot limit or extend benefits beyond the charter provisions prescribing the class entitled to benefits.[10] But a by-law which provides for forfeiture for nonpayment of an assessment does not contravene a charter provision that the officers may declare a policy forfeited for a like cause.[11]

§ 376. Enforcement of by-laws: penalty.—The power to enact a by-law carries with it necessarily the power to enforce the same by a reasonable penalty, within the scope of the corporate purposes, and upon due notice and hearing.[12] So, a member may be suspended for nonpayment of assessments;[13] but a by-law which subjects the member to a quasi penalty of deprivation of benefits for three months after he has paid dues in arrears for a certain time, is unreasonable, oppressive, and detrimental to the interests of the corporation.[14] And an amendment of the constitution which is ex post facto in its effect, in that it enforces a penalty not existing at the time of default in payment of dues by a member, is not valid.[15]

[9] Daniels, J., dissenting; Thomas v. Musical Mutual Protective Union, 121 N. Y. 45, 8 L.R.A. 175, 24 N. E. 24, reversing 49 Hun (N. Y.) 171.

[10] Hicks Sup. Council American Legion of Honor v. Perry, 140 Mass. 580, 5 N. E. 634; Kentucky Masonic Mutual Life v. Miller, 13 Bush (Ky.) 489.

[11] Equitable Life Assur. Soc. v. McLennon (Tenn. Sup. Ct. 1876) 6 Ins. L. J. 124.

[12] See Beadle v. Chenango Co. Ins. Co. 3 Hill (N. Y.) 161; Lawson v. Howell, 118 Cal. 613, 49 L.R.A. 400, 50 Pac. 763; Angell & Ames on Corporations (9th ed.) secs. 360 et seq.

[13] Hansen v. Supreme Lodge Knights of Honor, 140 Ill. 301, 29 N. E. 11, 21.

[14] Cartan v. Father Matthew United Benevolent Soc. 3 Daly (N. Y.) 20. See Connolly v. Shamrock Benevolent Soc. 43 Mo. App. 283; Cahill v. Kalamazoo Ins. Co. 2 Doug. (Mich.) 124, 43 Am. Dec. 457.

[15] Pulford v. Fire Department, 31 Mich. 459. See sections herein on forfeiture, etc.

CHAPTER XXI.

MUTUAL COMPANIES, BENEFIT, ETC., SOCIETIES—CHANGE OF BY-LAWS, ETC.—CONSTRUCTION.

§ 377. Power to alter or change by-laws.
§ 378. By-laws, constitutions, etc.: changes, how made.
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§ 379. By-laws: statutory or charter power to repeal, change, etc.
§ 379a. By-laws, constitution, etc.: amendments, changes, or repeal under reserved power or agreement.
§ 379b. Same subject: decisions holding amendments, etc., binding.
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§ 379d. Same subject: prohibiting extra-hazardous occupation.
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§ 379g. Same subject: accidental injuries: total disability.
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§ 379k. Amendments, changes, or repeal must be reasonable even under reserved power or agreement.
§ 379l. Reasonable amendments, etc., binding.
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§ 379p. Same subject.
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§ 380. Change of by-laws, etc.: vested right.
§ 380a. Same subject.

§ 380b. Same subject: instances.
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§ 380e. Same subject: classification of risks: discrimination.
§ 380f. Right of member or beneficiary to object to amendments: waiver or estoppel.
§ 380g. Same subject: when waiver or estoppel not applicable.
§ 380h. Waiver by or estoppel against association, society, etc., or officers thereof: amendments.
§ 381. Construction of by-laws.

§ 377. Power to alter or change by-laws.—A mutual insurance corporation or association may change its rules, or dispense with their literal and rigorous enforcement, when by so doing no substantial rights of the company or the insured will be impaired.[13] And where a change is regularly made in the by-laws and the motive which influences the change is honestly exercised to promote the society's welfare and all the members have an opportunity to avail themselves of the change, neither members nor beneficiaries suffer any actionable wrong.[17] The right of a corporation to alter, modify, or change its by-laws is generally reserved in the charter or articles of association, but aside from the reservation of such power it is said to be incident to the very nature and purposes of such organizations that they should have the right to make changes in their laws.[18] This principle is undoubtedly true, but in its application the courts widely diverge. An attempt has been made by some of the decisions to reconcile the cases on the common ground of vested rights, but here again the question of what constitute vested rights has been the subject of much discussion, and the decisions are far from unanimous, nor is the question settled as to what extent such societies are authorized to change their by-laws, where the power so to do is reserved in the charter or articles of association. We have seen that the fundamental law of organization of such societies, and the charter and by-laws constitute a part of the contract of each member,[19] and it would seem as if neither a corporation nor association would have the inherent power to enact a by-law which materially and radically changes the contract with

[16] See Protection Life Ins. Co. v. Foote, 79 Ill. 361.

[17] Supreme Lodge Knights of Pythias v. Knight, 117 Ind. 489, 3 L.R.A. 409, 20 N. E. 479, 483.

[18] Fugure v. Mutual Society of St. Joseph, 46 Vt. 369.

[19] See §§ 188 et seq., 380 et seq. herein.

members; such societies can certainly have no inherent power to arbitrarily abrogate the provisions of a contract which members have entered into in good faith, nor may it divest members of rights which have become vested under their contracts. And a charter reservation of the right to modify and change by-laws, and to which a party consents by becoming a member, ought not to be construed to warrant the passing of a by-law which would operate to annul a member's contract and abrogate vested rights, or which would in effect be a repudiation of its obligations by the society.[20] The following extract from the opinion in a Federal case is pertinent here. The court per Ray, D. J., said: "It is not questioned in the New York cases, to which attention has been called at some length, that under such general language the by-laws of a corporation or of an association may be amended in those respects which go to the general management and control of the company and the government of its internal affairs. When it comes to so amending the by-laws as to materially affect and change the obligations of such contract and destroy rights or seriously impair rights vested we have a different question." [1]

§ 378. By-laws, constitutions, etc., changes, how made.—Alterations, changes or repeal of by-laws etc., must be made in the manner prescribed by statute, the charter, or articles of association and by-laws and subject to the restrictions imposed [2] and where a by-law prescribes the time when such alteration can be made, and the number of votes required therefor, such provision must be followed.[3] Where the articles of a corporation provide for the management of its business by a board of directors, and for meetings of that board, but do not provide for meetings of the corporation, and the first by-laws were adopted by the directors, the latter have power to

[20] Supreme Commandery Knights of the Golden Rule v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332; Fire Ins. Co. v. Connor, 17 Pa. St. 136; Stewart v. Lea Mutual Fire Ins. Assn. 64 Miss. 499, 1 So. 743. See Korn v. Mutual Assur. Soc. 6 Cranch (10 U. S.) 192, 3 L. ed. 195. See sections next ensuing herein. See §§ 380 et seq. herein.

[1] Smythe v. Supreme Lodge Knights of Pythias (U. S. D. C.) 198 Fed. 967, 42 Ins. L. J. 6, case aff'd Smyth v. Supreme Lodge Knights of Pythias, 220 Fed. 438, 137 C. C. A. 32. See §§ 380 et seq. herein.

[2] Thibert v. Supreme Lodge Knights of Honor, 78 Minn. 448, 47 L.R.A. 136, 79 Am. St. Rep. 412, 81 N. W. 220; Lange v. Royal Highlanders, 75 Neb. 188, 10 L.R.A. (N.S.) 666, 121 Am. St. Rep. 786, 106 N. W. 224 (cannot change statutory mode of exercise of power. If amendment is in contravention of statute it is void); Farmers' Mutual Ins. Co. v. Kinney, 64 Neb. 808, 90 N. W. 926 (by-law must be adopted in conformity with authority conferred); Deuble v. Grand Lodge, Ancient Order U. W. 72 N. Y. Supp. 755, 66 App. Div. 323, aff'd 172 N. Y. 665, 65 N. E. 1116.

[3] Torry v. Baker, 1 Allen (83 Mass.) 120.

amend the by-laws.[4] An amendment of a by-law made in pursuance of a by-law permitting it and which is in existence when a person becomes a member is binding as a part of the contract.[5]

An attempted amendment of the by-laws of a mutual benefit society is not binding on a member who did not attend the meeting, unless it is affirmatively shown to have been called and conducted as provided by the constitution.[6] And parol evidence of officers and members then present is competent to prove the enactment of amendments to by-laws at the time and in the manner prescribed.[7] A presumption also exists, when there is no evidence to the contrary, that an amendment was voted on by all the members present and that it was properly adopted where the record shows the votes for and against at a regular meeting and its adoption.[8]

An association empowered by charter, and undertaking by its by-laws, to accumulate a fund for the benefit of persons dependent upon members at the time of their death, cannot so amend its by-laws as to distribute the accumulated fund among the living members and thereby bind dissenting members.[9] And the governing body of a fraternal benefit association which has not adopted a representative form of government as required by statute is without power to adopt a by-law changing the terms and obligations of a certificate theretofore issued to one of its members.[10]

§ 378a. Same subject.—Under a Mississippi decision a constitution adopted by an incorporated fraternal benefit society and not embodied in its charter has no greater force than any by-law, and it may itself be amended or repealed the same as any other by-law without following the mode prescribed by such constitution, and the adoption of an amendment in a different mode is valid provided that it does not contravene the terms of the charter and is not contrary to laws of the land.[11] So in Illinois although by-laws of a subordinate order are called its "constitution" they are nevertheless of

[4] Heintzelman v. Druids' Relief Assoc. 38 Minn. 138, 36 N. W. 100.

[5] Hass v. Mutual Relief Assoc. 118 Cal. 6, 49 Pac. 1056, 26 Ins. L. J. 992. See also Lawson v. Hewell, 118 Cal. 613, 49 L.R.A. 400, 50 Pac. 763.

[6] Metropolitan Safety Fund Accident Assoc. v. Windover, 137 Ill. 417, 27 N. E. 538.

[7] Masonic Mutual Benefit Assoc. v. Severson, 71 Conn. 719, 43 Atl. 192.

[8] Cowan v. New York Caledonian Club, 61 N. Y. Supp. 714, 46 App. Div. 288 (a purely charitable organization in respect to funeral benefits).

[9] Parish v. New York Produce Exchange, 169 N. Y. 34, 56 L.R.A. 149, 61 N. E. 977. See Pokrefky v. Detroit Firemens Fund Assoc. 121 Mich. 456, 6 Det. Leg. N. 240, 80 N. W. 240 (contract cannot be changed against member's protest. See also §§ 380 et seq. herein).

[10] Lange v. Royal Highlanders, 75 Neb. 188, 10 L.R.A.(N.S.) 666, 121 Am. St. Rep. 786, 106 N. W. 224.

[11] Dornes v. Supreme Lodge Knights of Pythias of the World, 75 Miss. 466, 1 Miss. Dec. (No. 14) 106, 23 So. 191.

no greater force than by-laws, and by employing such a term said order cannot extend its power to the adoption of by-laws of a character which it is solely within the power of the supreme lodge to enact, even though such subordinate body has power by the laws of the order to adopt certain laws and regulations.[12]

Where the executive committee is empowered to rerate members the objection is immaterial that such rerating power was not exercised by the supreme legislative authority of the society [13] and a beneficiary cannot object that amendments to articles of association are invalid because the resolution referring the same to the subordinate councils provided only for a reference of certain proposed amendments to the constitution where it is shown that the amendments to said articles were properly submitted and adopted.[14] And where an amendment contains an illegal provision which, from its importance, may have contributed more than any one of the others to secure the small majority of votes by which it was adopted, it will fall entirely.[15]

An amendment to an invalidly enacted amendment and not adopted in conformity with the original provisions as to the manner of amending by-laws are not binding.[16] And the simultaneous repeal and re-enactment, in terms or in substance, of parts of a by-law of a fraternal association, preserve without interruption the re-enacted provisions of the original by-law.[17]

§ 378b. Same subject: requirements as to notice.—If notice of amendments or additions to by-laws is required it must be given in the prescribed manner [18] for the specified purpose, and it must not be insufficient.[19] So the rule that statutory requirements

[12] Supreme Lodge Knights of Pythias v. Kutscher, 179 Ill. 340, 70 Am. St. Rep. 115, 53 N. E. 620, rev'g 72 Ill. App. 462.

[13] Supreme Ruling of Fraternal Mystic Circle v. Ericson (1910) — Tex. Civ. App. —, 131 S. W. 92.

[14] Pold v. North American Union, 180 Ill. App. 448, case aff'd 261 Ill. 433, 104 N. E. 4.

As to beneficiaries and effect of subsequent change of by-laws, see §§ 748 et seq. herein.

[15] Parish v. New York Produce Exchange, 169 N. Y. 34, 56 L.R.A. 149, 61 N. E. 977.

[16] Deuble v. Grand Lodge Ancient Order U. W. 72 N. Y. Supp. 755, 66 App. Div. 323, aff'd 172 N. Y. 665, 65 N. E. 1116.

[17] Quick v. Modern Woodmen of America, 91 Neb. 106, 135 N. W. 433.

[18] Morris v. Farmers' Mutual Fire Ins. Co. 63 Minn. 420, 65 N. W. 655; Allen v. Merrimack County Odd Fellows Mutual Relief Assoc. 72 N. H. 525, 57 Atl. 922. *Compare* McCabe v. Young Men's Father Matthew Total Abstinence Ben. Soc. 24 Hun (N. Y.) 149, *considered* under § 379 herein.

[19] Mutual Fire Ins. Co. of Montgomery County v. Farquhar, 86 Md. 668.

When presumption exists that member of fraternal beneficiary association had notice of change in by-law, see Attorney General v. Supreme Council American Legion of Honor (Dunlevy, In re; Clement, In

as to notice must be complied with is interpreted to mean reasonable notice with reference to time, sufficiency, the complex nature of the amendments, and the widely separated location of the members.[20] And resolutions passed by the board of directors of a mutual insurance company suspending the policy of a member does not affect a policy holder having no notice of their passage.[21] But if power is expressly conferred upon the directors by the articles of incorporation notice need not be given each member of the intention to exercise said power.[1]

§ 378c. Same subject: delegation of power.—Where no statutory authority therefor exists the power to amend by-laws vested by charter in the board of directors cannot be delegated to the members.[2] Nor can power be delegated by a supreme lodge to a subordinate order to adopt a by-law whereby the endowment rank is exempted from liability for a member's death from specified causes such by-law is not void, however, even though not adopted in conformity with prescribed rules of procedure where it is otherwise lawfully enacted.[3] And although the supreme lodge has power under its fundamental law to enact all such reasonable laws as may be deemed proper for the establishment and government of an endowment rank and may also create a board of control or any other like agency for the management of the business of that rank it cannot

re; Osterhout, In re; Tuska, In re) 206 Mass. 168, 92 N. E. 140. For citations of the several cases involved in this litigation see § 380f herein.

As to estoppel from laches and acquiescence to assert want of notice, see Kane v. Knights of Columbus, 84 Conn. 96, 79 Atl. 63, 40 Ins. L. J. 874, *considered* under § 380f herein.

[20] Robinson v. Mutual Reserve Life Ins. Co. (U. S. C. C.) 159 Fed. 564, N. Y. Ins. Law 1892, p. 2013, *e.* 690, see. 209; Parker's N. Y. Ins. L. (ed. 1915) p. 321, providing that "every such association, corporation or society, other than secret fraternal societies now authorized to do business in this state, must hereafter, before the adoption of any by-law or amendment thereto, cause the same to be mailed to the members and directors of such association, society or corporation, together with a notice of the time and place when the same shall be considered, which notice shall be the same as hereinbefore required for stated meetings." This Art. (VI.) relates to life or casualty insurance corporations upon the co-operative or assessment plan. See § 365b herein.

[21] Martin v. Mutual Fire Ins. Co. of Montgomery Co. 45 Md. 51.

[1] Farmers' Mutual Hail Assoc. of Iowa v. Slattery, 115 Iowa, 410, 88 N. W. 949.

[2] Farmers Loan & Trust Co. v. Aberle, 41 N. Y. Supp. 638, 18 Misc. 257, case modified 46 N. Y. Supp. 10, 19 A. D. 79.

[3] Supreme Lodge Knights of Pythias v. Kutscher, 179 Ill. 340, 53 N. E. 620, rev'g 72 Ill. App. 462. The court said: "We regard the question as settled that the supreme lodge could not delegate to a subordinate body the power to enact laws of this character and that said board of control had no power to enact said law." Id. 343. See also Supreme Lodge Knights of Pythias v. McLennan, 171 Ill. 417, 49 N. E. 530, aff'g 69 Ill. App. 599.

legally delegate its power to a board of control to pass a general law affecting the entire endowment rank. "It could not abdicate its high position and transfer its law-making power to such board or other agency." [4] But it is decided that empowering the board of directors to make effective and put in force by-laws or amendments enacted by the association, delegates only the power to determine when such laws shall go into effect, not the power to make them.[5] It is declared in a North Dakota case, relying upon the code, that: "By-laws can only be repealed or amended in the manner provided by statute, which in this state to a corporation like the appellant is by vote of the members, or by directors when this power to do so has been delegated to them by the same proportion of members as may make amendments themselves." [6]

§ 378d. **Same subject: adoption of committee's report: validating unauthorized by-law.**—A revision and codification of the constitution and laws of a benefit society may be validly adopted and the old laws repealed upon a report of a committee appointed and acting in conformity with the requirements of the constitution of the society.[7] And where a board of control, a body with no power to enact certain by-laws, reports its action in passing such a law with a copy thereof to the supreme lodge at its regular session, and that body referred said report to one of its committees which reported back favorably, approving the action of the board and recommending adoption of the report and it was adopted by the supreme lodge and published as one of the laws of the order said unauthorized by-law is validly adopted.[8]

§ 378e. **Same subject: right to exercise powers outside state of incorporation.**—A benevolent society's supreme legislative department, composed of delegates from head camps and when assembled denominated the sovereign camp, has power at a meeting outside the state of incorporation, to adopt in the manner required by the by-laws an amendment to the constitution, and such enactment is a proper exercise of the corporate power to make its own constitution and to exercise general legislative authority, although an executive council composed of the officers of the sovereign camp may exercise legislative authority under certain conditions and limita-

[4] Supreme Lodge Knights of Pythias v. La Malta, 95 Tenn. (11 Pick.) 157, 31 S. W. 493, 30 L.R.A. 838.

[5] Evans v. Southern Tier Masonic Relief Assoc. 78 N. Y. Supp. 611, 76 App. Div. 151. See §§ 380 et seq. herein.

[6] J. P. Lamb & Co. v. Merchants National Mutual Fire Ins. Co. 18 N. Dak. 253, 259, 119 N. W. 1048, 1050, per Spalding, J.; Rev. Codes 1905, secs. 4201, 4204.

[7] Supreme Council American Legion of Honor v. Adams, 68 N. H. 236, 44 Atl. 380.

[8] Supreme Lodge Knights of Pythias v. Kutscher, 179 Ill. 340, 53 N. E. 620, rev'g 72 Ill. App. 462.

tions and the power to hold such meetings outside the state of incorporation arises by implication where the corporation constitutes said department to be established by it with power to organize subordinate bodies throughout the United States and Canada.[9] And where, by authority of the statute under which a fraternal beneficiary association is incorporated, power is conferred to so amend or alter its by-laws as to provide for holding the meetings of its legislative body in any state or territory where it has subordinate lodges its decision on this question is final, and a resolution of its governing body to meet in another state, at a place other than that stated in the by-laws authorizes such meetings and its proceedings regularly had are not void.[10]

§ 379. By-laws: statutory or charter power to repeal, change, etc.—It is undoubtedly true that a right may exist to repeal or amend by-laws, where provision is made therefor in the charter, act of incorporation, or fundamental law of the corporation or association. Thus in the case of Stohr v. San Francisco Musical Fund Society [11] the defendant was incorporated, and both the general laws of the state and the by-laws of the society gave it the right to repeal, alter, or amend its laws. After a member's sickness a by-law was passed limiting the allowance to which he was entitled to a certain amount, unless otherwise ordered by the board of directors, and the by-law was declared to be valid. So it is held in New York that where the constitution provides that the by-laws may be amended, the society may alter them, even after a member has been taken sick, and reduce the amount of his benefits.[12] It is declared in another case in the same state that the constitution and by-laws may be changed, and the member becomes bound where the amendment is made in accordance with the constitution and laws, even without notice to the member, in the absence of a provision therefor in the constitution or by-laws.[13] Again, it is held that where, by statute, insurance companies have the right to amend their charters, a person who takes a policy from a company, the charter of which provides for the surrender of policies and compensation thereupon, can-

[9] Sovereign Camp Woodmen of the World v. Fraley, 94 Tex. 200, 51 L.R.A. 898, 59 S. W. 879, aff'g — Tex. Civ. App. —, 59 S. W. 905. The court makes a distinction between the rule as above stated and the rule contra with regard to ordinary corporations. Id. 205, per Brown, Assoc. J.

[10] Miller v. National Council Knights & Ladies of Security, 69 Kan. 234, 76 Pac. 830.

[11] 82 Cal. 557, 22 Pac. 1125.

[12] Poultney v. Bachman, 31 Hun (N. Y.) 49, overruling 62 How. Pr. (N. Y.) 466. See §§ 380 et seq. herein.

[13] McCabe v. Young Men's Father Matthew Total Abstinence Ben. Soc. 24 Hun (N. Y.) 149.

not be heard to complain of a subsequent abrogation of this provision.[14] And where there is an express provision in the constitution of an association that the society may alter or change its by-laws, and the manner of doing it is specifically pointed out, such amendment may be made.[15] It is also held that a total nonobservance of a by-law operates as a repeal thereof.[16] And where, under the charter of a mutual fire insurance association, the incorporators are authorized to make such by-laws as they may deem advisable for the management of their corporate affairs, such by-laws can have no effect to modify contracts entered into between the corporation and the assured.[17] Where the charter restricts legislative power to the supreme lodge, a mere ministerial committee such as the Board of Control of the Knights of Pythias, vested with administrative functions in relation to the endowment rank, has no power to pass a law providing a new condition which will avoid a benefit certificate in case of suicide.[18]

§ 379a. By-laws, constitution, etc.: amendments, changes, or repeal under reserved power or agreement.—If a power is reserved to amend, change or repeal the constitution or articles of association, by-laws, rules and regulations, or there is a valid agreement between the parties that the assured or members shall conform to, abide by, or in effect be bound by, such changes or repeal they may be made and will be binding. Provided: (1) That they are within the powers of the company, society, association or order to enact, having also in view the limitations and restrictions imposed by statute, the charter, constitution or articles of associations and by-laws: (2) That they are validly enacted: (3) That all conditions precedent to said enactment or adoption of such changes are complied with:[19]

[14] Allen v. Life Assn. of America, 8 Mo. App. 52. See § 189 herein.

[15] Fugure v. Mutual Society of St. Joseph, 46 Vt. 369. See, also, Poultney v. Bachman, 31 Hun (N. Y.) 49, overruling 62 How. Pr. (N. Y.) 466, and 10 Abb. N. C. (N. Y.) 252.

[16] Attorney General v. Middleton, 2 Ves. Sr. 328.

[17] Stewart v. Lee Mutual Fire Ins. Assoc. 64 Miss. 499, 1 So. 743.

[18] Supreme Lodge Knights of Pythias v. Stein, 75 Miss. 107, 37 L.R.A. 775, 65 Am. St. Rep. 589, 21 So. 559, 26 Ins. L. J. 557. See Supreme Lodge Knights of Pythias v. Kutscher, 179 Ill. 340, 70 Am. St. Rep. 115, 53 N. E. 620, s. c. 72 Ill. App. 462.

As to adoption of by-law, § 2532. As to suicide after contract made, see § 2647 herein.

[19] See §§ 377 et seq. herein.

Where a board of control of the endowment rank Knights of Pythias has no power to enact a certain by-law, assured is not bound thereby where he only agrees to be bound or "controlled by all the laws, rules and regulations of the order governing said rank, now in force or that may hereafter be enacted by the Supreme Lodge" as such contract obligation cannot be extended to include by-laws

(4) That the power is exercised in good faith and without fraud:[20] (5) That Federal and State laws are not violated thereby:[1] (6) That they are not against public policy:[2] (7) That they are reasonable:[3] (8) That they are not arbitrary:[4] (9) That they are necessary to effect, and are consistent with, the purposes of the company, society, association or order and for its general welfare:[5] (10) That they do not operate retroactively,[6] or (11) impair the obligation of contracts or impair or divest vested rights.[7]

In applying the above rule, however, it may be stated that each case depends to some extent upon its own circumstances and how far the right to amend, change or repeal has been expressly or impliedly reserved or agreed upon.

Again, inasmuch as these reservations or agreements are made either by statute, the charter or articles of association, constitution, by-laws, application or certificate, or two or more of them together as parts of or as constituting in this respect the original contract, the rules which we have given elsewhere as governing what constitutes a part of the contract and to what extent they apply should be considered.[8] We will state here, however, that it is held that the

enacted by any law making body other than said supreme lodge. Supreme Lodge Knights of Pythias v. McLennan, 171 Ill. 417, 49 N. E. 530, affg. 69 Ill. App. 599.

A fraternal benefit certificate although requiring compliance with thereafter enacted laws by the board of control of the endowment rank as a condition precedent to benefits does not authorize an amendment which such board has no power to make. Supreme Lodge Knights of Pythias v. Kutscher, 179 Ill. 340, 53 N. E. 620, rev'g 72 Ill. App. 462.

[20] See Clarkson v. Supreme Lodge Knights of Pythias, 99 S. Car. 134, 82 S. E. 1043.

[1] Amendment must not violate laws of state. Fraternal Union of America v. Zeigler, 145 Ala. 287, 39 So. 751; Eaton v. International Travelers' Assoc. — Tex. Civ. App. —, 136 S. W. 817. Must not be contrary to law. Kane v. Knights of Columbus, 84 Conn. 96, 79 Atl. 63, 40 Ins. L. J. 874. See § 375 herein.

[2] Chicago, Burlington & Quincy Ry. Co. v. Hendricks, 125 Ill. App. 580; De Graw v. Supreme Court Independent Order of Odd Fellows, 182 Mich. 366, 148 N. W. 703. Constitution and by-laws when not against public policy are part of contract. West v. Grand Lodge Ancient Order United Workmen, 14 Tex. Civ. App. 471, 37 S. W. 966. See § 374 herein.

A change may be made in by-laws or rules under a reserved power to amend where such change accords with public policy. Knights of Maccabees of the World v. Nelson, 77 Kan. 629, 95 Pac. 1052, 37 Ins. L. J. 986.

[3] See §§ 379k–379n herein.

[4] Clarkson v. Supreme Lodge Knights of Pythias, 99 S. Car. 134, 82 S. E. 1043.

It is not arbitrary to change a system of rates which would better promote the ability of the order or association to fulfil its contract obligations. Kane v. Knights of Columbus, 84 Conn. 96, 79 Atl. 63, 40 Ins. L. J. 874.

[5] See § 379k herein.

[6] See §§ 379o et seq. herein.

[7] See §§ 380 et seq. herein.

[8] See §§ 188 et seq. herein.

power of a fraternal benefit society granted in its charter to alter and repeal its constitution, by-laws, rules and regulations, enters into and forms part of its contracts with its members when the latter agrees to abide not only by the existing constitution and laws but also by amendments thereto. In other words, that the terms of the contract between a fraternal benefit society and its members are determined by the constitution and laws of the society as they exist at the beginning of the membership and as they may be lawfully amended from time to time, and the agreements made thereunder between the incoming members and the society.[9] So a reserved charter power to change or repeal the constitution, by-laws, rules and regulations coupled with an agreement of the applicant for membership to conform to and abide by the same as they then exist or as they may be thereafter changed or amended, is also decided to constitute the contract between the society and its members.[10]

§ 379b. Same subject: decisions holding amendments, etc., binding.—Under the following decisions the rule stated under the preceding section has been fully sustained, whether the reservation or agreement was made by statute, the charter or articles of association, constitution, by-laws, application or certificate, or two or more of them together. In a *Federal* case where the stipulation was that the contract should be governed by all the laws, rules and regulations of the order governing the rank "now in force or that may hereafter be enacted," and there was also a condition requiring "full compliance with all the laws governing this rank now in force or that hereafter may be enacted," it was declared that the right so reserved was well recognized as authorizing the association to subject members to further requirements and conditions of future liability by reasonable enactments within the objects and for the general welfare of the association, and to apply the regulations to prior contracts, but to the extent only that the conditions thus imposed arise after the enactment, and the insurer could not repudiate obligations already vested under the contract and that a by-law could not impose a new condition or exempt from liability, nor be made retroactive to impair or destroy or exempt from liability for a pre-existing cause which arose under the contract.[11] In *Alabama* a provision in the certificate that assured shall comply with all its terms

[9] Kane v. Knights of Columbus, 84 Conn. 96, 79 Atl. 63, 40 Ins. L. J. 874.

[10] Hines v. Modern Woodmen of America, 41 Okla. 135, L.R.A.1915A, 264, 137 Pac. 675.

[11] Lloyd v. Supreme Lodge Knights of Pythias, 98 Fed. 66, 38 C. C. A. 654, 29 Ins. L. J. 744.

and those of the constitution and that the policy will be liable to forfeiture where existing and future adopted by-laws and rules are not complied with is a binding contract embracing future amendments of laws or rules.[12] In *California* a member and his beneficiaries are bound where he agrees in his certificate to abide by and conform to the by-laws then in force or subsequently adopted.[13] In *Colorado* if articles of association of a beneficiary society reserve a right to modify, amend or adopt a new constitution etc., a change in the fundamental law binds.[14] In *Connecticut* where an amendment to the charter of a fraternal beneficial order empowered it to alter and repeal its constitution, by-laws, rules, and regulations, and this was re-enacted in later amendments and there was also an agreement in the application to conform to and abide by the constitution and rules of the council which were then in force or might thereafter be adopted by the proper authority, and it was further recited in the certificate that it was issued upon condition of compliance with present or future laws, it was decided that such reserved power of amendment authorized the order to change its laws and such changes became a part of the contract of insurance, since the contract was determined by the constitution and laws of the corporation as amended from time to time and the agreements made thereunder between the parties.[15] It is likewise decided in that state that where a member agrees to subject himself to the constitution and laws of the order the terms of his contract are determined not only by those existing when he became a member, but also by amendments made from time to time.[16] And under another decision in the same state where there is an agreement on becoming a member to be bound by by-laws in force or to be enacted, a subsequently validly adopted by-law binds.[17] In *Illinois* a benefit society may amend its by-laws under a reserved power so to do, and if the applicant expressly agreed at the time the certificate was issued that rules subsequently adopted should be applicable, such reservation or agreement is binding upon both member and beneficiary.[18] So a member of an association who agrees to abide

[12] Fraternal Union of America v. Zeigler, 145 Ala. 287, 39 So. 751.

[13] Caldwell v. Grand Lodge of United Workmen, 148 Cal. 195, 113 Am. St. Rep. 219, 2 L.R.A.(N.S.) 653n, 82 Pac. 781, 7 Am. & Eng. Annot. Cas. 356.

[14] Head Camp Pacific Jurisdiction, Woodmen of the World v. Woods, 34 Colo. 1, 81 Pac. 261.

[15] Kane v. Knights of Columbus, 84 Conn. 96, 79 Atl. 63, 40 Ins. L. J. 874.

[16] Coghlin v. Knights of Columbus, 79 Conn. 218, 64 Atl. 223, 36 Ins. L. J. 44.

[17] Masonic Mutual Benefit Assoc. v. Severson, 71 Conn. 719, 43 Atl. 192.

[18] Murphy v. Nowak, 223 Ill. 301, 7 L.R.A.(N.S.) 393n, 79 N. E. 112.

by and be governed by subsequently adopted by-laws is bound by them unless they are unreasonable.[19] So an amendment may be enacted where the certificate is accepted subject to all subsequently adopted laws and rules.[20] So an acceptance of a certificate by a member constitutes a sufficient reservation of a right to amend by-laws where the certificate contains an express provision giving the association such power.[1] And acceptance of a certificate obligating a member as to rules which might be subsequently enacted governing the council and funds of a fraternal association constitutes a reserved power to amend the laws of such society.[2] And a requirement in a certificate of a fraternal order that right to benefits is conditioned upon compliance with existing and future enacted laws obligates the member and his beneficiary.[3] So, a reserved power in the by-laws and an agreement in the policy to be bound by subsequently enacted by-laws, is binding.[4] So, also, where right to change by-laws is expressly reserved under the certificate or contract the insurer may make such change and an agreement that such changes may be made is valid.[5] And in other cases in that state a contract to be bound by after-enacted by-laws or new laws is binding upon members and beneficiaries.[6] In *Indiana* if the constitution clearly and expressly reserves the right to amend, a member is bound to take notice thereof.[7] And a member is bound by laws thereafter adopted when he so agrees in his certificate.[8] In *Iowa* it is settled law that a contract is valid and binding whereby the insured agrees to be bound by the constitution and by-laws and by those which may thereafter be enacted, and that members are bound to take notice of by-laws whether adopted prior or subsequent to the contract.[9] And a reservation in the certificate of a

[19] Scow v. Supreme Council of the Royal League, 223 Ill. 32, 79 N. E. 42.

[20] Pold v. North American Union, 261 Ill. 433, 104 N. E. 4, aff'g 180 Ill. App. 488.

[1] Covenant Mutual Life Assoc. v. Tuttle, 87 Ill. App. 309.

[2] Supreme Council of Royal Arcanum v. McKnight, 238 Ill. 349, 87 N. E. 299.

[3] Supreme Lodge Knights of Pythias v. Kutscher, 179 Ill. App. 340, 53 N. E. 620, rev'g 72 Ill. App. 462.

[4] Smith v. Mutual Reserve Fund Life Assoc. 140 Ill. App. 409.

[5] Covenant Mutual Life Assoc. v. Tuttle, 87 Ill. App. 309.

[6] Supreme Tent of Knights of Maccabees of the World v. Stensland, 105 Ill. App. 267; Grand Lodge Ancient Order of U. W. 139 Ill. App. 4.

[7] Supreme Lodge Knights of Pythias v. Knight, 117 Ind. 489, 3 L.R.A. 409, 20 N. E. 479, 483.

[8] Supreme Lodge Knights of Honor v. Bieler, 58 Ind. App. 550, 105 N. E. 244.

[9] Norton v. Catholic Order of Foresters, 138 Iowa 464, 24 L.R.A. (N.S.) 1030n, 114 N. W. 893. Agreement in certificate was that it was issued upon condition that the member complied in future "with the laws, rules and regulations, now governing said order, or that may hereafter be enacted by said high court."

right to amend is valid and binding.[10] And in that state if insured agrees to be bound by and subject to the provisions of all duly enacted laws as they are or hereafter may be changed or amended, he is bound by amendments made subsequent to his contract.[11] In *Kansas* provisions in the application and certificates obligating the member to conform to and be governed by by-laws thereafter enacted are binding upon assured and his beneficiary.[12] And subsequent enactments are binding under an agreement made in the certificate and by-laws.[13] In *Louisiana* subsequently enacted by-laws are held valid and binding.[14] In a *Massachusetts* case where the contract found in the application, certificate, the statute constituting the charter and the constitution and laws of the order, provided for future changes or amendments it was held that the members would be bound by amendments regularly made even if there were no express stipulation, in regard to the by-laws, in the application or in the certificate, but that full authority to amend the laws, rules and regulations also existed under an express agreement, made when joining the society to conform to and abide by by-laws thereafter adopted and also under the certificate which made compliance with the laws, rules and regulations "now governing the supreme council and fund, or that may hereafter be enacted by the supreme council to govern said council and fund" a condition precedent to payment under said certificate.[15] In *Michigan* a member when joining may validly agree that changes may be made in the constitution and laws in order to enable it to carry out its contracts especially when author-

[10] House v. Modern Woodmen of America, 165 Iowa, 607, 146 N. W. 817.

[11] Elliott v. Home Mutual Hail Assoc. 160 Iowa 105, 140 N. W. 431. *Citing* Jordan v. Iowa Mutual Tornado Ins. Co. 151 Iowa, 73, Ann. Cas. 1913A, 266, 130 N. W. 177; Fort v. Iowa Legion of Honor, 146 Iowa 183, 123 N. W. 224; Sieverts v. National Benevolent Assoc. 95 Iowa, 710, 64 N. W. 671; Hobbs v. Iowa Mutual Benefit Assoc. 82 Iowa, 107, 11 L.R.A. 299, 31 Am. St. Rep. 466, 47 N. W. 983. The court in the principal case (160 Iowa, 105) per Ladd, J., said: "The authorities, however, are quite as conclusive that where the assured agrees to be bound by amendments to the by-laws or articles subsequently adopted, he must take notice thereof, and is as effectually bound thereby as by those existing at the time of the issuance of the certificate or policy of insurance." *Citing* Norton v. Catholic Order of Foresters, 138 Iowa, 464, 24 L.R.A. (N.S.) 1030, 114 N. W. 803; Ross v. Modern Brotherhood of America, 120 Iowa, 692, 95 N. W. 207.

[12] Knights of Maccabees of the World v. Nelson, 77 Kan. 629, 95 Pac. 1052, 37 Ins. L. J. 986.

[13] Miller v. National Council Knights & Ladies of Security, 69 Kan. 234, 76 Pac. 830.

[14] Dougherty v. Knights of Pythias, 48 La. Ann. 1203, 20 So. 712.

[15] Reynolds v. Supreme Council Royal Arcanum, 192 Mass. 150, 7 L.R.A.(N.S.) 1154n, 7 Am. & Eng. Ann. Cas. 776, 78 N. E. 129, 35 Ins. L. J. 673.

ized by statutory amendment of the charter.[16] And an agreement is valid which binds the parties to a mutual benefit certificate, to by-laws to be adopted in the future.[17] In *Minnesota* the rights of members in benefit insurance associations depend upon the articles of association and by-laws which have been adopted; and, generally speaking, the body authorized to make by-laws may change, amend, or repeal those already in existence, subject, however, to the restrictions and limitations of the charter or articles of association, and of the by-laws themselves, and also subject to the implied condition that such change, amendment, or repeal must be reasonable.[18] In *Nebraska* an agreement by a member of a fraternal benefit association to be bound by subsequently enacted by-laws will be upheld when such by-laws are reasonable in their nature and legally enacted.[19] And an agreement in the application to be bound by by-laws now in force or hereafter adopted is binding as to subsequently enacted by-laws.[20] In *New Hampshire* an agreement in the application and in the certificate issued on condition that the member conform to the by-laws, rules and usages in force or thereafter enacted is binding as to subsequent amendments changing rules.[1] Under a *New York* decision although the statute of organization of a fraternal beneficiary association, the constitution and the certificates authorize amendments as to the benefit fund the association may not enact amendments reducing the amount of said fund, or increasing assessments.[2] So changes in by-laws though made after the issuance of a certificate are held binding as a part of the contract where the member of an assessment association has agreed in his application to be bound by by-laws thereafter enacted.[3] In *Oregon* mutual benefit societies have the right to alter, amend or repeal their laws, or to enact others consistent with the purpose for which they are organized.[4] In *Pennsylvania* a by-law may be changed under a reserved power in the certificate stipulating that

[16] De Graw v. Supreme Court Independent Order of Odd Fellows, 182 Mich. 366, 148 N. W. 703.

[17] Wineland v. Knights of Maccabees of the World, 148 Mich. 608, 14 Det. Leg. N. 345, 112 N. W. 696.

[18] Thibert v. Supreme Lodge K. of H. 78 Minn. 448, 79 Am. St. Rep. 412, 47 L.R.A. 136, 81 N. W. 220.

[19] Lange v. Royal Highlanders, 75 Neb. 188, 10 L.R.A.(N.S.) 666, 106 N. W. 224.

[20] Farmers Mutual Ins. Co. v. Kinney, 64 Neb. 808, 90 N. W. 926.

[1] Supreme Council American Legion of Honor v. Adams, 68 N. H. 236, 44 Atl. 380.

[2] Green v. Supreme Council of Royal Arcanum, 206 N. Y. 591, 100 N. E. 411, rev'g 129 N. Y. Supp. 791, 144 App. Div. 761. But *compare* §§ 380c et seq. herein, where this point is fully considered.

[3] Evans v. Southern Tier Masonic Relief Assoc. 78 N. Y. Supp. 61, 76 App. Div. 151.

[4] Wist v. Grand Lodge Ancient Order of United Workmen, 22 Ore. 271, 29 Am. St. Rep. 603, 29 Pac. 610. Agreement in application to

members shall comply with the laws of the order then in force or thereafter to be enacted.[5] And a member is bound where the constitution and by-laws authorize making changes in the law of organization of a beneficial association.[6] So an application may reasonably provide that the certificate issued is accepted subject to laws in force or which may "hereafter be adopted."[7] In *Tennessee* an agreement to conform to laws in force or which may "hereafter" be enacted binds the member by a validly enacted by-law where such agreement is contained in his application and the issuance of his certificate is conditioned thereon.[8] In *Texas* it is held that laws, rules, and regulations for the government of mutual benefit societies are equally obligatory upon members whether such laws etc., exist when a person becomes a member or are thereafter enacted, provided they are not arbitrary or unreasonable and are lawfully enacted in pursuance of such society's inherent power.[9] And if a member agrees that by-laws and regulations may thereafter be enacted he is bound.[10] In *Wisconsin* a stipulation in the certificate binding the member to future enacted by-laws is valid where the change relates only to matters of necessary detail and does not nullify the contract as it existed.[11] Under an *English* decision rules of a friendly society may be altered without the consent of one who was a member at the time when the rules provided for changes and although said altered rules deprive him in case of a breach thereof, of a benefit to which he was entitled he is bound thereby.[12]

§ 379c. Same subject: decisions holding amendments, etc., not binding.—If there is no reservation in the articles, by-laws or certificates, an amendment with certain conditions precedent affecting assured's rights is held not to apply.[13] So under a Mississippi decision a provision in the certificate that any failure to comply strictly with the laws and regulations of the association as prescribed by the grand lodge will forfeit membership, is not an express reservation

comply with laws, regulations and requirements thereafter enacted.

[5] Chambers v. Supreme Tent Knights of Maccabees of the World, 200 Pa. 244, 86 Am. St. Rep. 716, 49 Atl. 784.

[6] Stark v. Byers, 24 Pa. Co. Ct. Rep. 517.

[7] Nickum v. Grand Lodge Ancient Order United Workmen, 37 Pa. Co. Ct. Rep. 104.

[8] Supreme Lodge Knights of Pythias v. La Malta, 95 Tenn. (11 Pick.) 157, 30 L.R.A. 838, 31 S. W. 493.

[9] Supreme Ruling of Fraternal Mystic Circle v. Ericson, — Tex. Civ. App. —, 131 S. W. 92.

[10] West v. Grand Lodge Ancient Order United Workmen, 14 Tex. Civ. App. 471, 37 S. W. 966.

[11] Curtis v. Modern Woodmen of America, 159 Wis. 303, 150 N. W. 417.

[12] Smith v. Galloway (1898) 1 Q. B. 71, 77 Law T. Rep. 469, 67 L. J. Q. B. N. S. 15.

[13] McNeil v. Southern Tier Masonic Relief Assoc. 58 N. Y. Supp. 119, 40 App. Div. 581, a case of conditions precedent to reinstatement.

that a member shall be bound by all the regulations in force or thereafter to be enacted. The court per Whitfield, C., declared: "It is further to be said that the overwhelming weight of authority is to the effect that in those provisions which purport to bind the insured, if there is no express provision that he shall be bound by laws to be enacted in the future, then such laws so enacted in the future do not bind the insured." [14] So where a by-law was endorsed upon the back of a policy providing that it should have the same force and effect as if it appeared on the face thereof, and said by-law empowered the board of directors to change by-laws at any time and there are subsequent changes therein by the board, assured's rights are not controlled thereby, but only the by-laws appearing on his policy govern, when assured has not agreed that by-laws so changed should become a part of the contract.[15] Nor can the contract of insurance be changed at will under a constitutional provision of the society that persons becoming members shall be subject to said society's power to change by-laws.[16]

§ 379d. Same subject: prohibiting extra-hazardous occupation.— Under a reserved power so to do a fraternal benefit society may amend a list of prohibited occupations and enlarge the same so as to include as extra-hazardous the occupation of switchman.[17] And a reserved right in the certificate to amend authorizes an amendment specifying the occupation of lineman as extra-hazardous. And recovery is precluded where such occupation is engaged in by a member after the enactment of said amendment and his death results from an accident while so employed.[18] Again, although certain risks are classified as hazardous at the time the certificate was issued still a subsequent by-law may reasonably classify one of said risks as extra-hazardous, where assured has agreed to be bound by the constitution and by-laws then in force or thereafter enacted.[19]

[14] Masonic Benefit Assoc. v. Hopkins, 99 Miss. 112, 56 So. 169, 40 Ins. L. J. 1671. *Citing* to the above quotation, Hobbs v. Iowa Mutual Benefit Assoc. 82 Iowa, 107, 31 Am. St. Rep. 466, 11 L.R.A. 299, 47 N. W. 983; Miller v. Tuttle (Kan.) 73 Pac. 88; Startling v. Supreme Council Royal Templars of Temperance, 108 Mich. 440, 62 Am. St. Rep. 709, 66 N. W. 340; Morrison v. Wisconsin Odd Fellows Mutual Life Ins. Co. 59 Wis. 162, 18 N. W. 13, 29 Cyc. 77; 1 Cooley's Briefs on Ins. 709.

[15] Annan v. Hill Union Brewery Co. 59 N. J. Eq. 414, 46 Atl. 563.

[16] Bragaw v. Supreme Lodge Knights & Ladies of Honor, 128 N. Car. 354, 54 L.R.A. 602, 38 S. E. 905.

[17] Gilmore v. Knights of Columbus, 77 Conn. 58, 107 Am. St. Rep. 17, 1 Am. & Eng. Ann. Cas. 715, 58 Atl. 223.

As to clauses prohibiting change of occupation, see § 2236 herein.

[18] House v. Modern Woodmen of America, 165 Iowa, 607, 146 N. W. 817.

[19] Norton v. Catholic Order of Foresters, 138 Iowa, 464, 24 L.R.A. (N.S.) 1030 (annotated on validity of retrospective by-law or other rule of benefit association excluding certain class of members from benefits

But even though insured has agreed in his application to abide by the constitution, by-laws, rules and regulations of the society and the latter prior thereto had adopted a by-law or regulation making a certain occupation, in which assured thereafter engaged, extra-hazardous, a suit on the certificate will not be defeated where it does not appear that said member had actual knowledge of such a by-law or that anything was ever done at the time, or after, the certificate was obtained by which he could be constructively charged with knowledge that the occupation in which he was engaged was extra-hazardous and it also appeared that a list of occupations deemed extra-hazardous or prima facie hazardous, printed on the back of his application, signed by him and referred to in said application did not mention the occupation in question. Assured's agreement in his application must be deemed to have been made with reference to the information given him in such case.[20]

§ 379e. Same subject: prohibiting engaging in liquor or saloon business.—Where the agreement in the application to a fraternal society requires compliance with future enacted laws, regulations, etc., as a condition precedent, and the certificate is expressed to be issued on condition that the member shall comply with all the laws rules, etc., while a member, he is bound by a subsequently enacted by-law forfeiting benefits for engaging in the retail liquor business.[1] And under the same agreement in the application and certificate as that last above stated a member was held bound by a subsequently enacted general law providing that any member who should after a specified date enter into the business of selling by retail intoxicating liquors as a beverage should be expelled from the order, and also providing in such case for suspension from any and all rights to participate in the beneficiary fund and that his beneficiary certificate should become null and void from and after the date of his so engaging in said occupation with a further provision that said

or reducing benefit of that class), 114 N. W. 893.

[20] Gienty v. Knights of Columbus, 199 N. Y. 103, 92 N. E. 111, rev'g (mem.) 110 N. Y. Supp. 1129, (mem.) 126 App. Div. 934, which aff'd 105 N. Y. Supp. 244, 55 Misc. 98. In this same case upon a second trial of the action judgment was entered upon the verdict of the jury for the plaintiff and this was affirmed in 131 N. Y. Supp. 792, 146 App. Div. 497, aff'd (mem.) 205 N. Y. 577, 98 N. E. 1103.

[1] Grand Lodge Ancient Order U. W. v. Burns, 84 Conn. 356, 80 Atl. 157, 40 Ins. L. J. 1676. *Citing* Gilmore v. Knights of Columbus, 77 Conn. 58, 61, 107 Am. St. Rep. 17, 1 Am. & Eng. Ann. Cas. 715, 58 Atl. 223; Pain v. Societe St. John Baptiste, 172 Mass. 319, 70 Am. St. Rep. 287, 52 N. E. 502; State (ex rel. Schrempp) v. Grand Lodge Ancient Order United Workmen, 70 Mo. App. 456. *Citing* and *considering*, Coughlin v. Knights of Columbus, 79 Conn. 218, 220, 64 Atl. 223.

law should be self-executing.[2] So the acceptance of a certificate with a requirement that the member comply with thereafter adopted by-laws in order to prevent forfeiture, binds him by a subsequently adopted by-law prohibiting engaging in the liquor business after becoming a member and providing a forfeiture of membership therefor.[3] And a by-law enacted after a person becomes a member of a fraternal society, prohibiting members not so engaged from engaging in the saloon business is obligatory under an express provision of the membership contract that members shall comply with laws, regulations, etc., thereafter enacted.[4] Again, a resolution of the masonic order which denies membership to saloon keepers applies to existing members who continue thereafter in said business.[5] And a member whose existing contract is expressly subject to "such by-laws and rules as are or may be adopted by the supreme lodge or local lodge of which he is a member." is obligated by an amendment of the constitution of the order providing that any member who should thereafter enter upon the manufacture or sale of malt, spirituous or vinous liquors, to be used as a beverage, in the capacity of proprietor, stockholder, agent or employee should ipso facto forfeit all his rights as a member either social or beneficial and his certificate should thereby become absolutely null and void. The constitution before amendment prohibited such occupation.[6]

But in New York payment of a certificate of life insurance issued

[2] State (ex rel. Strang) v. Camden Lodge, Ancient Order United Workmen, 73 N. J. L. 500, 64 Atl. 93, 35 Ins. L. J. 858. *Citing* and *considering*, Gilmore v. Knights of Columbus, 77 Conn. 58, 107 Am. St. Rep. 17, 1 Am. & Eng. Ann. Cas. 715, 58 Atl. 223; Moerschbaecher v. Supreme Council Royal League, 188 Ill. 9, 52 L.R.A. 281, 59 N. E. 17; State (ex rel. Schremp) v. Grand Lodge Ancient Order United Workmen, 70 Mo. App. 456; Langnecker v. Trustees of Grand Lodge Ancient Order United Workmen, 111 Wis. 279, 55 L.R.A. 185, 87 Am. St. Rep. 860. 87 N. W. 293; Loeffler v. Modern Woodmen of America, 100 Wis. 79, 73 N. W. 1012. *Citing* Fullinwider v. Supreme Council Royal League, 180 Ill. 621, 72 Am. St. Rep. 239, 54 N. E. 485; Messer v. Grand Lodge Ancient Order United Workmen, 180 Mass. 321, 62 N. E. 252; Pain v. Societe St. John Baptiste, 172 Mass. 319, 72 Am. St. Rep. 287, 52 N. E. 502. *Compare* Brown v. Great Camp of Knights of Modern Maccabees, 107 Mich. 123, 132 N. W. 562.

[3] Loeffler v. Modern Woodmen of America, 100 Wis. 79, 73 N. W. 1012.

[4] State (ex rel. Schrempp) v. Grand Lodge Ancient Order U. W. 70 Mo. App. 456.

[5] Ellerbe v. Faust, 119 Mo. 653, 25 L.R.A. 149, 25 S. W. 390. See also MacDowell v. Ackley, 93 Pa. 277; St. Patrick's Male Benevolent Soc. v. McVey, 92 Pa. 510.

[6] Supreme Lodge of Fraternal Union of America v. Light, 195 Fed. 903, 115 C. C. A. 591. *Considered* and *explained* in Smythe v. Supreme Lodge Knights of Pythias (U. S. D. C.) 198 Fed. 967, 981, which case is aff'd in Smyth v. Supreme Lodge Knights of Pythias, 220 Fed. 438. 137 C. C. A. 32.

by a "mutual benefit fraternity," or society, upon which dues had been paid by the assured and accepted by the society to the time of his death, cannot be avoided upon the ground that the assured, at the time of his death, was, and for a few months prior thereto had been, engaged in the hotel business, in violation of a by-law adopted by the society, without notice to the assured, many years after his certificate was issued, prohibiting any certificate holder of the society from selling liquors at retail, and declaring the certificate of any one engaging in such business void for a violation thereof, nor the by-laws under which the certificate was issued, contained any restriction as to the business in which the assured might engage.[7] So it is decided in Kansas that the adoption, by a fraternal insurance order, of a by-law declaring that no person shall be admitted or retained as a member who is engaged in the sale of intoxicating liquors, does not, in the absence of a specific provision to that effect, avoid the beneficiary certificate of a member who is already engaged in that business in a state where it is not unlawful, who continues therein, and against whom no action is taken. And a by-law of a fraternal insurance order, which provides that any member who shall, after the date of its adoption, have entered, or who shall thereafter enter, into the business of selling intoxicating liquors, shall stand suspended from his rights to participate in the beneficial fund, and that his certificate shall become void from the date of his engaging in such occupation, does not, in terms, apply to a member who, before the adoption of such by-law, was engaged in such business, and who has remained in it continuously thereafter.[8] And under an Illinois decision a member who was engaged in the liquor business before the enactment of a by-law prohibiting such occupation and providing for forfeiture for non-compliance, is not thereby precluded from thereafter re-engaging in the same business after being forced to temporarily abandon it.[9]

§ 379f. **Same subject: prohibiting use of intoxicating liquors or drugs.**—A reserved power in the original contract to amend, authorizes an amendment relieving the society from liability in case of

[7] Ayres v. Order of United Workmen, 188 N. Y. 280, 281, 80 N. E. 220, aff'g 109 App. Div. 919.

[8] Grand Lodge Ancient Order of United Workmen v. Haddock, 72 Kan. 35, 1 L.R.A.(N.S.) 1064, 82 Pac. 583. *Citing* and *considering* Steinert v. United Brotherhood of Carpenters & Joiners of America, 91 Minn. 189, 97 N. W. 668; Ellerbe v. Faust, 119 Mo. 653, 25 L.R.A. 149, 25 S. W. 390; Deuble v. Grand Lodge Ancient Order United Workmen, 72 N. Y. Supp. 755, 66 App. Div. 323, aff'd (mem.) 172 N. Y. 665, 65 N. E. 1116; Langnecker v. Trustees of Grand Lodge Ancient Order United Workmen, 111 Wis. 279, 55 L.R.A. 185, 87 Am. St. Rep. 860, 87 N. W. 293.

[9] Grand Lodge Ancient Order United Workmen v. Oetzel, 139 Ill. App. 4.

death resulting from the use of intoxicating liquors and is applicable to pre-existing members.[10] If the intemperate use of intoxicating liquors forfeits the certificate under existing by-laws a subsequently enacted by-law may provide for forfeiture in case of death from said cause applying the same to existing members as well as to future ones where the certificate also provides for the enactment thereafter of amendments to by-laws.[11] But a by-law of fraternal insurance society, which provides that, if any member heretofore or hereafter adopted shall become intemperate in the use of drugs, the benefit certificate held by such member shall, by such acts, become and be absolutely void as to benefits, and all payments made thereon shall be thereby forfeited, does not apply to the case of a member who, prior to the enactment of such by-law, had become intemperate in the use of drugs, and continued so thereafter.[12]

§ 379g. Same subject: accidental injuries: total disability.—Where it appeared that the member of a mutual benefit society, organized to provide for social enjoyments and also pecuniary benefits in case of injury or death from accidental means, had read the constitution which provided for a faithful observance of laws, rules, etc., in force or those "added to this constitution, by-law, and rules," and in taking the obligation of membership necessary to admittance, the member agreed in writing to "abide by" the constitution "as it now is or may be hereafter amended," it was determined that "to observe" and "to abide by" meant "to obey" and "to accept the consequences of" and did not relate merely to disciplinary and social regulations, concerning which no power of amendment was needed, and therefore amendments defining more clearly what accidents were and were not within the benefits of the common fund bound the member.[13]

But a member of a benefit association who receives an injury is entitled to recover under a by-law then in force where such injury is fairly within the intendment of its provisions, although the by-laws were thereafter amended before the injury became permanent or the cause of action complete. The amendment, however, de-

[10] Ury v. Modern Woodmen of America, 149 Iowa, 706, 127 N. W. 665.

As to excepted risks and losses: use of intoxicants, see §§ 2612 et seq. herein.

[11] Curtis v. Modern Woodmen of America, 159 Wis. 303, 150 N. W. 417.

[12] Taylor v. Modern Woodmen of America, 72 Kan. 443, 5 L.R.A. (N.S.) 283, 83 Pac. 1099, s. c. Modern Woodmen of America v. Taylor, 67 Kan. 368, 71 Pac. 806, rev'd because of want of certain allegations and proof, upon second trial peremptory instructions were given to find for defendant and plaintiff brought proceedings in error (5 L.R.A.(N.S.) 283, 72 Kan. 443).

[13] Order of Commercial Travelers of America v. Smith, 192 Fed. 102, 112 C. C. A. 442, 41 Ins. L. J. 779.

fined or made clearer the meaning of the former by-law.[14] And a contract providing for benefits in case of total disability cannot be changed by a by-law thereafter adopted, even though the assured has agreed under the terms of his certificate to observe the rules, etc., of the society.[15] So the liability of an accident association towards its members is held to be fixed by its constitution and by-laws as they exist at the time of issuance of the certificate of membership, and not by those in force at the death of the member, when such constitution does not authorize amendments thereof nor of the by-laws, binding the member to any change in the contract without his consent.[16] Again, if a mutual benefit society issues to a member a certificate of insurance, it cannot, by the subsequent adoption of a by-law, modify or change the contract without the consent of the member. Therefore, if when a certificate is issued, it defines what shall be deemed a total disability, and declares the member to be entitled to a sum specified on the suffering by him of such disability, the society cannot, without his consent, afterward reduce the classes of total disability.[17]

§ 379h. Same subject: deficiency or reserve assessments: delinquent assessments.—A deficiency or reserve assessment with a creation of a lien on policies is authorized under a reserved power in the by-laws and certificate.[18] And under an agreement, made when joining an order to conform to changes thereafter made in the constitution and laws thereof, a member may be assessed under an amended law to make up a deficiency in funds of the order, where rates have been inadequate, when also so authorized by a statutory amendment of the charter of organization.[19] So, where the by-laws provide that amendments subsequently enacted shall be binding upon the member he is obligated by an amendment relieving the association from liability while said member is delinquent in assessments.[20] Again, neither the obligation of a member's contract nor a beneficiary's vested rights are impaired by a repeal of a by-law

[14] Maynard v. Locomotive Engineers' Mutual Life & Accident Ins. Assoc. 16 Utah, 145, 47 Am. St. Rep. 602, 5 Pac. 259, 27 Ins. L. J. 208, s. c. 14 Utah, 458, 47 Pac. 1030, 26 Ins. L. J. 579.

[15] Starling v. Supreme Council Royal Templars of Temperance, 108 Mich. 440, 62 Am. St. Rep. 709, 2 Det. Leg. N. 893, 66 N. W. 340.

[16] Carnes v. Iowa State Traveling Men's Assoc. 106 Iowa, 281, 68 Am. St. Rep. 286, 76 N. W. 283, 28 Ins. L. J. 345.

[17] Starling v. Supreme Council Royal Templars of Temperance, 108 Mich. 440, 62 Am. St. Rep. 709, 66 N. W. 340.

[18] Smith v. Mutual Reserve Fund Life Assoc. 140 Ill. App. 409.

[19] De Graw v. Supreme Court Independent Order Odd Fellows, 182 Mich. 366, 148 N. W. 703.

[20] Elliott v. Home Mutual Hail Assoc. of Cherokee, 160 Iowa, 105, 140 N. W. 431.

and an amendment enacted under a reserved right in the certificate providing for self-executing forfeitures for nonpayment of assessments on a specified day.[1] But even though the articles of association expressly confer upon the directors the power to enact by-laws and the member has agreed to be governed by said articles and by-laws he is not bound by changes in the latter providing for suspension of members delinquent in meeting assessments, where the by-laws when he became a member, were silent as to any such condition.[2]

§ 379i. Same subject: time limitation for suing.—An agreement in the application to conform to thereafter enacted laws and rules is held binding upon a member under an amended by-law providing a time limitation for suing.[3]

§ 379j. Same subject: as to remedies within association.—It is held that where the certificate provided for compliance with conditions in the constitution and laws thereafter enacted a change therein concerning the presentation of claims against the association to tribunals of the society is binding upon a beneficiary even though no such condition existed when insured became a member.[4] It is also held error to charge the jury, in an action for sick benefits, that only the constitution and laws in force when the certificate was issued bound the plaintiff, where there was a defense of non-compliance with the required procedure as to remedies within the society, and there was also an express agreement to comply with changes which might thereafter be adopted in the constitution, laws, etc.[5]

§ 379k. Amendments, changes, or repeal must be reasonable even under reserved power or agreement.[5a]—It is well settled as one of the essentials that an amendment change in or repeal of the constitution or articles of association, by-laws, rules and regulations, must be reasonable to be binding, even though the power to make the

[1] Brown v. Knights of the Protected Ark, 43 Colo. 289, 96 Pac. 450.

[2] Farmers' Mutual Hail Assoc. v. Slattery, 115 Iowa, 410, 88 N. W. 949.

[3] Arold v. Supreme Conclave Improved Order of Heptasophs, 123 Md. 675, 91 Atl. 679.

As to limitation clauses affecting actions, see §§ 3181 et seq. herein.

[4] Monger v. New Era Assoc. 156 Mich. 645, 24 L.R.A.(N.S.) 1027 (annotated on validity of retrospective by-law or other rule of benefit association as to manner of establishing claim), 121 N. W. 823. *Compare* Monger v. New Era Assoc. 171 Mich. 614, 137 N. W. 631, 41 Ins. L. J. 1788.

As to exhausting remedies within association and by-laws excluding resort to civil courts. See §§ 352–352c, 372–372b herein.

[5] Union Fraternal League of Boston v. Johnston, 124 Ga. 902, 53 S. W. 241.

[5a] See §§ 368, 369, 377–380 herein.

same is reserved or is agreed to in the contract of the assured or member with a mutual company, society, association or order.[6]

And although the power to alter a by-law is reserved, that power cannot be exercised to enact unreasonable by-laws, even though the by-law is substantially an enactment of another on the same subject.[7] So, a subsequent amendment must be reasonable and not one which radically departs from the fundamental plan and scheme of insurance and this applies even though the certificate makes the contract subject to the by-laws of the association and amendments thereafter to be made.[8] And a power reserved in general terms in the charter and by-laws does not authorize a material alteration of the contract, but only such amendments as are reasonable, in furtherance of the contract,[9] and consistent with the purpose for which the society was organized.[10] So amendments to the consti-

[6] *United States.*—Lloyd v. Supreme Lodge Knights of Pythias, 98 Fed. 66, 38 C. C. A. 654, 29 Ins. L. J. 744.

Connecticut.—Kane v. Knights of Columbus, 84 Conn. 96, 79 Atl. 63, 40 Ins. L. J. 874.

Illinois.—Scow v. Supreme Council of the Royal League, 223 Ill. 32, 79 N. E. 42; Smith v. Mutual Reserve Fund Life Assoc. 140 Ill. App. 409; Supreme Tent Knights of Maccabees v. Hammers, 81 Ill. App. 560.

Indiana.—Supreme Lodge Knights of Honor v. Bieler, 58 Ind. App. 550, 105 N. E. 244.

Iowa.—Ury v. Modern Woodmen of America, 149 Iowa, 706, 127 N. W. 665.

Kansas.—Knights of Maccabees of the World v. Nelson, 77 Kan. 629, 95 Pac. 1052, 37 Ins. L. J. 986.

Maryland.—Arold v. Supreme Conclave Improved Order of Heptasophs, 123 Md. 675, 91 Atl. 829.

Minnesota.—Rosenstein v. Court of Honor, 122 Minn. 310, 142 N. W. 331; Olson v. Court of Honor, 100 Minn. 117, 8 L.R.A.(N.S.) 521, 117 Am. St. Rep. 676, 10 Am. & Eng. Ann. Cas. 622, 110 N. W. 374; Thibert v. Supreme Lodge Knights of Honor, 78 Minn. 448, 47 L.R.A. 136, 79 Am. St. Rep. 412, 81 N. W. 220.

Missouri.—Claudy v. Royal League, 250 Mo. 92, 168 S. W. 593; Lewine v. Supreme Lodge Knights of Pythias of the World, 122 Mo. App. 821; Smith v. Supreme Lodge Knights of Pythias, 83 Mo. App. 512.

Nebraska.—Lange v. Royal Highlanders, 75 Neb. 188, 121 Am. St. Rep. 786, 10 L.R.A.(N.S.) 666, 110 N. W. 1110; Farmers Mutual Ins. Co. v. Kinney, 64 Neb. 808, 90 N. W. 926.

New Hampshire.—Supreme Council American Legion of Honor v. Adams, 68 N. H. 236, 44 Atl. 380.

New Jersey.—O'Neill v. Supreme Council American Legion of Honor, 70 N. J. L. 410, 57 Atl. 463.

Texas.—Eaton v. International Travelers' Assoc. — Tex. Civ. App. —, 136 S. W. 817; Supreme Ruling of Fraternal Mystic Circle v. Ericson, — Tex. Civ. App. —, 131 S. W. 92.

On reasonableness of new by-laws as implied condition of consent to change of by-laws, see note in 8 L.R.A.(N.S.) 521.

[7] Kent v. Quicksilver Mining Co. 78 N. Y. 159.

[8] Smith v. Supreme Lodge Knights of Pythias, 83 Mo. App. 512.

[9] Parks v. Supreme Circle, Brotherhood of America, 83 N. J. Eq. 131, 89 Atl. 1042.

[10] Claudy v. Royal League, 250 Mo. 92, 168 S. W. 593.

tution and by-laws must be reasonable and within the scope of the original purpose.[11] And a reserved power in the certificate whereby the member agrees to comply with all the laws, rules and regulations thereafter enacted only authorizes reasonable changes in the manner and mode as to details of carrying on the scheme of insurance, and a right to modify any essential feature of the contract is not authorized by such reservation.[12] But amendments within the scope of the original design, and one in which the members generally are alike interested will be upheld.[13] Again, when the exercise of judgment and discretion is vested, either by law or contract, in an individual or governing body, a reservation is implied that it must be exercised in good faith and reasonably. In determining whether it has been so exercised the court will not substitute its judgment for that of the individual or body in whom the discretion has been vested. In such a case, the inquiry is: Does the action under consideration fail to measure up to any fair test of reason? If the facts or circumstances are such that reasonable men may differ as to the wisdom and expediency thereof, the judgment and discretion of those vested with authority to decide must be upheld. It follows that a very clear cause of abuse of discretion must be made out to warrant judicial interference.[14]

Changes or amendments in existing by-laws may be unreasonable and invalid as to those who were members prior to the adoption thereof and who have not consented thereto, although they may be reasonable and valid as to those who became members after the enactment of said laws and who will be deemed to have assented thereto by becoming members.[15]

It is held, however, in a New York case, that in purely voluntary associations the constitution and by-laws constitute the contract and if their provisions are not illegal, immoral or contrary to public policy they will be upheld, whether reasonable or not as parties have the right to enter into unreasonable and unwise contracts, so long as they are not illegal and are fairly made; and therefore the court has nothing to do with the reasonableness or unreasonableness of an amendment to a by-law.[16] But this decision is cited in

[11] Strauss v. Mutual Reserve Fund Life Assoc. 126 N. Car. 971, 54 L.R.A. 605, 36 S. E. 352, 128 N. Car. 465, 39 S. E. 55.

[12] Stirn v. Supreme Lodge of Bohemian Slavonian Benevolent Soc. 150 Wis. 13, 136 N. W. 164, 41 Ins. L. J. 1130.

[13] Mathieu v. Mathieu, 112 Md. 625, 77 Atl. 112, 39 Ins. L. J. 1413.

[14] Clarkson v. Supreme Lodge Knights of Pythias, 99 S. Car. 134, 82 S. E. 1043, per Hydrick, J.

[15] Thibert v. Supreme Lodge Knights of Pythias, 78 Minn. 448, 47 L.R.A. 136, 81 N. W. 220. See this case under § 379n herein. The above statement is also in accord with the cases throughout this chapter.

[16] Maxwell v. Theatrical Mechan-

another case in that state and the court declares and so decides that with respect to reasonableness or unreasonableness of a by-law there is no difference between the rules respecting incorporated or unincorporated societies.[17] And the rights and obligations of a member of a produce exchange, organized for strictly commercial purposes, do not rest upon his contract alone but upon his contract as interpreted by the charter and by laws under which it was made and the corporation may in such case alter the by-laws by any reasonable amendment, that is one which does not impair vested rights.[18]

If the facts are undisputed the question whether a by-law, rule, or regulation is reasonable is one of law for the court.[19]

§ 3791. Reasonable amendments, etc., binding.—We will also state here that, subject to the rules hereinbefore given,[20] a legally enacted, amended by-law which is reasonable will be upheld,[1] and a member of a fraternal beneficiary association who so agrees is bound by subsequent by-laws when they are reasonable.[2] So, where the applicant agrees to conform to and comply with the laws, rules and usages thereafter to be enacted by the society, he is bound where they are reasonable and within the laws of the society.[3] A member will also be held to have assented to amendments which are reasonable and which are within the associations power to make where such power is reserved, fairly advising one applying for membership of the terms of his intended contract.[4] So, an agreement made while a member of a fraternal benefit order to comply with all the laws, rules and requirements thereof obligates him to comply with all reasonable rules and regulations thereafter enacted in the association's interest and this applies to a new law increasing his rate of monthly assessments.[5] It is also determined that if there is reserved in the contract a power of amendment of the laws governing

ical Assoc. 104 N. Y. Supp. 815, 54 Misc. 619. See §§ 368 et seq. herein.

[17] Stanton v. Eccentric Association of Firemen, etc. 114 N. Y. Supp. 480, 130 App. Div. 129.

[18] Parish v. New York Produce Exchange, 169 N. Y. 34, 56 L.R.A. 149, 61 N. E. 977, aff'g 69 N. Y. Supp. 764, 60 App. Div. 11.

[19] Clarkson v. Supreme Lodge, Knights of Pythias, 99 S. Car. 134, 82 S. E. 1043.

[20] See § 379a herein.

[1] Lange v. Royal Highlanders, 75 Neb. 188, 10 L.R.A.(N.S.) 666, 121 Am. St. Rep. 786, 106 N. W. 224.

[2] Theorell v. Supreme Court of Honor, 115 Ill. App. 313. See also Supreme Lodge of Fraternal Union of America, 195 Fed. 903, 115 C. C. A. 591.

[3] Supreme Council American Legion of Honor v. Adams, 68 N. H. 236, 44 Atl. 380.

[4] Green v. Supreme Council of Royal Arcanum, 129 N. Y. Supp. 791, 144 App. Div. 761.

[5] Miller v. National Council Knights & Ladies of Security, 69 Kan. 234, 76 Pac. 830. *Compare* §§ 380c et seq. herein.

such associations, reasonably designating the subjects thereof, so that a person when he makes application for membership is fairly advised that the terms of the contract in which he is about to enter may be altered in the respects thus referred to, subsequent changes in such laws when reasonably made by the proper authorities of the organization are within their power and must be deemed assented to by him.[6] Again, a stipulation of the application to conform to and abide by the constitution, by-laws and regulations of the association thereafter adopted by the proper authorities, constitutes an assent in advance to all reasonable changes properly made therein and an amendment which is intended to effect a modification of the benefit plan or policy of the association, that is within the scope of the original design, and one in which the members generally are alike interested, will be upheld.[7]

As to mutual benefit societies with social and indemnity purposes, if consent to amendment is exacted, it should be attributed to the matter in respect to which consent is necessary and not to those concerning which no reservation of power to amend is needed.[8]

A member of a produce exchange will be bound by reasonable amendments to the laws where the charter amendment and by-laws enacted pursuant thereto as well as the contract among the members must be looked to in determining the member's rights, and where, by the contract, the assessments to which he is liable and the payments to his beneficiaries are to be determined by the by-laws.[9]

§ 379m. When amendments, etc., are reasonable.—An agreement or reservation that the certificate is accepted subject to such laws, rules, and regulations as now exist or may hereafter be adopted is reasonable.[10] An amendment or change is held reasonable: which provides as to classification of members;[11] which alters a system of rates so as to better promote the ability of the order or association to carry out its contracts;[12] which provides for an increase of assessments under an agreement in the certificate or contract to com-

[6] Green v. Supreme Council of Royal Arcanum, 143 N. Y. Supp. 1119, 158 App. Div. 945, 40 Ins. L. J. 414a. *Citing* Beach v. Supreme Tent Knights of Maccabees of the World, 177 N. Y. 100, 69 N. E. 281.

[7] Mathieu v. Mathieu, 112 Md. 625, 77 Atl. 112, 39 Ins. L. J. 1413.

[8] Order of United Commercial Travelers of America v. Smith, 192 Fed. 102, 112 C. C. A. 442, 41 Ins. L. J. 779.

[9] Parish v. New York Produce Exchange, 169 N. Y. 34, 56 L.R.A. 149, 61 N. E. 977.

[10] Nickum v. Grand Lodge Ancient Order United Workmen, 37 Pa. Co. Ct. Rep. 104.

[11] French v. New York Mercantile Exchange, 80 N. Y. Supp. 312, 80 App. Div. 131.

As to power to classify members: discrimination, see § 350b herein.

[12] Kane v. Knights of Columbus,

ply with subsequent enactments;[13] which rerates existing members as well as those becoming members thereafter, where a mutual benefit society under its constitution is empowered to rerate members taken over by it from another society where such members are permitted to retain their certificates, or their rates were lower than those of said receiving association;[14] which provides against liability while a member is in default of the payments of a valid assessment;[15] which defines an injury, to indemnify which the certificate was issued;[16] which enlarges the list of prohibited occupations and includes that of switchman as extrahazardous;[17] which classifies as extrahazardous an occupation which had been classed only as a hazardous risk at the time the certificate was issued, and as such was not then prohibited;[18] which tends to enhance the dignity and influence of a fraternal order as well as diminish the risk of mortality, as where it provides for forfeiture of benefits for engaging, while a member thereof, in the retail liquor business;[19] which makes null and void member's certificates where they engage in prohibited occupations; where the by-laws exclude persons engaged in the sale of intoxicating liquors from becoming members and power was vested in a committee to suspend permanently

84 Conn. 96, 79 Atl. 63, 40 Ins. L. J. 874.

As to amendments or changes increasing assessments or reducing benefits, see §§ 380c et seq. herein.

[13] Supreme Lodge Knights of Honor v. Bieler, 58 Ind. App. 550, 105 N. E. 244.

On the right of mutual insurance company to increase rates, see notes in 7 L.R.A.(N.S.) 1154, 31 L.R.A. (N.S.) 417.

[14] Supreme Ruling of Fraternal Mystic Circle v. Ericson, — Tex. Civ. App. —, 131 S. W. 92 (case where member was held to have consented to change of plan from assessment to one of periodical payments).

[15] Farmers Mutual Ins. Co. v. Kinney, 64 Neb. 808, 90 N. W. 926.

[16] Ross v. Modern Brotherhood of America, 120 Iowa, 692, 95 N. W. 207.

[17] Gilmore v. Knights of Columbus, 77 Conn. 58, 107 Am. St. Rep. 17, 58 Atl. 223, 1 Am. & Eng. Annot. Cas. 715. See House v. Modern Woodmen of America, 165 Iowa, 607, 146 N. W. 817. See § 379d herein.

[18] Norton v. Catholic Order of Foresters, 138 Iowa, 464, 24 L.R.A. (N.S.) 1030 (annotated on validity of retrospective by-law or other rule of benefit association excluding certain class of members from benefits or reducing benefits of that class), 114 N. W. 893.

[19] Grand Lodge Ancient Order United Workmen v. Burns, 84 Conn. 356, 80 Atl. 157, 40 Ins. L. J. 1676. *Citing* State (ex rel. Strang) v. Camden Lodge Ancient Order U. W. 73 N. J. L. 500, 64 Atl. 93; Ellerbe v. Faust, 119 Mo. 653, 25 L.R.A. 149, 25 S. W. 390; State (ex rel. Schrempp) v. Grand Lodge A. O. U. W. 70 Mo. App. 456; Langnecker v. Grand Lodge A. O. U. W. 111 Wis. 279, 55 L.R.A. 185, 87 Am. St. Rep. 860, 87 N. W. 293; Loeffler v. Modern Woodmen of America, 100 Wis. 79, 75 N. W. 1012; Schmidt v. Supreme Tent of Knights of Maccabees of the World, 97 Wis. 528, 73 N. W. 22.

members engaged in prohibited occupations;[20] and an amendment to the constitution which prohibits members from thereafter entering upon the manufacture or sale of intoxicating liquors in the capacity of stockholder, proprietor, agent or employee binds a member whose certificate was issued prior thereto;[1] which limits the amount up to which sick benefits may be received, and increases the amount of death benefits at the same time;[2] which limits the amount of benefits in case of suicide;[3] which limits, or more definitely fixes, the time of expiration of the policy or termination of the risk;[4] and which provides that the beneficiary's not the member's admin-

[20] Brown v. Great Camp of Modern Maccabees, 167 Mich. 123, 132 N. W. 562.

[1] Supreme Lodge of Fraternal Union of America v. Light, 195 Fed. 903, 115 C. C. A. 591. The court per Adams, Civ. J., said: "We think the true rule is this: That a member of a fraternal beneficial organization who accepts membership, subject to such by-laws and rules as the Supreme Lodge may thereafter adopt, is bound by any reasonable legislation thereafter adopted. The following authorities sustain this proposition: Hall v. Western Travelers Accident Assoc. 69 Neb. 601, 96 N. W. 170; Head Camp Pacific Jurisdiction Woodmen of the World v. Woods, 34 Colo. 1, 81 Pac. 261; Court of Honor v. Hutchens, 43 Ind. App. 321, 82 N. E. 89; Union Benevolent Soc. v. Martin, 113 Ky. 25, 67 S. W. 38; Daughtry v. Knights of Pythias, 48 La. Ann. 1203, 55 Am. St. Rep. 310, 20 So. 712; Pain v. Société St. Jean Baptiste, 172 Mass. 319, 70 Am. St. Rep. 287, 52 N. E. 502; Dornes v. Supreme Lodge Knights of Pythias of the World, 75 Miss. 466, 23 So. 191; Supreme Council, American Legion of Honor v. Adams, 68 N. H. 236, 44 Atl. 380; Tisch v. Protected Home Circle, 72 Ohio St. 233, 74 N. E. 188; Chambers v. Supreme Tent Knights of Maccabees, 200 Pa. 244, 86 Am. St. Rep. 716, 49 Atl. 784; Eversberg v. Supreme Tent of Maccabees, 33 Tex. Civ. App. 549, 77 S. W. 246; Fugure v. Mutual Society of St. Joseph, 46 Vt. 362; Loeffler v. Modern Woodmen of America, 100 Wis. 79, 75 N. W. 1012; Supreme Lodge Knights of Pythias v. La Matta, 95 Tenn. 157, 30 L.R.A. 838, 31 S. W. 493; Louisa Moerschbaecher v. Royal League, 188 Ill. 9, 52 L.R.A. 281, 59 N. E. 17; Supreme Commandery of the Knights of the Golden Rule v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332; O'Neill v. Supreme Council, 70 N. J. Law 410, 420, 57 Atl. 463, 1 Ann. Cas. 422."

[2] Berg v. Badenser Understuetzungs Verein von Rochester, 86 N. Y. Supp. 429, 90 App. Div. 474 (change in constitution).

[3] Scow v. Supreme Council of Royal League, 223 Ill. 32, 79 N. E. 42; Streeper v. Mutual Protective League, 186 Ill. App. 535. See also Knights of Maccabees of the World v. Nelson, 77 Kan. 629, 95 Pac. 1052, 37 Ins. L. J. 986, holding that a by-law limiting the amount recoverable in case of suicide is binding when an amendment is enacted under a reserved power to amend or change by-laws or rules. *Compare* cases under § 379n herein.

On subsequent by-law excluding or reducing liability in case of suicide, see notes in 46 L.R.A.(N.S.) 308, and L.R.A.1915D, 1095.

As to adoption of by-law against suicide after contract made, see § 2647 herein.

[4] Flakne v. Minnesota Farmers' Mutual Ins. Co. 105 Minn. 479, 117 N. W. 785.

istrator is entitled to the proceeds of the certificate where the beneficiary dies before the member.[5] And a new by-law is also reasonable which excludes from the lodge meetings those who do not comply therewith, and it binds existing, as well as future, members where such new law creates a compulsory insurance department with certain fixed periodical payments applicable to all, with certain exceptions based on age and disability, and the mode or manner of adopting the same is that prescribed by existing by-laws.[6]

§ 379n. When amendments, etc., are unreasonable.—If a member of a beneficial association is entitled under existing by-laws to a written or printed notice, at a specified time of assessments or levies due, as a prerequisite to suspension and consequent loss of rights in the benefit fund for nonpayment of such assessments, a subsequent change of such by-laws providing that notice shall be at the option of each subordinate lodge, and that no failure on the part of the lodge to give notice, or failure to receive it shall relieve members from the penalty of absolute and unqualified suspension if assessments are not paid, is, as to such member, unreasonable and void as he is thereby virtually deprived of all right to any notice, either directly or indirectly, and the giving of notice is rendered wholly immaterial, especially so where said member is not shown to have had any knowledge of such change, although a newspaper notice of assessments was mailed to him.[7] An amendment or change is also held unreasonable: which increases assessments and dues in violation of pre-existing rights;[8] which is contrary to and renders nugatory the provisions of a statute as to presumption of death from absence;[9] which provides for forfeiture of the certificate of membership for engaging in an occupation in which, prior to said amendment, members had a right to engage, and no notice

[5] O'Brien v. Supreme Council Catholic Benevolent Legion, 80 N. Y. Supp. 776, 81 App. Div. 1, aff'd (mem.) 176 N. Y. 597, 68 N. E. 1120.

[6] Ward v. David & Jonathan Lodge, No. 1,976 Grand United Order of Odd Fellows, 90 Miss. 116, 43 So. 302.

[7] Thibert v. Supreme Lodge Knights of Pythias, 78 Minn. 448, 47 L.R.A. 136, 79 Am. St. Rep. 412, 81 N. W. 220.

As to notice of assessments and dues, see §§ 1320 et seq. herein.

As to assessments and suspension of member, see §§ 1260 et seq. herein.

[8] Wright v. Knights of Maccabees of the World, 95 N. Y. Supp. 996, 48 Misc. 558, 1151, 119 App. Div. 914, s. c. 196 N. Y. 391, 89 N. E. 1078, 39 Ins. L. J. 95.

As to amendments or changes increasing assessment and dues or reducing benefits, see §§ 380c, 380d herein.

[9] Samberg v. Knights of Modern Maccabees, 158 Mich. 568, 133 Am. St. Rep. 396, 16 Det. Leg. N. 677, 123 N. W. 25, 39 Ins. L. J. 34. The amendment was adopted fifteen years after insured became a member, four years after his disappearance, and three years before the beneficiary ceased to pay assessments.

On validity of by-law of mutual benefit society refusing to pay indem-

of said change was provided for, or had by the member;[10] when it impairs the obligation of contract or divests vested rights;[11] which diverts the fund of an association, organized for strictly commercial objects, from the purposes specified in the charter;[12] which voids a designation of a beneficiary made before marriage of a member, but authorizes a re-designation thereafter.[13] Again, an amendment of the by-laws of a mutual fraternal benefit society, limiting the benefit in case of suicide to a certain per cent of the face of the certificate for each year the member has been continuously a member of the society, is unreasonable and void as to existing members, although the right to change its by-laws is reserved by the society.[14] So, a change in by-laws may be unreasonable as to a member where he is afflicted with a disease of such a character as to preclude its application to him.[15]

§ 379o. Amendments or changes must not operate retroactively: reserved right or agreement to amend or change: vested rights.—The rule, outside of any constitutional governing provisions, that a statute will be construed to have a prospective operation only and not to operate retrospectively unless the legislative intent that it shall be retroactive is so clearly expressed that no other meaning can be given to the language used,[16] has been expressly applied in

nity upon presumption of death from seven years' absence, see note in L.R.A.1915B, 793.

[10] Tebo v. Supreme Council of Royal Arcanum, 89 Minn. 3, 93 N. W. 513.

[11] Hines v. Modern Woodmen of America, 41 Okla. 135, 137 Pac. 675; Kane v. Knights of Columbus, 84 Conn. 96, 79 Atl. 63, 40 Ins. L. J. 874. See §§ 380 et seq. herein.

[12] Parish v. New York Produce Exchange, 169 N. Y. 34, 56 L.R.A. 149, 61 N. E. 977, aff'g 69 N. Y. Supp. 764, 60 App. Div. 11.

[13] Mathieu v. Mathieu, 112 Md. 625, 77 Atl. 112, 39 Ins. L. J. 1413.

On retrospective by-law of benefit association in relation to beneficiaries, see note in L.R.A.1915A, 264.

[14] Olson v. Court of Honor, 100 Minn. 117, 8 L.R.A.(N.S.) 521, 117 Am. St. Rep. 676, 10 Am. & Eng. Ann. Cas. 622, 110 N. W. 374. See Smith v. Supreme Lodge Knights of Pythias, 83 Mo. App. 512; Bottjer v. Supreme Council, American Legion of Honor, 79 N. Y. Supp. 684, 78 App. Div. 746. *Compare* cases under § 379n herein.

As to adoption of by-laws against suicide after contract made, see § 2647 herein.

As to suicide amendment and vested rights, see § 2647 herein.

[15] Grossmayer v. District No. 1, Independent Order B'nar B'rith, 70 N. Y. Supp. 393, 34 Misc. 577, aff'd 74 N. Y. Suppl. 1057, 70 App. Div. 90, aff'd (mem.) 174 N. Y. 550, 67 N. E. 1083.

[16] *California.*—Grimes v. Norris, 6 Cal. 621, 65 Am. Dec. 545.

Colorado.—Edelstein v. Carlile, 33 Colo. 54, 78 Pac. 680.

Connecticut.—Lane's Appeal, 57 Conn. 182, 4 L.R.A. 45, 14 Am. St. Rep. 94, 17 Atl. 926; Goshen v. Stonington, 4 Conn. 209, 10 Am. Dec. 121.

District of Columbia.—Brown v. Grand Fountain United Order of True Reformers, 28 App. D. C. 200;

construing by-laws of fraternal beneficiary associations in actions

Ohio National Bank v. Berlin, 26 App. D. C. 218.

Illinois.—Conway v. Cable, 37 Ill. 82, 87 Am. Dec. 240; Bruce v. Schuyler, 4 Gilm. (Ill.) 221, 46 Am. Dec. 447; Brennan v. Electrical Installation Co. 120 Ill. App. 461.

Indiana.—Lewis v. Brackenridge, 1 Blackf. (Ind.) 220, 12 Am. Dec. 228.

Kentucky.—Hess' Administrator, (Morgan) v. Segenfelter, 127 Ky. 348, 14 L.R.A.(N.S.) 1172, 105 S. W. 476, 32 Ky. L. Rep. 225; Lawrence v. Louisville, 96 Ky. 595, 27 L.R.A. 560, 49 Am. St. Rep. 309, 29 S. W. 450.

Maine.—Carr v. Judkins, 102 Me. 506, 67 Atl. 569.

Maryland.—Williams v. Johnson, 30 Md. 500, 96 Am. Dec. 613.

Massachusetts.—City of Haverhill v. City of Marlborough, 187 Mass. 150, 72 N. E. 743; Murphy v. Commonwealth, 172 Mass. 264, 43 L.R.A. 154, 52 N. E. 505.

Minnesota.—Stein v. Hanson, 99 Minn. 387, 109 N. W. 821.

Mississippi.—Givens v. Southern Railroad Co. 94 Miss. 830, 22 L.R.A. (N.S.) 971, 49 So. 180.

New Hampshire.—Leavitt v. Loverin, 64 N. H. 607, 1 L.R.A. 58, 15 Atl. 414.

New Jersey.—Coghlan v. Supreme Conclave Improved Order Heptasophs, 86 N. J. Law 41, 91 Atl. 132.

New York.—Rhodes v. Sperry & Hutchinson Co. 193 N. Y. 223, 34 L.R.A.(N.S.) 1143, 127 Am. St. Rep. 945, 85 N. E. 1097; Laidlaw v. Sage, 158 N. Y. 73, 44 L.R.A. 216, 52 N. E. 679; People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692.

North Carolina.—Lowe v. Harris, 112 N. Car. 472, 22 L.R.A. 379, 17 S. E. 539.

North Dakota.—Adams & Freese Co. v. Kenoyer, 17 N. Dak. 302, 16 L.R.A.(N.S.) 681, 116 N. W. 98; Blakemore v. Cooper, 15 N. Dak. 5, 4 L.R.A.(N.S) 1074, 106 N. W. 56.

Oregon.—Seton v. Hoyt, 34 Ore. 266, 43 L.R.A 634, 75 Am. St. Rep. 641, 55 Pac. 967.

Pennsylvania.—Martin v. Greenwood, 27 Pa. Super. Ct. 245.

Tennessee.—Slover v. Union Bank, 115 Tenn. 347, 1 L.R.A.(N.S.) 528, 89 S. W. 399; Dugger v. Mechanics & Traders Ins. Co. 95 Tenn. 245, 28 L.R.A. 796, 32 S. W. 5.

Vermont.—Richardson v. Cook, 37 Vt. 599, 88 Am. Dec. 622.

West Virginia.—Stewart v. Vandervort, 34 W. Va. 524, 12 L.R.A. 50, 12 S. E. 736; Murdock v. Franklin Ins. Co. 33 W. Va. 407, 7 L.R.A. 572, 10 S. E. 777.

United States.—*Compare* McDougal v. New York Life Ins. Co. 146 Fed. 674, 77 C. C. A. 100; Lamb v. Powder River Live Stock Co. 132 Fed. 634, 65 C. C. A. 570, 67 L.R.A. 558.

Colorado.—British American Assur. Co. v. Colorado Southern Railroad Co. 52 Colo. 589, 41 L.R.A. (N.S.) 1202, 125 Pac. 508.

Georgia.—Washington v. Atlantic Coast Line R. R. Co. 136 Ga. 638, 38 L.R.A.(N.S.) 867, 71 S. E. 1066.

Illinois.—Aultman & Taylor Machinery Co. v. Fish, 120 Ill. App. 314.

Indiana.—Connecticut Mutual Life Ins. Co. v. Talbot, 113 Ind. 373, 3 Am. St. Rep. 655, 14 N. E. 586.

Maine.—Leavitt v. Canadian Pacific R. R. Co. 90 Me. 153, 38 L.R.A. 152, 37 Atl. 886.

Maryland.—Baugher v. Nelson, 9 Gill. (Md.) 299, 52 Am. Dec. 694.

Ohio.—Commissioners of Hamilton County v. Rosche, 50 Ohio St. 103, 19 L.R.A. 584, 40 Am. St. Rep. 653, 33 N. E. 408.

Tennessee.—Shields v. Clifton Hotel Land Co. 94 Tenn. 123, 26 L.R.A. 509, 45 Am. St. Rep. 700, 28 S. W. 668.

Virginia.—Smith v. Northern Neck Mutual Fire Assoc. 112 Va. 192, 38 L.R.A.(N.S.) 1016n, 70 S. E. 482.

in the civil courts in which they have been involved.[17] The same line of reasoning is also followed in an Oregon case and it is there decided that a new law will not be construed as retroactive in operation, unless by its terms it is clearly intended to be so, on the contrary it will be interpreted as operating only on causes or facts which come into existence after its enactment.[18] It is likewise decided in a Federal case that although a member may agree to abide by the constitution, rules, and regulations of the company "as they now are or may be constitutionally changed hereafter," still if there is nothing to indicate that such amendments were intended to have a retrospective operation and no evidence to that effect, but on the contrary the evidence does indicate that they were intended to operate prospectively on policies thereafter to be issued it will be so held in accord with the rule of construction by which statutes are given a prospective operation unless it is manifest that they were intended to operate retrospectively. The court said that there was no reason why the same rule of statutory construction "should not apply to the legislative acts of a private corporation. If it assumes to amend its constitution or by-law, and the amendment is in such form that, if given a retrospective effect, it will alter obligations which the company has assumed by existing contracts, it should be presumed unless there are imperative reasons to the contrary, that it was not intended to have such an effect, but was only intended to prescribe a rule of action for the future."[19] It is also declared that this acknowledged rule of construction has been generally applied to the by-laws and regulations of corporate bodies. But that the courts have frequently held that by-laws of mutual benefit and similar societies, in view of the nature of the associations adopting them and the character of the by-laws themselves, operated upon and controlled the relations of existing members to the society and their right to future benefits, although such laws

Wisconsin.—Seamans v. Carter, 15 Wis. 548, 82 Am. Dec. 696.

[17] Coghlan v. Supreme Conclave Improved Order Heptasophs, 86 N. J. Law 41, 91 Atl. 132; Roxbury Lodge No. 184, Independent Order Odd Fellows v. Hocking, 60 N. J. Law, 439, 64 Am. St. Rep. 536, 38 Atl. 693.

[18] Wist v. Grand Lodge Ancient Order United Workmen, 22 Ore. 271, 29 Am. St. Rep. 603, 29 Pac. 610, *cited* in Norton v. Catholic Order of Foresters, 138 Iowa, 464, 469, 24 L.R.A.(N.S.) 1030n, 114 N. W. 803.

[19] Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 104 Fed. 638, 44 C. C. A. 93, 30 Ins. L. J. 230, case is aff'd in 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. 108, 32 Ins. L. J. 57, where the court said: "This agreement could have no operation upon changes which upon their face indicated that they applied only to policies thereafter to be issued. To cover this case he" (insured) "should have promised to abide by amendments thereafter made, though they were intended to apply only to future policies."

were not expressed in retroactive terms, and that such has generally been held to be the rule where the member has agreed to be bound by such laws as might thereafter be enacted.[20] By-laws or changes are, therefore, not retrospective unless no other meaning can be given and cannot affect the validity of a prior contract not in harmony therewith.[1] And this is so decided even though the member has agreed in his certificate to comply with future-enacted laws, regulations and requirements.[2] So, it is held in Illinois that a by-law enacted after the issuance of a benefit certificate will not be held retroactive as to certificates in force unless the intention that it shall be retroactive is expressly declared or necessarily implied from the language used, and this rule applies even though a member agrees to be bound by thereafter enacted by-laws.[3]

§ 379p. Same subject.—Under a New York decision the insured's right under his original contract cannot be divested by an amendment to the by-laws which is retrospective in its operation, even

[20] Mathieu v. Mathieu, 112 Md. 625, 77 Atl. 112, 39 Ins. L. J. 1413, per Schmucker, J., *citing:*

Connecticut.—Gilmore v. Knights of Columbus, 77 Conn. 58, 107 Am. St. Rep. 17, 58 Atl. 223; Knights of Columbus v. Rowe, 70 Conn. 550, 40 Atl. 551.

Illinois.—Fullenwider v. Supreme Council of Royal League, 180 Ill. 261, 72 Am. St. Rep. 239, 54 N. E. 485.

Indiana.—Supreme Lodge Knights of Pythias v. Knight, 117 Ind. 489, 3 L.R.A. 409, 20 N. E. 479.

Massachusetts.—Pain v. Société St. John Baptiste, 172 Mass. 319, 70 Am. St. Rep. 287, 52 N. E. 502.

New York.—Parish v. New York Produce Exchange, 169 N. Y. 34, 56 L.R.A. 149, 61 N. E. 977.

Tennessee. — Supreme Lodge Knights of Pythias v. LaMalta, 95 Tenn. 157, 30 L.R.A. 838, 31 S. W. 493.

Texas.—Eversberg v. Supreme Tent Knights of Maccabees of the World, 33 Tex. Civ. App. 549, 77 S. W. 246, 29 Cyc. 75n, 55, 82n, 75.

[1] Coghlan v. Supreme Conclave Improved Order Heptasophs, 86 N. J. L. 41, 91 Atl. 132. See also:

United States.—Lloyd v. Supreme Lodge Knights of Pythias, 98 Fed. 66, 38 C. C. A. 654, 29 Ins. L. J. 744.

Georgia.—Ancient Order United Workmen v. Brown, 112 Ga. 595, 37 S. E. 890.

Illinois.—Zeman v. North American Union, 263 Ill. 304, 105 N. E. 22, aff'g 181 Ill. App. 551; Haley v. Supreme Court of Honor, 139 Ill. App. 478; Cigar Makers International Union of America v. Huecker, 123 Ill. App. 336.

Minnesota.—Ruder v. National Council Knights & Ladies of Security, 124 Minn. 431, 145 N. W. 118.

Mississippi.—Grant v. Independent Order Sons Daughters of Jacob, 97 Miss. 182, 52 So. 698.

New York.—Bottjer v. Supreme Council American Legion of Honor, 79 N. Y. Supp. 681, 78 App. Div. 746; Spencer v. Grand Lodge Ancient Order United Workmen, 48 N. Y. Supp. 590, 22 Misc. 147, aff'd 65 N. Y. Supp. 1146, 53 App. Div. 727.

[2] Ancient Order United Workmen v. Brown, 112 Ga. 545, 37 S. E. 890.

[3] Marshall v. Modern American Fraternal Order, 184 Ill. App. 231.

On effect of adoption of by-laws by fraternal insurance order upon benefit certificates already issued, see note in 1 L.R.A.(N.S.) 1065.

though he agrees to comply with by-laws thereafter enacted.[4] So, amendments made under a reserved power or agreement, apply to prior contracts to the extent only that the conditions imposed arise after the enactment and do not repudiate vested rights of existing obligations, and such changes should not operate retroactively.[5] And an amendment of the charter will not have a retroactive effect where such intent, or an intention to acquiesce, does not appear.[6] So, amendments to the constitution which imply a prospective operation upon pre-existing policies are not retroactive and do not apply to policies already issued.[7] An amended by-law is also prospective only and not retroactive where it does not expressly apply to existing contracts even though the application provides that the constitution and by-laws then existing or thereafter adopted shall form part of the certificate issued thereon.[8] It is further decided that an agreement in an application for a policy of insurance issued on the assessment plan, to abide by the constitution, rules, and regulations of the company, as they then were or might be constitutionally changed thereafter, does not amount to a consent to such changes which on their face indicated they applied only to policies thereafter to be issued.[9] And if a mutual benefit society issues to a member a certificate of insurance, it cannot, by the subsequent adoption of a by-law, modify or change the contract without the member's consent,[10] nor can by-laws be validly enacted which are retroactive and ex post facto.[11] Again, a by-law which acts retrospectively impairs the obligation of contract of a member and the provisions of such by-law constitute no defense to an action on the certificate even though it and the application obligated the member as to future or amended by-laws.[12]

[4] Shipman v. Protected Home Circle, 73 N. Y. Supp. 594, 66 App. Div. 448. Judgment *modified* in Shipman v. Protected Home Circle, 174 N. Y. 398, 63 L.R.A. 347, 67 N. E. 83.

[5] Lloyd v. Supreme Lodge Knights of Pythias, 98 Fed. 66, 38 C. C. A. 654, 29 Ins. L. J. 744.

[6] Brown v. United Order True Reformers, 28 App. D. C. 200.

[7] Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. 108, 32 Ins. L. J. 57, aff'g 104 Fed. 638, 44 C. C. A. 93, 30 Ins. L. J. 230; Jarman v. Knights Templars' & Masons' Life Indemnity Co. (U. S. C. C.) 95 Fed. 70.

[8] Hadley v. Queen City Camp No. 27, Woodmen of the World, 1 Tenn. Ch. App. 413.

[9] Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. 108, 32 Ins. L. J. 57, s. c. 104 Fed. 638, 44 C. C. A. 93, 30 Ins. L. J. 230.

[10] Starling v. Supreme Council Royal Templars of Temperance, 108 Mich. 440, 82 Am. St. Rep. 709, 66 N. W. 340.

[11] Kent v. Quicksilver Mining Co. 78 N. Y. 159; Pulford v. Fire Department, 31 Mich. 458; Angell & Ames on Corporations (9th ed.) sec. 339 et seq.

[12] Zimmerman Jr. v. Supreme Tent

§ 379q. Same subject: instances.—By-laws are not retroactive which prohibit the designation of beneficiaries without an insurable interest where such a beneficiary has been legally designated, and this applies even though assured has agreed to abide by thereafter enacted by-laws.[13] So, a by-law authorizing a change of beneficiaries has no retroactive effect.[14] Nor are amendments retroactive which exclude as risks certain hazardous occupations.[15] And an amended by-law which in form and terms is present and future and not intended to be retroactive will be held to be prospective merely and so not applicable to a contract with a mutual benefit association, under a by-law, for benefits in case of certain injuries resulting from accident, made prior to such amendment, especially so when the changed by-law by fair intendment simply makes clearer the true meaning of the former law.[16] Again, a subsequently enacted by-law limiting liability in case a member dies by suicide, alcoholism, etc., is not retroactive and cannot affect rights acquired under the contract,[17] A subsequently enacted by-law limiting the time for suing is also invalid as to pre-existing certificates.[18]

But amendments with conditions precedent as to reinstatement do not apply to existing certificates in the absence of a reserved right to amend under the articles of association, by-laws or certificate.[19] And it is held that an agreement in the application to be bound by thereafter enacted by-laws is held binding although its terms are not retroactive.[20] Again, a change in by-laws may be retroactive

of the Knights of Maccabees of the World, 122 Mo. App. 591, 99 S. W. 817.

[13] Grant v. Independent Order of Sons & Daughters of Jacob, 97 Miss. 182, 52 So. 698; see Ancient Order of United Workmen v. Brown, 112 Ga. 545, 37 S. E. 890.

[14] Pittinger v. Pittinger, 28 Colo. 308, 89 Am. St. Rep. 193, 64 Pac. 195.

On retrospective by-law of benefit association in relation to beneficiaries, see note in L.R.A.1915A, 264.

[15] Haley v. Supreme Court of Honor, 139 Ill. App. 478. See § 379d herein.

[16] Maynard v. Locomotive Engineers Mutual Life & Accident Ins. Assoc. 16 Utah, 145, 47 Am. St. Rep. 602, 51 Pac. 259, 27 Ins. L. J. 208, s. c. 14 Utah, 458, 47 Pac. 1030, 26 Ins. L. J. 579.

[17] Bottjer v. Supreme Council American Legion of Honor, 79 N. Y. Supp. 684, 70 App. Div. 746.

As to retroactive effect of resolution or by-law of mutual insurance company changing period during which policy may be contested for suicide, see note 12 L.R.A.(N.S.) 504.

On subsequent by-law excluding or reducing liability in case of suicide, see notes in 46 L.R.A.(N.S.) 308, and L.R.A.1915D, 1095.

[18] Attorney General v. Supreme Council American Legion of Honor, 196 Mass. 151, 81 N. E. 966.

[19] McNeil v. Southern Tier Masonic Relief Assoc. 58 N. Y. Supp. 119, 40 App. Div. 581.

[20] Arold v. Supreme Conclave Improved Order of Heptasophs, 123 Md. 675, 91 Atl. 829.

as to a member where he is afflicted with a disease of such a character as to preclude its application to him.[1]

§ 380. Change of by-laws, etc.: vested right.—It is the rule that by-laws cannot disturb a vested right;[2] but members may assent to a by-law which would not bind strangers or nondissenting members, and such by-law would be good as a contract as to assenting parties.[3]

But what constitutes a vested right is a question upon which the courts differ. Supposing the contingency has arisen which the contract provides against, and upon the happening of which the benefit is to accrue or the loss to be paid. The contract is to be interpreted like one of insurance, and it would reasonably seem that a power to abrogate the provision of the agreement would not exist, for the express terms of a contract of insurance cannot be changed by a by-law without the consent of the insured.[4] So where a provision of the charter and a by-law of an insurance company constitute part of a contract of insurance, it is held that their alteration without the consent of the insured cannot affect the contract.[5] Again, it is decided that a by-law cannot be amended, after the right to benefits has accrued, so as to reduce the amount it would otherwise be obligated to pay.[6]

There are decisions, however, which not only hold that where a member has no vested right in a fund the society may change the disposition of the fund,[7] but also that a by-law in existence when a member claims relief, and not the one in existence at the time he

[1] Grossmayer v. District No. 1, Independent Order B'nai B'rith, 34 Misc. 577, 70 N. Y. Supp. 393, 74 N. Y. Supp. 1057, 70 App. Div. 90, 174 N. Y. 550, 67 N. E. 1083.

[2] Morrison v. Wisconsin Odd Fellows' Mutual Life Ins. Co. 59 Wis. 162, 18 N. W. 13. But see Fugure v. Mutual Society of St. Joseph, 49 Vt. 362. See next following sections herein.

[3] Stetson v. Kempton, 13 Mass. 282. "What may be bad as a by-law as against common right may be good as a contract:" Angell & Ames on Corporations (9th ed.) sec. 342.

[4] Great Falls Mutual Fire Ins. Co. v. Harvey, 45 N. H. 292; Becker v. Farmers' Mutual Ins. Co. 48 Mich. 610, 12 N. W. 874; Gundlach v. Germania Mechanics' Ass'n, 49 How. Pr. (N. Y.) 190; Morrison v. Wisconsin Odd Fellows' Mutual Life Ins. Co. 59 Wis. 162, 18 N. W. 13. *Examine* Reynolds v. Supreme Council Royal Arcanum, 192 Mass. 150, 7 L.R.A. (N.S.) 1154, 7 Am. & Eng. Ann. Cas. 776, 78 N. E. 129; Connor v. Supreme Commandery Golden Cross, 117 Tenn. 549, 97 S. W. 306; Hicks v. Northwestern Aid Association, 117 Tenn. 203, 96 S. W. 262.

[5] Morrison v. Wisconsin Odd Fellows' Mutual Life Ins. Co. 59 Wis. 162, 18 N. W. 13.

[6] Becker v. Berlin Benefit Soc. 144 Pa. St. 232, 27 Am. St. Rep. 624, 22 Atl. 699. See § 379 herein.

On right of mutual benefit society to decrease benefits, see note in 31 L.R.A.(N.S.) 423.

[7] Torrey v. Baker, 1 Allen (83 Mass.) 120. *Compare* § 379 herein.

became a member, is the one under which he is entitled, as the society has the right to amend such a by-law.[8] It is further held that if a member has deceased, the society may amend its by-laws limiting the amount of recovery to which his widow would have been entitled before the alteration.[9] So, in a California case [10] it is decided that a by-law limiting the amount of recovery, enacted after the right to claim relief has accrued, does not impair vested rights, since it is not retroactive. The commissioner's opinion adopted by the court is as follows: "It is contended for the respondent that the by-law giving a right to benefits constituted a contract, which could not be changed, and the question presented is, whether the defendant had power to change said by-law in the way it did. Undoubtedly, when the plaintiff complied with what was required of him as a member, the by-laws constituted a contract; and unless the contract itself otherwise provided, it could not be changed without the consent of all the parties. But here the contract itself does provide otherwise; . . . . there is an express provision that the by-laws may be changed; . . . . the law provides that the by-laws may be changed. This provision must be held to enter into and form a part of the contract. . . . . In view of this power to alter the contract, it cannot be said that the defendant could not alter its by-laws in any respect. The respondent argues, however, that it had no power to alter them so as to impair a vested right. This must be conceded, but we do not think that the new by-law purported to impair a vested right. The term 'vested right' is often loosely used. In one sense every right is vested. If a man has a right at all, it must be vested in him; otherwise, how could it be a right? The moment a contract is made, a right is vested in each party to have it remain unaltered and to have it performed. The term, however, is frequently used to designate a right which has become so fixed that it is not subject to be divested without the consent of the owner, as contradistinguished from rights which are subject to be divested without his consent. Now, a right, whether it be of such a fixed character or not, must be a right to something; and when a man talks vaguely of his vested right, it conduces to clearness to ask: 'A vested right to what?' In the present case the plaintiff can have no right to have the contract remain unchanged, because, as we have seen, the contract itself provides that it may be changed. Nor has he a right to remain unaffected by any change

[8] St. Patrick's Male Ben. Soc. v. McVey, 92 Pa. St. 510.

[9] Fugure v. Mutual Society of St. Joseph, 46 Vt. 362. *Compare* § 379 herein.

[10] Stohr v. San Francisco Musical Fund Soc. 82 Cal. 557, 22 Pac. 1125.

that may be made; for if such right be common to all the members, it is merely another way of saying that no change can be made, and if the right be not common to the other members, it would be to assert a privilege or superiority over them, of which there is no pretense. If the plaintiff has any right which is so fixed that it is not subject to change, we think it can only be to the fruits which ripened before the change was made; in order words, to such sums as became due before the new by-law was adopted. To express it differently, the change could not be retroactive. This is all that we think can be meant by 'vested right,' in a case like the present. Now, under the contract, nothing was due before the sickness actually took place. Benefits do not accrue for future sickness. The right of the plaintiff to benefits for future sickness is not different in its nature from the right of the well members to benefits for future sickness. In the one case the members have a right to future payment in case they become sick; in the other, the plaintiff has a right to future payments in case he continues sick, and if there was no power to change the by-law in the one case, there was no power to change it in the other; which is equivalent to saying that there was no power to change it at all. The cases where a specific sum becomes due upon the happening of a certain event, as upon death, are not like the present. In such cases an alteration in the contract cannot be made after the fact; for that would be to make that not due which had already become due. It might, perhaps, be argued that the foregoing would apply if the by-law under consideration had specified that the weekly payments were to continue as long as the sickness continued. But it does not so specify. The time during which the payments were to continue is left indefinite. The substance of the contract is, in our opinion, that, in case of sickness, the member is to receive weekly payments for an indefinite period of sickness, subject to the power of the defendant to change the provision authorizing such payments, so far as future payments are concerned." So in New York, articles of association which provide for the payment to widows of a certain sum a month may be amended so as to change the amount of benefits, but such change is not retroactive, and the beneficiary will be entitled to the benefits under the original provision.[11] So a society may limit the payments of benefits until there shall be a certain sum in the treasury by a by-law enacted after the party claiming to be entitled to benefits had become a member.[12]

[11] Gundlach v. Germania Mechanics' Assoc. 4 Hun (N. Y.) 341. See McVey, 92 Pa. St. 510. §§ 379o, 380a et seq. herein.

[12] St. Patrick's Male Ben. Soc. v.

§ 380a. Same subject.—The rule undoubtedly is that vested rights cannot be divested or the obligation of contracts be impaired by amendments, changes, or repeal of the articles of association, constitution, by-laws, rules, and regulations of companies, associations or orders of the nature or character here under consideration. And this rule applies notwithstanding a reserved right or agreement in the contract that such amendments, changes or repeal may be made. The application of this rule has however, been the subject of much discussion covering the vexed question of what, as stated in the last preceding section, constitutes a vested right, and also the construction of the terms of such a reserved power or agreement and the extent to which it applies.[13] The words of the court in a Federal case are pertinent. They are: "I dissent entirely from all the cases holding that the terms and obligations of a contract of insurance between one of these fraternal corporations and one of its members can in any manner be changed by an amendment to its constitution or by-laws, unless the power is specified in and granted by the law creating the corporation, under a general consent in the contract to be bound by all by-laws then in existence or that may thereafter be adopted."[14] It is also declared in a Connecticut case that a reserved power of amendment or repeal and an agreement with the members of a fraternal benefit society does not authorize an adoption of a by-law which divests, impairs, or disturbs vested rights as such a by-law would be unreasonable, as existing or future enacted by-laws should carry out the purposes of the order or help fulfil its contract obligations.[15] So, under an Illinois decision the law does not undertake to make or modify

[13] Schack v. Supreme Lodge of the Fraternal Brotherhood, 9 Cal. App. 584, 99 Pac. 989 (cannot impair contract rights without members' consent although contract conditioned for compliance with subsequently enacted by-laws); Mathieu v. Mathieu, 112 Md. 625, 77 Atl. 112, 39 Ins. L. J. 1413 (vested rights must not be impaired); Supreme Lodge Knights of Pythias v. Stein, 75 Miss. 107, 65 Am. St. Rep. 589, 37 L.R.A. 775, 21 So. 559 (a condition adopted by a beneficial association after issuing a certificate of insurance cannot affect right of the holder of such certificate); Parks v. Supreme Circle Brotherhood of America, 83 N. J. Eq. 131, 89 Atl. 1042 (power to amend does not authorize material changes violating contract rights but only such as are in aid of contract); Hines v. Modern Woodmen of America, 41 Okla. 135, L.R.A.1915A, 264, 137 Pac. 675 (an amendment cannot impair the obligation of contract or impair vested rights).

As to change of beneficiary: vested interest, see §§ 730, 731–743, 881 herein.

[14] Smythe v. Supreme Lodge Knights of Pythias (U. S. D. C.) 198 Fed. 967, 990, per Ray, Dist. J., case aff'd in Smythe v. Supreme Lodge Knights of Pythias, 220 Fed. 438, 137 C. C. A. 32.

[15] Kane v. Knights of Columbus, 84 Conn. 96, 79 Atl. 63, 40 Ins. L. J. 874.

contracts, whether relating to insurance or to some other subject, but it enforces contracts as the parties themselves have made them and there is no presumption that a member of a benefit association contemplated a change in the terms of his contract, although he is presumed to have contemplated such by-laws as are passed for the purpose of regulating the business and general affairs of the association.[16] And the existing constitution and by-laws and not subsequent changes therein depriving the member of his contract rights, are within a provision in the certificate requiring compliance with the constitution and by-laws a copy of which is attached to the certificate, and this applies even though the constitution provides for amendment.[17] In Iowa an insurance company has no power to change any contract rights without the consent of the members or policy holders and cannot, therefore, by amendment of its by-laws introduce new terms and conditions into the original contract which will have such an effect even though insured agrees to be governed by the articles of incorporation and rules, in force when the policy is issued or which might thereafter be made by the association and the amendment is not of the articles or rules but of the by-laws.[18] And a constitutional provision giving the right to amend the instrument by a certain vote at any time and a requirement of the certificate that insured comply with the constitution and by-laws does not constitute an assent to an amendment divesting contract rights, but only designates the manner of exercising the power granted.[19] It is decided, however, in that state that where a member's contract requires compliance with by-laws then in force or thereafter enacted he and his beneficiary became thereby obligated by a subsequently properly adopted by-law especially so when under the general power of the association to make contracts for death benefits the power exists to insert certain clauses for forfeiture when such clause was authorized by a by-law regularly adopted.[20] In New Jersey a subsequently enacted by-law, which by its terms is prospective in its operation and which is not in aid of a pre-existing

[16] Covenant Mutual Life Assoc. v. Kentner, 188 Ill. 431, 440, 58 N. E. 966.

[17] Peterson v. Gibson, 191 Ill. 365, 54 L.R.A. 836, 61 N. E. 127.

[18] Jordan v. Iowa Mutual Tornado Ins. Co. 151 Iowa, 73, Ann. Cas. 1913A, 266, 130 N. W. 177, 40 Ins. L. J. 1065. See also Wasson v. American Patriots, 148 Iowa, 142, 126 N. W. 778. Fort v. Iowa Legion of Honor, 146 Iowa, 183, 123 N. W. 224, 39 Ins. L. J. 3, *quoted* from under § 380c herein. *Examine* Seiverts v. National Benev. Assoc. 95 Iowa, 710, 64 N. W. 601.

[19] Peterson v. Gibson, 191 Ill. 365, 54 L.R.A. 836, 61 N. E. 127.

[20] Pold v. North American Union, 261 Ill. 433, 104 N. E. 4, aff'g 180 Ill. App. 448. *Examine* Norton v. Catholic Order of Forresters, 138 Iowa, 464, 24 L.R.A.(N.S.) 1030n, 114 N. W. 893. *Considered* under § 380b herein.

contract, cannot impair or avoid it even though there is an agreement in the application or certificate to comply with future enacted laws, etc.[1] It is said in a New York case that: "Much has been written in various jurisdictions upon the subject of amendments to by-laws, but we shall confine our review to our own decisions, which we regard as conclusive in principle. They show determined and consistent progression. More than thirty years ago it was held by this court, in a carefully considered case, that, even when the power to amend is reserved by the charter of a business corporation, a by-law could not be repealed so as to impair rights which had been given and had become vested by virtue of such by-law." [2] It is also further declared and so held in that state that it is well established by the authorities therein,[3] " 'that a general power reserved either by statute or by the constitution of a society to amend its by-laws does not authorize an amendment impairing the vested rights of members.' An amendment of by-laws which form part of a contract is an amendment of the contract itself, and, when such a power is reserved in general terms, the parties do not mean, as the courts hold, that the contract is subject to change in any essential particular at the election of the one in whose favor the reservation is made. It would be not reasonable and hence not within their contemplation, at least in the absence of stipulations clearly specifying the subjects to be affected, that one party should have the right to make a radical change in the contract, or one that would reduce its pecuniary value to the other. A contract which authorizes one party to change it in any respect that he chooses would in effect be binding upon the other party only and would leave him at the mercy of the former, and we have said that human language is not strong enough to place a person in that

[1] Sautter v. Supreme Conclave Improved Order of Heptasophs, 72 N. J. L. 325, 71 Atl. 232. *Cited* in Fort v. Iowa Legion of Honor, 146 Iowa, 183, 123 N. W. 224, 39 Ins. L. J. 3.

[2] Wright v. Knights of Maccabees of the World, 196 N. Y. 391, 31 L.R.A.(N.S.) 423, 89 N. E. 1078, 39 Ins. L. J. 95, *citing* Kent v. Quicksilver Mining Co. 78 N. Y. 159, 182.

[3] *Citing:* Evans v. Southern Tier Masonic Relief Assoc. 182 N. Y. 453, 75 N. E. 317; Beach v. Supreme Tent, Knights of Maccabees of the World, 177 N. Y. 100, 69 N. E. 281; Shipman v. Protected Home Circle, 174 N. Y. 398, 63 L.R.A. 347, 67 N. E. 83; Langan v. Supreme Council American Legion of Honor, 174 N. Y. 266, 269, 66 N. E. 932; Weber v. Supreme Tent, Knights of Maccabees of the World, 172 N. Y. 490, 65 N. E. 258; Deuble v. Grand Lodge Ancient Order United Workmen, 72 N. Y. Supp. 755, 66 App. Div. 323, 327, aff'd 172 N. Y. 665, 65 N. E. 1116; Parish v. New York Produce Exchange, 169 N. Y. 34, 48, 56 L.R.A. 149, 61 N. E. 977; Englehardt v. Fifth Ward Permanent Dime & Savings Loan Assoc. 148 N. Y. 281, 297, 35 L.R.A. 289n, 42 N. E. 710; Matthews v. Associated Press of New York, 136 N. Y. 333, 342, 32 N. E. 981; Kent v. Quicksilver Mining Co. 78 N. Y. 159.

situation.[4] While the defendant may doubtless so amend its by-laws, for instance, as to make reasonable changes in the methods of administration, the manner of conducting its business, and the like, no change can be made which will deprive a member of a substantial right conferred expressly or impliedly by the contract itself. That is beyond the power of the legislature as well as the association, for the obligation of every contract is protected from state interference by the Federal Constitution." [5] So, under another decision in the same state a member's acquired rights under his contract, consisting of the charter and by-laws, cannot be taken away by a subsequent amendment of the by-laws, especially so as to by-laws which are inconsistent with the charter.[6] And an amendment of laws enacted under an illegally adopted and invalid amendment cannot operate to divest a member of his contract rights.[7] In North Carolina although a power is reserved in the policy to change the by-laws it does not permit the corporation to change at will its contract with its members; [8] nor can the value of a member's contract be destroyed by a mere general consent that the constitution and by-laws may be amended.[9] In Oregon a right to alter, amend or repeal the laws of a mutual benefit society, exercised under an agreement in the application does not authorize a repudiation of obligations or work a forfeiture of rights previously granted to its members.[10] And in Wisconsin a stipulation in a certificate that a member shall be bound by future amendments to laws, etc., does not authorize a substantial change abrogating the existing contract.[11] But notwithstanding these decisions it is held that an

[4] *Citing* Industrial & General Trust, Ltd. v. Tod, 180 N. Y. 215, 225, 73 N. E. 7.

[5] Ayres v. Ancient Order of United Workmen, 188 N. Y. 280, 80 N. E. 220, 36 Ins. L. J. 891, per Vann, J., aff'g 95 N. Y. Supp. 1112, 109 App. Div. 919 (U. S. Const. art. 1, sec. 10) *quoted* in Fort v. Iowa Legion of Honor, 146 Iowa, 183, 123 N. W. 224, 39 Ins. L. J. 3.

[6] Sinclair v. Fitzpatrick, 78 Misc. 60, 138 N. Y. Supp. 272, 42 Ins. L. J. 227 (case of right to designate beneficiaries). *Citing:* Wright v. Knights of Maccabees of the World, 196 N. Y. 391, 31 L.R.A.(N.S.) 423, 134 Am. St. Rep. 838, 89 N. E. 1078, 39 Ins. L. J. 95; Roberts v. Cohen, 70 N. Y. Supp. 57, 60 App. Div. 259; Spencer v. Grand Lodge Ancient Order United Workmen, 48 N. Y. Supp. 590, 22 Misc. 147.

[7] Deuble v. Grand Lodge Ancient Order of United Workmen, 72 N. Y. Supp. 755, 66 App. Div. 323, aff'd 172 N. Y. 665, 65 N. E. 1116.

[8] Bragaw v. Supreme Lodge, Knights & Ladies of Honor, 128 N. Car. 354, 54 L.R.A. 602, 38 S. E. 905.

[9] Strauss v. Mutual Reserve Fund Life Assoc. 126 N. Car. 971, 54 L.R.A. 605, 36 S. E. 352, 128 N. Car. 465, 39 S. E. 55.

[10] Wist v. Grand Lodge Ancient Order of United Workmen, 22 Ore. 271, 29 Am. St. Rep. 603, 29 Pac. 610.

[11] Curtis v. Modern Woodmen of America, 159 Wis. 303, 150 N. W. 417.

amendment does not impair the obligation of contracts where compliance with future enacted laws, etc. is required by the certificate;[12] and a certificate of a fraternal beneficiary association is held not to confer vested rights and that where a certificate in a fraternal beneficiary association creates no vested interest it may be validly agreed that the terms thereof, may be changed;[13] and that the contract or vested rights of a member of a mutual benefit society who has agreed to be bound by future by-laws are not impaired by a by-law requiring that all claims against the society must be submitted for adjustment to the tribunals established within the association.[14]

§ 380b. Same subject: instances.—Trustees cannot exceed their powers in adopting by-laws which affect prior contracts with members by materially changing such by-laws.[15] And members cannot be deprived of vested rights in a reserve fund by an amendment which in effect makes an essentially new contract by changing an absolute and definite one.[16] Nor, under an English decision, can a company alter their regulations so as to abrogate the contract rights of a policy-holder to have the entire profits of the mutual life assurance department divided among those holding policies therein, where the company was registered with unlimited liability under the companies act prior to assured's application for a policy, and he was influenced so to do by the terms of a prospectus guaranteeing such division of profits without deductions, which was referred to as a part of the policy.[17] And amendments of by-laws are invalid which defeat the fundamental purpose of benefits or which are opposed to public policy, or which are vexatious.[18] Nor can a member be deprived of his right to sick benefits without his consent by an amendment of by-laws.[19] And where changes in the articles of association are not

[12] Fraternal Union of America v. Zeigler, 145 Ala. 287, 39 So. 751.

[13] Claudy v. Royal League, 250 Mo. 92, 168 S. W. 593.

[14] Monger v. New Era Assoc. 156 Mich. 645, 24 L.R.A.(N.S.) 1027 (annotated on validity of retrospective by-law or other rule of benefit association as to manner of establishing claim) 121 N. W. 823. See Monger v. New Era Assoc. 171 Mich. 614, 137 N. W. 631, 41 Ins. L. J. 1788. See §§ 352–352c, 372–372b herein.

When company, society or association can change plan of insurance: Impairment of obligation of contract, see § 350m herein.

[15] Guthrie v. Supreme Tent Knights of Maccabees of the World, 4 Cal. App. 184, 87 Pac. 405.

[16] Farmers Loan & Trust Co. v. Aberle, 41 N. Y. Supp. 633, 18 Misc. 257, case modified 46 N. Y. Supp. 10, 19 App. Div. 79.

[17] Bally v. British Equitable Assur. Co. [1904] L. R. Ch. Div. 374.

[18] Chicago, Burlington & Quincy Ry. Co. v. Hendricks, 125 Ill. App. 580.

[19] Zinna v. Saveria Friscia Soc. 88 N. Y. Supp. 404.

made in the manner expressly provided therefor they cannot operate to deprive a member of his contract right to sick benefits.[20] Nor can restrictions as to liability for accidental injury, which are not in the certificate, be imposed by a new law so as to impair a member's contract.[1] So, where a member is entitled to benefits for an injury he cannot be deprived thereof by amendments to the constitution adopted after said injury is sustained.[2] Again, the adoption of a new article of incorporation by a mutual benefit association, making certificates void where the holders engage in extra-hazardous occupations, does not become part of the contract with a member to whom a certificate had been previously issued, or destroy a right which he previously had to change his occupation without making his certificate void.[3] But an amendment made under a contract in which assured agrees to be bound by the laws, rules, and regulations then in force or thereafter to be enacted, does not deprive him of any vested right by a subsequent classification of a risk as extra-hazardous, which risk was only classed as an extra-hazardous one when the certificate was issued and was not then prohibited, nor is such an amendment unreasonable when applied to switchmen in railroad yards although brakemen who also do switching, are not excluded, especially so where said change was made while insured was still a brakeman, and after the occupation of switchman was placed in the prohibited class he voluntarily engaged therein.[4] Again, a member holding an endowment certificate in

[20] Mutual Aid & Instruction Soc. v. Monti, 59 N. J. L. 341, 36 Atl. 666.

[1] Young v. Railway Mail Assoc. 126 Mo. App. 325, 103 S. W. 557. See Order of United Commercial Travelers of America v. Smith, 192 Fed. 102, 112 C. C. A. 442, *distinguished* and held not in point in Smythe v. Supreme Lodge Knights of Pythias, 198 Fed. 967, 987 and held not in point.

[2] Brotherhood of Painters, Decorators & Paperhangers v. Moore, 36 Ind. App. 580, 76 N. E. 262.

[3] Hobbs v. Iowa Mutual Benefit Assoc. 82 Iowa, 107, 11 L.R.A. 299, 31 Am. St. Rep. 466, 47 N. W. 983.

[4] Norton v. Catholic Order of Foresters, 138 Iowa, 464, 24 L.R.A. (N.S.) 1030n, 114 N. W. 893. The court, per Sherwin, J., said: "We are of the opinion that no vested right was impaired, and that he was bound by the change. Hobbs v. Iowa Mutual Benefit Assoc. 82 Iowa, 107, 31 Am. St. Rep. 466, 11 L.R.A. 299, 47 N. W. 983; Ross v. Brotherhood of America, 120 Iowa, 692; Gilmore v. Knights of Columbus, 77 Conn. 58, 107 Am. St. Rep. 17, 58 Atl. 223. In Parish v. New York Produce Exchange, 169 N. Y. 34, 56 L.R.A. 149, 61 N. E. 977, relied upon by appellants, it is held that a reasonable change in by-laws may be made, but not so as to destroy vested rights or make a new contract. There was no agreement for a change in that case, and the rule announced is undoubtedly correct. In Tebo v. Supreme Council of Royal Arcanum, 89 Minn. 3, 93 N. W. 513, it was held, that a change in the by-laws without actual notice to the insured was unreasonable and void. No other point was decided. Olson v. Court of Honor, 100 Minn. 117, 8 L.R.A.(N.S.)

a fraternal order is not, even though he has agreed to be governed by thereafter enacted by-laws, bound by a by-law enacted without his knowledge or consent, imposing a condition of forfeiture for engaging in active military service, it also appearing that the corporation before its charter expired, obtained, without assured's knowledge, a special charter from Congress and the old company's assets and obligations including said member's certificate were transferred to the re-incorporated company and dues were paid on such certificate until the member died.[5] Nor can the pre-existing contract rights of a member under the laws of the order concerning his occupation or business of selling liquor be arbitrarily destroyed by a forfeiture amendment.[6] And a member cannot be deprived of his rights under his certificate, and in the benefit fund, by the adoption of a by-law, the terms of which do not apply to him; as where it prohibits engaging in a certain business thereafter and the member had before its adoption and subsequently thereto been engaged therein continuously.[7] Nor can a member be deprived of such rights even though a by-law prohibits indulging in intemperate habits before its adoption or thereafter, where, prior to the enactment of such by-law he had been addicted to such habits and continued so thereafter.[8] And vested rights must not be impaired by a reduction of the certificate amount in case of death from intoxicating liquors even though there is a policy agreement to comply with thereafter enacted by-laws.[9] And a time limitation for suing cannot be imposed by a subsequently enacted by-law where no no-

521, 110 N. W. 374, relates to the question of notice and follows the Tebo case. Wist v. Grand Lodge, 22 Ore. 271, 29 Am. St. Rep. 603, 29 Pac. 610, was determined on the point that by the language of the changed law itself, it was prospective only." See also House v. Modern Woodmen of America, 165 Iowa, 607, 146 N. W. 817.

[5] Richter v. Supreme Lodge Knights of Pythias, 137 Cal. 8, 69 Pac. 483.

As to prohibition as to entering military or naval service, see § 2237 herein.

[6] Deuble v. Grand Lodge Ancient Order of United Workmen, 72 N. Y. Supp. 755, 66 App. Div. 323, aff'd 172 N. Y. 665, 65 N. E. 1116. See also Barrett v. Grand Lodge Ancient Order United Workmen, 63 Misc. 429, 117 N. Y. Supp. 125. *Examine* Supreme Lodge of Fraternal Union of America v. Leight, 195 Fed. 903, *considered* and *explained* in Smythe v. Supreme Lodge Knights of Pythias, 198 Fed. 967, 981.

[7] Grand Lodge Ancient Order of Union Workmen v. Haddock, 72 Kan. 35, 1 L.R.A.(N.S.) 1064 (annotated on effect of adoption of by-laws by fraternal insurance order upon benefit certificates already issued) 82 Pac. 583. *Cited* in Fort v. Iowa Legion of Honor, 146 Iowa, 183, 123 N. W. 224, 39 Ins. L. J. 3.

[8] Taylor v. Modern Woodmen of America, 72 Kan. 443, 5 L.R.A. 283 (annot.) 83 Pac. 1099.

[9] Lloyd v. Supreme Lodge Knights of Pythias, 98 Fed. 66, 38 C. C. A. 654, 29 Ins. L. J. 744.

tice of said enactment is given and the certificate contains no time limitation within which suit may be brought.[10] And pre-existing relief fund certificates are not affected by by-laws prohibiting their transfer and prescribing a limited time after their maturity for the payment of the same.[11] A by-law adopted by a mutual benefit society that all claims against it must be adjudicated in its own tribunal, applies to holders of existing certificates.[12] And where power to alter, amend and repeal charters is reserved in a statute, members of a co-operative or assessment company have no such vested rights as will prevent such an association to reincorporate under the law as a regular life insurance company. Therefore, the obligation of contract existing between such members and the original company is not impaired by such reincorporation;[13] nor can a member be deprived of vested, valuable statutory rights under a by-law changing venue contrary to statutory provisions.[14] But the burden of proof to show that the rights of one claiming under a benefit certificate have been impaired is upon said party.[15]

§ 380c. Same subject: changes in by-laws, etc.: increasing assessments or dues or reducing amount payable.—Although there is an irreconcilable conflict between the decisions in certain jurisdictions, and although varying circumstances necessarily so affect the adjudications that no absolutely governing rule can be applied to all the cases, and although it is difficult to determine what constitutes the weight of authority, nevertheless the rule, outside of any statutory provision to the contrary, seems to be settled that an amendment or change in the constitution, articles of association, by-laws, rules and regulations, which increases the dues or rate of assessment to which a member is subject under his original contract with the society, association, or order, or which reduces the amount payable

[10] Rosenstein v. Court of Honor, 122 Minn. 310, 142 N. W. 331. *Followed* in Ruder v. National Council Knights & Ladies of Security, 124 Minn. 431, 145 N. W. 118.

[11] Wheeler v. Supreme Sitting Order of Iron Hall, 110 Mich. 437, 3 Det. Leg. N. 446, 68 N. W. 229.

[12] Monger v. New Era Assoc. 156 Mich. 645, 24 L.R.A.(N.S.) 1027, 121 N. W. 823. See Monger v. New Era Assoc. 171 Mich. 614, 137 N. W. 631, 41 Ins L. J. 1788.

As to conditions precedent to resort to courts, see §§ 352–352c herein.

As to conditions excluding resort to civil courts, see §§ 372–372b herein.

[13] Polk v. Mutual Reserve Fund Life Assoc. 207 U. S. 310, 28 Sup. Ct. 65, 52 L. ed. 222, *quoted* from and *distinguished* in Smythe v. Supreme Lodge Knights of Pythias, 198 Fed. 967, 986, but held not to support defendant's contention in that case.

[14] Eaton v. International Travelers' Assoc. of Dallas, — Tex. Civ. App. —, 136 S. W. 817.

As to effect of stipulation limiting action to particular forum, see §§ 3194, 3195 herein.

[15] United Moderns v. Rathbun, 104 Va. 736, 52 S. E. 552.

under his certificate, impairs the obligation of said contract and divests his vested rights, notwithstanding a general reservation or agreement in the constitution, by-laws, etc., or in any or all of them, that changes therein may thereafter be made. If a power is vested by said general reservation or agreement to repudiate a part of the contract by such an increase or reduction, logically the exercise of the same power authorizes a repudiation in toto of all the insurer's obligations and the insured would be bound thereby. It seems unreasonable that such a conclusion could be deduced as being the intent of the parties in entering into the original contract of membership. If it was intended that changes increasing assessments or dues, or reducing the amount payable, or both, should bind the member, it would seem that the terms of the consent should have been so clearly and explicitly expressed that no room would be left for construction. The reasoning and deductions of the courts are, however, set forth in the following pages.[16]

Under a *Federal* Supreme Court decision an agreement in the application, made a part of the contract, to abide by changes in the constitution, rules and regulations of the society, does not authorize amendments of the constitution, reducing the amount of indemnity, which amendments imply a prospective operation, and not retroactive.[17] So it is decided, in the Federal Circuit Court of Appeals that where a member of a fraternal beneficiary society contracted, upon printed representations, that a constitution of a certain date was the basis of the contract governing the amount of assessments to be paid he is not bound by a constitution of a later date even though adopted prior to the contract, which increased the amount of assessments, nor is he bound even though under a stipulation in the application the contract was to be governed by thereafter enacted by-laws.[18] And it was held in the same case in the court below that if power is reserved to increase assessments, as such a beneficial association or society has the right to do, it must be expressly, explicitly and clear-

[16] As to vested rights and changes in by-laws, etc. reducing benefits or forfeiting them in case of suicide, see §§ 2647 et seq. herein.

On right of mutual benefit society to decrease benefits, see note in 31 L.R.A.(N.S.) 423. On right of mutual insurance company to increase rates, see notes in 7 L.R.A.(N.S.) 1154, and 31 L.R.A.(N.S.) 417.

[17] Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 187 U. S. 197, 47 L. ed 139, 23 Sup. Ct. 108, 32 Ins. L. J. 57, aff'g 104 Fed. 638, 44 C. C. A. 93, 30 Ins. L. J. 230. But see Mutual Assurance Soc. v. Korn, 7 Cranch (11 U. S.) 396, 3 L. ed. 383. *Quoted* from with approval in Whitfield v. ÆEtna Life Ins. Co. 205 U. S. 489, 493, 51 L. ed. 895, 27 Sup. Ct. 578 (rev'g 144 Fed. 350) where the same Missouri statute was passed upon.

[18] Smythe v. Supreme Lodge Knights of Pythias, 220 Fed. 438, 137 C. C. A. 32, aff'g Smythe v. Supreme Lodge Knights of Pythias, 198 Fed. 967, 42 Ins. L. J. 6.

ly stated in such a manner as to constitute a part of the contract so as to fully inform and advise the member that such increase may be made and the contract so changed.[19] Again, contract obligations cannot be impaired by a reduction of the amount specified as payable in the certificate of a member.[20]

In *California* an association cannot even, though power is reserved to amend, destroy without assured's special consent his contract rights by reducing death benefits.[1] And a subsequent resolution classifying risks and increasing assessments violates assured's contract.[2]

But it is also held in that state that an amendment, enacted after a person becomes a member, providing that the balance of the amount of certificates, over and above the number of members, shall be payable out of the reserve fund only when there is a sufficient excess over a specified sum to meet such further payment, is not detrimental where such amendment was made in pursuance of a by-law permitting changes to be thereafter made, and in addition no reserve fund was created under any by-law or rule although all the net assets were treated as belonging to that fund which was not specially devoted to other purposes.[3]

In *Georgia* the agreement in the certificate to pay a certain sum constitutes a contract which cannot be repudiated by the association by a subsequently enacted by-law reducing said amount even though the certificate made the payment conditional upon compliance with all existing or future enacted by-laws.[4]

In *Illinois* a member's contract rights cannot be impaired by a change of by-laws increasing assessments where there was no agreement to be bound by subsequent changes except such as might be implied from his being charged with knowledge of by-laws provid-

[19] Smythe v. Supreme Lodge Knights of Pythias (U. S. D. C.) 198 Fed. 967, 980, 42 Ins. L. J. 6, aff'd Smythe v. Supreme Lodge Knights of Pythias, 220 Fed. 438, 137 C. C. A. 32.

[20] Supreme Council American Legion of Honor v. Champe, 127 Fed. 541, 63 C. C. A. 282.

[1] Bornstein v. District Grand Lodge No. 4, Independent Order B'nai B'rith, 2 Cal. App. 624, 84 Pac. 271.

As to right to sick benefits not being subject to change of by-law reducing same, see Berlin v. Eureka Lodge No. 9, Knights of Pythias, 132 Cal. 294, 64 Pac. 254.

[2] Benjamin v. Mutual Reserve Fund Life Association, 146 Cal. 34, 79 Pac. 517, 34 Ins. L. J. 614, *considered* more fully under § 380c herein.

[3] Hass v. Mutual Relief Assoc. of Petaluma, 118 Cal. 6, 49 Pac. 1056, 26 Ins. L. J. 992. The point of vested interest, however, was not discussed by the court, except in so far as it was stated that the contention was that the contract was one for the payment of an absolute, specified sum.

[4] Supreme Council American Legion of Honor v. Jordan, 117 Ga. 808, 45 S. E. 33.

ing therefor at the time of the issuance of his certificate.[5] Assessments may be increased by a change in by-laws under a provision of the certificate obligating the member to comply with by-laws thereafter enacted, as insured has no vested right to have the former rate continued.[6]

In *Indiana* the amount of assessments may be increased under a reserved power or agreement that changes may thereafter be made.[7]

In an *Iowa* case the association by amendments to its constitution not only increased the annual assessments and made other changes therein but it also scaled down the amount of assured's certificate, that is reduced the amount of his policy, said constitution when assured became a member provided that it could not be amended except in a certain specified manner and a form of constitution for the government of subordinate lodges contained a provision for the enactment and alteration or amendment of by-laws and the mode for adoption and approval thereof, but assured's certificate did not expressly provide for any changes or amendments of the articles of incorporation, constitution or by-laws nor did the subordinate lodges of which assured was a member make any changes in the by-laws. Assured had ratified a prior change by paying assessments thereunder without protest, but under the later amendments a claim of ratification, by the subordinate lodge or lodges of which he was a member sending a representative to the grand lodge and who agreed to the amendment was not sustained. Other than as above appears there was no consent by assured to said changes and he elected to rescind the contract and brought suit for its breach. It was held that by said unlawful amendments, without assured's consent, the association repudiated the contract and so justified rescinding it and bringing suit for its breach and also that he was not obligated to tender assessments under the old rate.[8] The opinion of the court, per Deemer, J., is of importance and so much thereof as applies to the question here under consideration is as follows: "It will thus be seen that plaintiff nowhere

[5] Covenant Mutual Life Assoc. v. Kentner, 188 Ill. 431, 58 N. E. 966. See Covenant Mutual Life Ins. Co. v. Tuttle, 87 Ill. App. 309.

[6] Fullenwider v. Supreme Council Royal League, 180 Ill. 621, 72 Am. St. Rep. 239, 54 N. E. 485, 31 Chic. Leg. N. 382, 73 Ill. App. 321, 30 Chic. Leg. N. 187, *considered* and *quoted* from in Smythe v. Supreme Lodge Knights of Pythias (U. S. D. C.) 198 Fed. 967, 983, case aff'd in Smythe v. Supreme Lodge Knights of Pythias, 220 Fed. 438, 137 C. C. A. 32.

[7] Supreme Lodge Knights of Honor v. Bieler, 58 Ind. App. 550, 105 N. E. 244. See opinion in this case under § 380d herein.

[8] Fort v. Iowa Legion of Honor, 146 Iowa 183, 123 N. W. 224, 39 Ins. L. J. 3.

expressly agreed, as in many of the cases cited and relied upon by appellant, to conform to and abide by any amendments that might thereafter be adopted. Doubtless the association, in the absence of such an agreement, had the right to change its by-laws.[9] But such amendments cannot be made of the by-laws as will in any manner affect the promise of the society to pay a particular sum to a member as an insured. As to this the member has the right to rely upon the terms of his contract.[10] As said by the Supreme Court of Massachusetts [11] 'Most of the cases relied on by the plaintiffs, when rightly analyzed, turn on the distinction between an attempted amendment of the by-laws directly affecting the promise to the certificate holder, as an insured person and an amendment affecting his duties as a member of the corporation bound to perform his part in providing means or otherwise as one of the association of insurers'—citing many authorities. The changes and amendments of which plaintiff complains were of the constitution itself, and they not only increased the amount of the assessment which the member was to pay, but they scaled down the amount which the association was to pay him as an insured, and in legal effect reduced the amount of his policy from $2,000 to $1,070 without his personal consent. That this may not be done under an implied agreement to be bound by subsequent amendments of the constitution, which is the fundamental law of the society, is well settled by authority.[12] Even though the constitution contains provisions for amendment, this does not authorize a change of the contract made with the assured which affects his liability as such.[13] Moreover, many courts have held that, even where there is an agreement on the part of the assured to be bound by subsequent changes, the society cannot make essential amendments affecting the rights of the insured as the hold-

[9] *Citing:* Durfee v. Old Colony & Fall River R. R. Co. 5 Allen (87 Mass.) 230; Pain v. Societé St. Jean Baptiste, 172 Mass. 319, 70 Am. St. Rep. 287, 52 N. E. 502; Wright v. Minnesota Mutual Life Ins. Co. 193 U. S. 657, 48 L. ed. 832, 24 Sup. Ct. 549; Supreme Lodge Knights of Pythias v. Knight, 117 Ind. 489, 3 L.R.A. 409, 20 N. E. 479.

[10] *Citing:* Newhall v. Supreme Council American Legion of Honor, 181 Mass. 111, 63 N. E. 1; Langan v. Supreme Council American Legion of Honor, 174 N. Y. 266, 66 N. E. 932.

[11] Reynolds v. Supreme Council of Royal Arcanum, 193 Mass. 158, 78 N. E. 129, reprinted in 7 Am. & Eng. Ann. Cas. 779.

[12] *Citing:* Hobbs v. Iowa Mutual Benefit Assoc. 82 Iowa, 107, 11 L.R.A. 299, 31 Am. St. Rep. 466, 47 N. W. 983; Farmers' Mutual Hail Soc. of Iowa v. Slattery, 115 Iowa, 410, 88 N. W. 949; Field v. Eastern Building & Loan Assoc. 117 Iowa 185, 90 N. W. 717, and cases cited.

[13] See cases above cited, and Pokrefky v. Detroit Firemen's Fund Assoc. 121 Mich. 456, 80 N. W. 240, and Peterson v. Gibson, 191 Ill. 365, 54 L.R.A. 836, 85 Am. St. Rep. 263, 61 N. E. 127.

er of a benefit certificate." [14] The court also said that the certificate issued to plaintiff was a contract,[15] that the amendment to the constitution affected the amount to be paid plaintiff or his beneficiary.[16] The court then continues as follows: "With practical unanimity the courts seem to hold that the general power to amend by-laws reserved to a society does not authorize an amendment which impairs the vested rights of the members.[17] . . . The reason for this rule is so well stated in Ayres' case.[17a] . . . that we quote the following therefrom: 'An amendment of by-laws which form part of a contract is an amendment of the contract itself, and, when such a power is reserved in general terms, the parties do not mean, as the courts hold, that the contract is subject to change in any essential particular at the election of the one in whose favor the reservation is made. It would be not reasonable, and hence not within their contemplation, at least in the absence of stipulations clearly specifying the subjects to be affected, that one party should have the right to make a radical change in the contract, or one that would reduce its pecuniary value to the other. A contract which authorizes one party to change it in any respect that he chooses would in effect be binding upon the other party only, and would leave him at the mercy of the former, and we have said that human language is not strong enough to

[14] *Citing:* Morton v. Supreme Council of Royal League, 100 Mo. App. 76, 73 S. W. 259; Hale v. Equitable Aid Union, 168 Pa. 377, 31 Atl. 1066; Olson v. Court of Honor, 100 Minn. 117, 8 L.R.A.(N.S.) 521, 117 Am. St. Rep. 676, 110 N. W. 374; Strauss v. Mutual Reserve Fund Life Assoc. 128 N. C. 465, 39 S. E. 55; O'Neill v. Supreme Council American Legion of Honor, 70 N. J. Law, 410, 57 Atl. 463; Supreme Council of American Legion of Honor v. Getz, 112 Fed. 119, 50 C. C. A. 153.

[15] *Citing:* Brown v. Iowa Legion of Honor, 107 Iowa, 439, 78 N. W. 73; Smail v. Court of Honor, 136 Mo. App. 434, 117 S. W. 117; Bornstein v. District Grand Lodge No. 4, Independent Order B'nai B'rith, 2 Cal. App. 624, 84 Pac. 271; Van Norman v. Modern Brotherhood of America, 134 Iowa, 575, 111 N. W. 992; Underwood v. Iowa Legion of Honor, 66 Iowa, 134, 23 N. W. 300; Trotter v. Iowa Legion of Honor, 132 Iowa, 513, 7 L.R.A.(N.S.) 569, 109 N. W. 1099.

[16] *Citing:* Supreme Council of American Legion of Honor v. Getz, 112 Fed. 119, 50 C. C. A. 153; Shepperd v. Bankers Union of the World, 77 Neb. 85, 108 N. W. 188; Johnson v. Bankers' Union of the World, 83 Neb. 48, 118 N. W. 1104; Pokrefky v. Detroit Firemen's Fund Assoc. 121 Mich. 456, 80 N. W. 240.

[17] *Citing:* Seow v. Supreme Council Royal League, 223 Ill. 32, 79 N. E. 42; Grand Lodge Ancient Order of United Workmen v. Haddock, 72 Kan. 35, 1 L.R.A.(N.S.) 1064, 82 Pac. 583; Ayres v. Grand Lodge Ancient Order United Workmen, 188 N. Y. 280, 80 N. E. 1020; Sautter v. Supreme Conclave Independent Order of Heptasophs, 72 N. J. Law, 325, 62 Atl. 529.

[17a] Ayres v. Grand Lodge Ancient Order U. W. 188 N. Y. 280, 80 N. E. 1020.

place a person in that situation.[18] While the defendant may doubtless so amend its by-laws, for instance, as to make reasonable changes in the methods of administration, the manner of conducting its business, and the like, no change can be made which will deprive a member of a substantial right conferred expressly or impliedly by the contract itself. That is beyond the power of the Legislature, as well as the association, for the obligation of every contract is protected from state interference by the Federal Constitution.[19] The courts are not agreed, however, as to what constitutes an impairment of the contract. Some of them hold that an amended by-law which increases the amount annually assessed against a member is not an impairment of vested rights,[20] while other courts hold exactly to the contrary.[1] We need not pass upon this troublesome question now, for it seems to be universally held, as already indicated, that a benefit society cannot diminish the amount payable to a member or his beneficiary under his certificate by the enactment of a subsequent by-law, resolution, or amendment to the constitution without the consent of the insured.[2] Save, then, as plaintiff consented to or ratified the different amendments made by the defendant, he is not bound thereby. That the subordinate lodge or lodges of which he was a member sent a representative to the Grand Lodge of which he was a member, and who agreed to the amendments, is of no moment. Such representative had no right to bind the plaintiff or to agree to a change of his contract rights." [3]

In *Kansas* a fraternal aid association has power to change the benefits to accrue under the certificate especially so where they are made to conform to the charter of the association and state laws where the member agrees in his application that his contract shall be controlled by all orders, rules and regulations of the association or order in force or which may be thereafter enacted by the general council and to submit to all penalties therein contained, and that

[18] Industrial & General Trust Ltd. v. Tod, 180 N. Y. 215, 225, 73 N. E. 7.

[19] Article 1, sec. 10.

[20] *Citing:* Reynolds v. Supreme Council Royal Arcanum, 192 Mass. 150, 7 L.R.A.(N.S.) 1154, 78 N. E. 129, 7 Am. & Eng. Ann. Cas. 776; Conner v. Supreme Commandery Golden Cross, 117 Tenn. 549, 97 S. W. 306; Gaines v. Supreme Council (C. C.) 140 Fed. 978.

[1] *Citing:* Wright v. Knights of Maccabees of the World, 48 Misc. Rep. 558, 95 N. Y. Supp. 996; Hicks v. Northwestern Aid Assoc. 117 Tenn. 203, 96 S. W. 962.

[2] Evans v. Southern Tier Masonic Relief Assoc. 182 N. Y. 453, 75 N. E. 317. See also cases *cited* in note to Gilmore v. Knights of Columbus, 77 Conn. 58, 58 Atl. 223, 1 Am. & Eng. Ann. Cas. 717.

[3] *Citing:* Hill v. Mutual Reserve Fund Life Assoc. 128 N. C. 463, 39 S. E. 56; Supreme Council American Legion of Honor v. Jordan, 117 Ga. 808, 45 S. E. 33; Supreme

the application shall constitute a part of the contract.[4] And where the certificate and by-laws construed together, show that the member agreed to be bound by subsequently enacted by-laws he is obligated by a new law which changes and increases his monthly assessments provided such amendment is necessary to accomplish the purposes of the society, and also reasonable.[5]

In *Louisiana* a clause in a membership certificate in an insurance benefit society by which the member agrees to comply with all of the by-laws of the society then existing or thereafter adopted, does not authorize the society to reduce the amount stipulated in the certificate to be paid, without the consent of the member.[6]

In a *Maryland* case it is declared by the court, per Burke, J., that: "There appears to be a general concurrence of authority in support of these two propositions: First that a general power to amend the laws reserved either by the constitution or by-laws of a fraternal benefit society does not authorize an amendment which impairs the vested rights of the members. Secondly, that where a member of a fraternal benefit society agrees in his application for membership to be bound by the rules or laws then in force, or which might be thereafter adopted, the society after he has become a member, may enact reasonable rules and amendments and bind him to their observance." [7]

Council American Legion of Honor v. Getz, 112 Fed. 119, 50 C. C. A. 153.

[4] Kirk v. Fraternal Aid Assoc. 95 Kan. 707, 149 Pac. 400.

[5] Miller v. National Council of the Knights & Ladies of Security, 69 Kan. 234, 76 Pac. 830, *followed* as to right to make reasonable changes and construction of by-laws as part of contract, in Moore v. Life & Annuity Assoc. 95 Kan. 591, 149 Pac. 400.

[6] Russ v. Supreme Council American Legion of Honor, 110 La. 588, 98 Am. St. Rep. 469, 34 So. 697.

[7] Supreme Conclave Independent Order of Heptasophs v. Rehan, 119 Md. 92, 85 Atl. 1035, 42 Ins. L. J. 631.

Citing: Alabama.—Fraternal Union of America v. Zeigler, 145 Ala. 287, 30 So. 75.

District of Columbia.—Brown v. Grand Fountain of U. O. of True Reformers, 28 App. D. C. 200.

Indiana.—Court of Honor v. Hutchens, — Ind. App. —, 79 N. E. 409.

Maryland.—Mathieu v. Mathieu, 112 Md. 625, 77 Atl. 112.

Minnesota.—Olson v. Court of Honor, 100 Minn. 117, 8 L.R.A. (N.S.) 521, 117 Am. St. Rep. 676, 10 Am. & Eng. Ann. Cas. 622, 110 N. W. 374.

Missouri.—Zimmerman v. Supreme Tent of Knights of Maccabees of the World, 122 Mo. App. 591, 99 S. W. 817.

Nebraska.—Lange v. Royal Highlanders, 75 Neb. 188, 10 L.R.A. (N.S.) 660, 121 Am. St. Rep. 786, 106 N. W. 224, 110 N. W. 1110.

New Jersey.—Strang v. Camden Lodge Ancient Order United Workmen, 75 N. J. L. 500, 64 Atl. 93; Sautter v. Supreme Lodge Independent Order Heptasophs, 72 N. J. L. 325, 62 Atl. 529.

New York.—Ayers v. Grand Lodge Ancient Order United Workmen, 188 N. Y. 280, 80 N. E. 1020.

In *Massachusetts,* increasing the rate of assessment on a member of a mutual benefit society by change of by-laws does not impair his contract, where the by-laws to which he agreed required him to conform to the laws then in force, or which might thereafter be adopted.[8] In this case the court, per Knowlton, C. J., said: "Another question is whether the amendments are in violation of the contract rights of members. It is stated in the record that 'the agreements between the plaintiff and the defendants concerning assessments and benefits are not contained in any one specific instrument, but are found in the application for membership, the benefit certificate, the laws of Massachusetts constituting the charter and the constitution and laws of the order.' If there were no express stipulation in regard to the by-laws in the application for membership or in the certificate, all members of the corporation would be bound by by-laws regularly made or amended.[9] Every member of this corporation, at the time of joining it enters into an express agreement to 'conform to and abide by the constitution, laws, rules, and usages of the said council and order, now in force or which may hereafter be adopted by the same.' The certificates promise payment only on condition that the member complies 'with the laws, rules and regulations now governing the said council and fund, or that hereafter may be enacted by the Supreme Council to govern the said council and fund,' etc. Here in the contract is full authority to amend the laws, rules and regulations. In regard to a similar provision under which a mutual fire insurance company changed its by-laws, so as to increase the assessments upon certain policy holders, the Supreme Court of the United States uses this language: 'The liability of members of this institution is of a twofold nature. It results both from an obligation to conform to laws of their own making as members of the body politic and from a particular as-

[8] Reynolds v. Supreme Council Royal Arcanum, 192 Mass. 150, 7 L.R.A.(N.S.) 1154, 7 Am. & Eng. Ann. Cas. 776, 78 N. E. 129, 35 Ins. L. J. 673. *Cited* in Fort v. Iowa Legion of Honor, 146 Iowa, 183, 123 N. W. 224, 39 Ins. L. J. 3. *Considered* in Smythe v. Supreme Lodge Knights of Pythias, 198 Fed. 967, 984 (case aff'd Smythe v. Supreme Lodge Knights of Pythias, 220 Fed. 438, 137 C. C. A. 72) and held in point "if good law," but "at variance with the New York cases" and to have been determined largely by force of Massachusetts statutes and "not decisive except in so far as it interprets those laws and determines the rights" of the parties under them.

[9] *Citing:* Wright v. Minnesota Mutual Life Ins. Co. 193 U. S. 657; Supreme Lodge Knights of Pythias v. Knight, 117 Ind. 489, 3 L.R.A. 409, 20 N. E. 479; Pain v. Société St. Jean Baptiste, 172 Mass. 319, 70 Am. St. Rep. 287, 52 N. E. 502; Spilman v. Supreme Council Home Circle, 157 Mass. 128, 31 N. E. 776; Oliver v. Hopkins, 144 Mass. 175, 10 N. E. 776; Durfee v. Old Colony R. R. Co. 5 Allen, 87 Mass. 230, 242.

sumption or declaration which every individual signs on becoming a member.' " The latter is remarkably comprehensive. "We will abide by, observe and adhere to the constitution, rules and regulations which are already established by a majority of the assured . . . or which are or may hereafter be established by the president and directors of the society." . . . As to what is contended to be a material alteration in their charter, we consider it merely as a new arrangement or distribution of their funds, and whether just or unjust, reasonable or unreasonable, beneficial or otherwise to all concerned, was certainly a mere matter of speculation proper for the consideration of the society, and which no individual is at liberty to complain of as he is bound to consider it as his own individual act. Every member stands in the peculiar situation of being party on both sides, insurer and insured. Certainly the general submission which they have signed will cover their liability to submit to this alteration.[10] This part of the present case is covered in principle by the decisions of this court in Messer v. Grand Lodge Ancient Order United Workmen,[11] and Pain v. St. Jean Baptiste,[12] in which cases changes similar to those made by the defendant were upheld under like contracts. The same general doctrine has been stated in many cases in other courts.[13] There are many cases in which it is held that the amount expressly promised to be paid in a certificate like those issued by the defendant cannot be cut down by an amendment of the by-laws.[14] But in many of these, as in the case from this court last cited, a distinction is made between the

[10] *Quoting* from Korn v. Mutual Assur. Co. 6 Cranch (10 U. S.) 192.

[11] 180 Mass. 321, 62 N. E. 252.

[12] 172 Mass. 319, 70 Am. St. Rep. 287, 52 N. E. 502.

[13] *Citing: United States.*—Wright v. Minnesota Mutual Life Ins. Co. 193 U. S. 657; Gaines v. Supreme Council Royal Arcanum (U. S. C. C.) 140 Fed. 978; Gant v. Mutual Reserve Fund Life Assoc. (U. S. C. C.) 121 Fed. 403, 409; Haydel v. Mutual Reserve Fund Life Assoc. 104 Fed. 718, 44 C. C. A. 169.

Georgia.—Barber v. Mutual Reserve Fund Life Assoc. 100 Ga. 681, 28 S. E. 498.

Illinois.—Fullenwider v. Supreme Council Royal Arcanum, 73 Ill. App. 321, 30 Chic. Leg. N. 187, aff'd 180 Ill. 621, 31 Chic. Leg. N. 382, 72 Am. St. Rep. 239, 54 N. E. 485.

Indiana.—Supreme Lodge Knights of Pythias v. Knight, 117 Ind. 489, 3 L.R.A. 409, 20 N. E. 479.

Missouri.—Richmond v. Supreme Lodge Order of Mutual Protection, 100 Mo. App. 8, 71 S. W. 736.

Vermont.—Fugure v. Society of St. Joseph, 46 Vt. 362.

Virginia.—Mutual Reserve Fund Life Assoc. v. Taylor, 99 Va. 208, 37 N. E. 854.

England.—Bartram v. Supreme Council Royal Arcanum, 6 Ont. W. R. 404.

[14] *Citing:* Supreme Council of American Legion of Honor v. Getz, 112 Fed. 119, 50 C. C. A. 153; Newhall v. American Legion of Honor, 181 Mass. 111, 63 N. E. 1, 31 Ins. L. J. 389; Langan v. American Supreme Council Legion of Honor, 174 N. Y. 266, 66 N. E. 932.

express stipulation of the corporation to pay a certain sum and other provisions relating to the methods of the corporation, and the duties of the certificate holders, which properly may be a subject for regulation of the by-laws, even though they affect the rights of the parties under their contract. The assessments to be paid for death benefits in this case are provided for by the by-laws, while the promise in writing to pay a certain sum to a particular person is, as to that person, a matter outside of those corporate rules which may be expected to be changed by an amendment of the by-laws. This promise on the one side is set over against the promise of the member on the other. The promise of the member is to do what may be called for by the by-laws then existing or that may afterwards be adopted. The promise of the corporation is stated expressly, without mention of the by-laws. The member occupies a dual position, as an insurer and the insured. As one of the association agreeing to provide for the payments that may become due to members, he agrees to be subject to the by-laws. As the insured person to whom a particular sum of money is promised, he has a right to stand on the terms of the promise. That the duties of members prescribed by the by-laws remain subject to modification has often been decided.[15] Most of the cases relied upon by the plaintiffs, when rightly analyzed, turn on the distinction between an attempted amendment of the by-laws directly affecting the promise to the certificate holder as an insured person, and an amendment affecting his duties as a member of the corporation bound to perform his part in providing means or otherwise as one of the association of insurers.[16] Other cases cited by the plaintiff

[15] *Citing:* Lawson v. Hewell, 118 Cal. 613, 49 L.R.A. 400n, 50 Pac. 763; Gilmore v. Knights of Columbus, 77 Conn. 58, 107 Am. St. Rep. 17, 58 Atl. 223; Ellerbe v. Faust, 119 Mo. 653, 25 L.R.A. 149n, 25 S. W. 390; Langnecker v. Grand Lodge Ancient Order United Workmen, 111 Wis. 279, 55 L.R.A. 185, 87 Am. St. Rep. 860, 87 N. W. 293; Loeffler v. Modern Woodmen of America, 100 Wis. 79, 75 N. W. 1012.

[16] *Citing: Illinois.*—Peterson v. Gibson, 191 Ill. 365, 54 L.R.A. 836, 61 N. E. 127.

Michigan.—Startling v. Supreme Council Royal Templars of Temperance, 108 Mich. 440, 62 Am. St. Rep. 709, 66 N. W. 340.

Minnesota.—Tebo v. Supreme Council, Royal Arcanum, 89 Minn. 3, 93 N. W. 513.

New Jersey.—Santter v. Supreme Conclave Independent Order Heptasophs, 72 N. J. L. 325, 62 Atl. 529.

New York.—Beach v. Supreme Tent of Knights of Maccabees, 177 N. Y. 100, 69 N. E. 281; Roberts v. Grand Lodge, Ancient Order United Workmen, 173 N. Y. 580, 65 N. E. 1122; Deuble v. Grand Lodge Ancient Order United Workmen, 172 N. Y. 665, 65 N. E. 1116; Weber v. Supreme Tent of Knights of Maccabees, 172 N. Y. 490, 65 N. E. 258; Fargo v. Supreme Tent of Knights of Maccabees, 89 N. Y. Supp. 65, 96 App. Div. 491; Deuble v. Grand Lodge Ancient Order United Workment, 72 N. Y. Supp. 755, 66 App.

are clearly adverse to the views we take.[17] "On principle and on the weight of authority we are of opinion that there is nothing in this contract that prevents the corporation from amending its by-laws in a reasonable way, to accomplish the purposes for which it was organized, even though the change increases the payments to be made by certificate holders. Such changes necessarily involve some hardship to certain individual members, but the corporation, under the law, should do that which will bring the greatest good to the greatest number." In another decision in the same state it is also decided that under a reserved right to change the by-laws no vested rights are impaired by an amendment reducing sick benefits or the time during which they might be received under the member's contract, as such right could not be construed to cover a period continuing as long as the disability, but merely a right to receive them under such limitations and changes as the society might prescribe by future enacted by-laws or amendments.[18] But it is also held in that state that the court cannot by an amended by-law cut down an express promise to pay the amount stipulated to be paid although the promise in the certificate was to comply with all existing and thereafter adopted by-laws, and that the words "full compliance with all the by-laws" existing or thereafter to be enacted, specified as a consideration in the certificate, mean doing what the by-laws may require the member to do, not submission to a change in a by-law after issuance of the certificate diminishing the sum promised to be paid thereunder.[19] And where an attempt was made to reduce the

Div. 323; Roberts v. Cohen, 70 N. Y. Supp. 57, 60 App. Div. 259; Spencer v. Grand Lodge Ancient Order United Workmen, 65 N. Y. Supp. 1146, 53 App. Div. 627.

Oregon.—Wist v. Grand Lodge Ancient Order United Workmen, 22 Ore. 271, 29 Am. St. Rep. 603, 29 Pac. 610.

Pennsylvania.—Hale v. Equitable Aid Union, 168 Pa. 377, 31 Atl. 1066.

Tennessee.—Hadley v. Queen City Camp No. 27, W. O. W. 1 Tenn. Ch. App. 413.

Texas.—Grand Lodge Ancient Order United Workmen v. Stumpf, 24 Tex. Civ. App. 309, 58 S. W. 840.

[17] *Citing:* Benjamin v. Mutual Reserve Fund Life Assoc. 146 Cal. 34, 79 Pac. 517; Ebert v. Mutual Reserve Fund Life Assoc. 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457; Strauss v. Mutual Reserve Fund Life Assoc. 126 N. Car. 971, 54 L.R.A. 605, 36 S. E. 352.

[18] Pain v. Société St. Jean Baptiste, 172 Mass. 319, 70 Am. St. Rep. 287, 52 N. E. 502.

[19] Newhall v. Supreme Council American Legion of Honor, 181 Mass. 111, 63 N. E. 1, 31 Ins. L. J. 389. The court, per Holmes, C. J., said: "The plaintiff's rights do not stand upon the by-laws alone. They stand also upon express contract. The promise to pay $5,000, is conditioned by the by-laws only to the extent that has been stated. Even if the 'full compliance with all the by-laws' which is mentioned as a consideration for the promise is not interpreted and limited by the more specific provisions of the express conditions, 'compliance' in this direction means doing what the by-laws may require the member to do, not sub-

amount of benefit payable, and the certificate stipulated that amendments might thereafter be made, and the society refused to receive assessments for more than would be due as based upon the reduced amount, it was held that, under the Massachusetts law, the refusal to perform amounted merely to notice of an intended breach of the contract in the future and therefore no present right of action existed.[20]

mission to seeing his only inducement to do it destroyed. The case is not like Daley v. People's Building, Loan & Savings Association, 172 Mass. 533, 52 N. E. 1090, and Moore v. Union Fraternal Accident Assoc. 103 Iowa 424, 72 N. W. 645, where the promise to pay a fixed sum was qualified by reference to a fund from which the payment was to come and which might turn out inadequate from causes over which the defendant had no control. Stating our opinion in a different form, whatever compliance with by-laws may be construed to mean, it does not mean absolute submission to whatever may be enacted in good faith, and it does not extend to permitting a direct deduction from the sum which, on the face of the certificate, any ordinary man would be led to suppose secure. With reference to him the by-law is a plain abuse." Gaut v. American Legion of Honor, 107 Tenn. 603, 55 L.R.A. 465, 64 S. W. 1070; Langan v. American Legion of Honor, 34 Misc. 629, 70 N. Y. Supp. 663, 665; Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 104 Fed. 638, 44 C. C. A. 92, 99; Pokrefky v. Detroit Firemen's Fund Assoc. 121 Mich. 456, 80 N. W. 240; Wist v. Grand Lodge A. O. U. W. 22 Ore. 271, 281, 29 Am. St. Rep. 603, 29 Pac. 610. "Another by-law undertakes to deduct five per cent from the face value of certificates for an emergency fund. Whatever may be the right to assess for this purpose, it follows from what we have said that the attempt to cut down the amount to be paid by the defendant under its contract must fail." *Distinguished* in Reynolds v. Supreme Council of the Royal Arcanum, 192 Mass. 150, 7 L.R.A.(N.S.) 1154n, 7 Am. & Eng. Ann. Cas. 776, 78 N. E. 129 (which holds that assessments may be increased by amendment of the by-laws under provisions of the statute Rev. Laws Mass. c. 119, sec. 6. The court also distinguishes Langan v. Supreme Council, American Legion of Honor, 174 N. Y. 266, 66 N. E. 932; Supreme Council, American Legion of Honor v. Getz, 112 Fed 119) *cited* in Fort v. Iowa Legion of Honor, 164 Iowa, 183, 123 N. W. 224, 39 Ins. L. J. 3; Tuttle v. Iowa State Traveling Men's Assoc. 132 Iowa 652, 661, 104 N. W. 1031, 7 L.R.A.(N.S.) 222, 230; Morse v. Fraternal Accident Assoc. 190 Mass. 417, 419, 112 Am. St. Rep. 337, 77 N. E. 491 (holding that the amount of insurance could not be reduced. The policy was not in terms subject to future alterations in the rules); Porter v. Supreme Council American Legion of Honor, 183 Mass. 326, 327, 328, 67 N. E. 238.

[20] Porter v. Supreme Council American Legion of Honor, 183 Mass. 326, 67 N. E. 238.

Repudiation and rescission of contract: anticipatory breach. Although under the Massachusetts rule as above stated it seems that there may be an anticipatory breach of an executory contract resulting from an absolute refusal to perform by one party and that the other party may at his option treat the contract as terminated for all purposes of performance and maintain action at once for damages occasioned by such repudiation without awaiting the time fixed by the contract for performance is well settled and is applicable to in-

In *Michigan* it is held that an amendment cannot have the effect of changing a pre-existing contract by reducing the amount of benefits and that the trustees under a general authority to change the by-laws cannot adopt such a by-law against the member's protest.[1] But it was subsequently decided in the same case that the assent of a member to an alteration of the by-laws increasing certain benefits and reducing others was not without consideration and that assent authorized a change, and that there was such consideration. It appeared, however, that assured had paid his assessments and increased dues without protest. The question of assent was held properly one for the jury.[2]

In *Missouri* it is decided that, although both the application and policy contained an agreement or reservation that assured abide by subsequent changes in the constitution, rules and regulations as they might be constitutionally changed thereafter, that an assessment association could not materially change the assured's contract by increasing his assessments; and also that it could not in the absence of a reserved right so to do, levy additional assessments to cover an obligation whereby assessments paid were to be added to the policy amount to constitute the sum to be paid to the beneficiary;[3] and that the agreed upon compliance with thereafter enacted laws and usages of the society reserved in the certificate referred

surance contracts, see Indiana Life Endowment Co. v. Carnithan (1915) — Ind. App. —, 109 N. E. 851, a case fully considering the authorities. See further as to right of member to rescind and sue on contract when benefits reduced, Supreme Council American Legion of Honor v. Lippincott, 69 L.R.A. 803, 134 Fed. 824, 67 C. C. A. 650, rev'g Lippincott v. Supreme Council American Legion of Honor, 130 Fed. 483; McAlarney v. Supreme Council American Legion of Honor, 131 Fed. 538, 33 Ins. L. J. 906, rev'd 135 Fed. 72, 67 C. C. A. 546; Supreme Council American Legion of Honor v. Daix, 130 Fed. 101, 64 C. C. A. 435 (may rescind); Daix v. Supreme Council American Legion of Honor (U. S. C. C.) 127 Fed. 374; Supreme Council American Legion of Honor v. Black, 123 Fed. 650, 59 C. C. A. 414, aff'g Black v. Supreme Council American Legion of Honor, 120 Fed. 580; Certiorari denied (mem.) 191 U. S. 568, 48 L. ed. 305, 25 Sup. Ct. 841 (may rescind); Henderson v. Supreme Council American Legion of Honor (U. S. C. C.) 120 Fed. 585; Supreme Council American Legion of Honor v. Jordan, 117 Ga. 808, 45 S. E. 33; O'Neill v. Supreme Council American Legion of Honor, 70 N. J. L. 410, 1 Am. & Eng. Ann. Cas. 422, 57 Atl. 463; Makely v. Supreme Council American Legion of Honor, 133 N. C. 367, 45 S. E. 649 (may recover after repudiation); Supreme Council American Legion of Honor v. Batte, 34 Tex. Civ. App. 456. As to rescission and cancelation, see §§ 1634 et seq. herein.

[1] Pokrefky v. Firemen's Fund Assoc. 121 Mich. 452, 80 N. W. 240, 6 Det. Leg. N. 527.

[2] Pokrefky v. Firemen's Fund Assoc. 131 Mich. 38, 96 N. W. 1057.

[3] Pearson v. Knights Templars & Masons Life Indemnity Co. 114 Mo. App. 283, 89 S. W. 588.

only to future regulations governing assured's duties as member and did not cover a reduction in the amount payable made under a subsequently enacted by-law.[4] But it is also decided that a reduction of the amount payable under the certificate conditioned upon the amount of assessments paid in, would be sustained under a provision making the beneficiary's rights determinable by the charter, constitution, laws, etc., in force when the sum, which was the amount of one assessment not exceeding that specified in the certificate, became payable.[5]

In *New Jersey* a general reserved power to alter or amend the laws of the order does not authorize an increase in dues beyond the amount specified in the contract and so impair the obligation thereof, especially so where the contract limited the amount up to which they might be increased when the receipts were insufficient thereby impliedly precluding an additional increase. In the case so deciding the court per Walker, V. C., said: "'But it is very generally, if not universally, held that these benefit certificates, like other contracts, confer a vested interest upon the member which may not be impaired by a subsequent amendment, even though the power to amend be reserved in general terms. If the member's stipulation to comply with all by-laws thereafter enacted could be construed to relate to a by-law that reduced the benefit from $5,000 to $2,000, it must also relate to a by-law canceling the benefit certificate entirely—a result wholly unjust and absurd. This stipulation must be construed as referring only to reasonable by-laws and amendments adopted in furtherance of the contract, and not to such as would overthrow it or materially alter its terms.'[6] . . . If this increase is to be held good, then it would appear that the complainant and those in the class with him are at the mercy of the supreme circle with reference to any impairment of their contracts of membership in the death benefit fund which that circle may see fit to make."[7]

In *New York* in a case decided in 1912, a change was made in the rate of assessment to which assured agreed, subsequently another change therein was made without notice to assured, without his consent and against his objection and protest. He had agreed in his application and certificate to conform to and comply with thereafter

[4] Morton v. Supreme Council Royal League, 100 Mo. App. 76, 73 S. W. 259.

[5] Richmond v. Supreme Lodge, Order of Mutual Protection, 100 Mo. App. 8, 71 S. W. 736.

[6] *Quoting* from O'Neill v. Supreme Council American Legion of Honor, 70 N. J. L. 410, 420, 1 Am. & Eng. Ann. Cas. 422, 57 Atl. 463, 467.

[7] Poole v. Supreme Circle Brotherhood of America, 80 N. J. Eq. 259, 85 Atl. 821, 42 Ins. L. J. 482.

adopted laws, rules, regulations and usages. It was held that said last amendment of the laws was not authorized. The Appellate Division had decided that the contract had so effectually reserved said right to amend as to bind the assured to such increase in rates. "This conclusion was based upon the assumption that there is a distinction between this case and the cases in which we have held that a membership contract in a mutual benefit association in which the member agrees to comply with the laws of the order 'now in force or that may hereafter be adopted,' does not authorize a subsequent amendment of the by-laws without the member's consent if the effect of such amendment is to increase the rate of assessment or to reduce the amount of the benefit, as fixed by the contract. . . . We think there is no distinction." It was further declared that the reservation in the certificate, if intended to bind the member, should be explicit in providing that the payments therein specified should be subject to such modification as to amount, terms and conditions of payment and contingencies in which the same were payable as the order might from time to time provide, and that nothing less explicit would be binding. It was further decided that the fact that the defendant was a Massachusetts corporation did not authorize such an amendment under its statute, nor apply to a member who had entered into and completed his contract in New York with the association.[8] It is said in another New York case, per Bartlett, J., that: "There is a conflict of judicial decisions in the various states on the point now presented, but a careful examination of the cases shows that the great weight of authority is in favor of the position that the original contract cannot be impaired. It would be quite impossible to harmonize the conflicting views of the learned judges, and it remains to be considered whether the decisions of this court have not laid down the rule of law which must now govern, to the effect that the contract of insurance cannot be changed by any act of the defendant. We have on the one hand the plaintiff standing upon the plain letter and spirit of his contract, and on the other the insistence of the defendant that unless, under its construction of the contract, it is vested with the power to increase the amount of a single assessment, as the exigen-

[8] Green v. Supreme Council Royal Arcanum, 206 N. Y. 591, 100 N. E. 411, 42 Ins. L. J. 3, 335, rev'g 129 N. Y. Supp. 791, 144 App. Div. 761, 40 Ins. L. J. 414a, which rev'd 124 N. Y. Supp. 398, 39 Ins. L. J. 1087, case in 129 N. Y. Supp. 791 is quoted from in Smythe v. Supreme Lodge Knights of Pythias (U. S. D. C.) 198 Fed. 967, 987, but court declared that "benefit certificate expressly stated that the member should comply with the laws 'that might thereafter be enacted to govern the relief fund.' This the court construed as sufficiently providing for an amendment which increased the assessments to make the relief fund."

cies of the company may require, it will be unable to continue its financial life and pay its death losses." [9] And a general power to amend without specifying in what respects, reserved in the application and certificate does not authorize an amendment reducing benefits or increasing assessments. So the power reserved by a mutual benefit society to amend its laws does not authorize it to decrease the benefits to which a member is entitled by the terms of his contract, such as the right to relief from assessments upon reaching a specified age or in case of disability, and to advance payments on the policy under certain conditions.[10] The court considers at length the several cases in New York and says: "These cases establish the rule that benefits cannot be reduced, or new conditions forfeiting the benefits added by an amendment of the by-laws, even when the general right to amend is expressly reserved. They are controlling, therefore, so far as all the amendments now in question are concerned, except that providing for an increase in the rate of assessments. Following the authorities cited we hold that the amendments which assume to cut down the benefits to which the plaintiff became entitled by his contract with the defendant, are void and of no effect. I am personally, of the opinion that the amendment increasing the rate of assessments is also void, for I can see no difference in principle between reducing benefits and increasing the amount to be paid for benefits. The plaintiff entered into the contract on the faith of the promise by the association that he should 'pay at the same rate thereafter so long as he remains continually in good standing in the order,' which he had the right to assume and the defendant knew that he would assume, was a covenant not to increase the rate. The certificate states that 'he is entitled to all the rights, benefits, and privileges' provided by the laws of the order, which are thus made a part of the certificate. Hence the right to pay at the old rate was one of the rights provided for and that he contracted for. It was a vested right, immune from change by amendment in the absence of a specific reservation of power to amend in that particular. On the average, such contracts

[9] Dowdall v. Supreme Council Catholic Mutual Benefit Assoc. 196 N. Y. 405, 31 L.R.A.(N.S.) 417n, 89 N. E. 1075, 39 Ins. L. J. 87, rev'g 122 N. Y. Supp. 1130, 123 App. Div. 913, 39 Ins. L. J. 87, rev'g 108 N. Y. Supp. 1130, 123 App. Div. 913.

[10] Wright v. Knights of Maccabees of the World, 196 N. Y. 391, 134 Am. St. Rep. 838, 31 L.R.A.(N.S.) 423, 89 N. E. 1078, 39 Ins. L. J. 95, rev'g 112 N. Y. Supp. 1150, 128 App. Div. 883 (*quoted* from in Smythe v. Supreme Lodge Knights of Pythias [U. S. D. C.] 198 Fed. 967, 977, 978) *cited* in dissenting opinion in Hannes v. Nederland Israelitish Sick Fund, 136 N. Y. Supp. 742, 152 App. Div. 140, 41 Ins. L. J. 1685, to point that law is well settled that subsequent amendments cannot decrease benefits.

would be impaired by doubling assessments to the same extent as by cutting off one-half of the benefit. The price to be paid by the plaintiff for insurance is as essential a part of his contract as the amount of insurance to be paid to him by the defendant on the maturity of the policy. Whether the one is increased or the other proportionately decreased makes no difference in principle, or in the final result. By either method the pecuniary value of the contract which is property, would be reduced one-half." [11] So the fact that in the application, upon which the certificate was issued, the assured agreed to comply with all laws, regulations and requirements of the society which were then, or might thereafter be, enacted, there being no reservation in the by-laws of the specific right to amend them so as to restrict the occupation, or business, of the assured, did not permit an amendment in that respect without the consent of the assured, and the attempt made without his consent was beyond the power of the society and absolutely void; since the effort was not to reduce the amount of insurance, but to destroy it altogether, unless the assured would conform to a by-law passed in violation of a vested right, for the privilege, allowed because not forbidden, of engaging in any lawful business was a vested right of which the assured could not be deprived without his consent.[12]

[11] Wright v. Knights of Maccabees of the World, 196 N. Y. 391, 31 L.R.A.(N.S.) 423, 89 N. E. 1078, 39 Ins. L. J. 95.

[12] Ayres v. Grand Lodge Ancient Order of United Workmen, 188 N. Y. 280, 80 N. E. 220, aff'g 109 App. Div. 919. Principal case is *quoted* in Smythe v. Supreme Lodge Knights of Pythias, 220 Fed. 438, 441, 137 C. C. A. 32, and in Smythe v. Supreme Lodge Knights of Pythias (U. S. D. C.) 198 Fed. 967, 980.

This decision is *considered* in another New York case, Dowdall v. Supreme Catholic Mutual Benefit Assoc. 196 N. Y. 405, 31 L.R.A.(N.S.) 417n, 89 N. E. 1075, 39 Ins. L. J. 87, rev'g 122 N. Y. Supp. 1130, 123 App. Div. 913, where the court per Bartlett, J. said: "In March 1885, one Emory D. Fuller, became a member of a local lodge of the defendant, a domestic corporation, and was to participate in the beneficiary fund of the order in the amount of $2,000 at the time of his death. The insured agreed to comply with all the laws, rules, and requirements of the order. In his application for membership the insured agreed 'to strictly comply with the constitution, laws, and regulations which are, or may hereafter be, enacted by the supreme, grand, or subordinate lodge.' Sometime between 1898 and 1902 the defendant adopted a by-law which provided, in substance, that any member who should thereafter enter into the business or occupation of selling by retail intoxicating liquors as a beverage should be suspended from any and all rights to participate in the beneficiary fund. Previous to January 1, 1904, the insured had never engaged in the business of selling liquors, but on that day, in connection with one Hanchett, his copartner, he began to carry on a hotel at Weedsport. The firm employed a bartender, who sold liquor in the usual way over the bar. In June of the same year the insured died and the defendant refused to pay on the ground

And the amount of benefits specified in a member's certificate cannot be reduced so as to take away vested rights by amendments to the by-laws adopted after the issuance of the certificate even though

that he had engaged in the business of selling intoxicating liquors at retail. The contract of insurance had been in force for more than twelve years at the time of the amendment of the by-laws as to the sale of intoxicating liquors. The defendant having refused to pay the amount alleged to be due on the certificate, an action was brought to recover the same. The trial court and the Appellate Division decided in favor of the plaintiff, and this court affirmed the judgment. Vann, J., writing, stated: 'This case cannot be distinguished in principle from a long line of cases decided by this court. . . . It is well established by these authorities "that a general power reserved either by statute or by the constitution of a society to amend its by-laws does not authorize an amendment impairing the vested rights of members."' An amendment of by-laws which form part of a contract is an amendment of the contract itself, and when such a power is reserved in general terms the parties do not mean, as the courts hold, that the contract is subject to change in any essential particular at the election of the one in whose favor the reservation is made. It would be not reasonable and hence not within their contemplation, at least in the absence of stipulations clearly specifying the subjects to be affected, that one party should have the right to make a radical change in the contract, or one that would reduce its pecuniary value to the other. A contract which authorizes one party to change it in any respect that he chooses would in effect be binding upon the other party only and would leave him at the mercy of the former, and we have said that human language is not strong enough to place a person in that situation." *Citing* Industrial & General Trust Ltd. v. Tod, 180 N. Y. 215, 225, 73 N. E. 7. "While the defendant may doubtless so amend its by-laws, for instance as to make reasonable changes in the methods of administration, the manner of conducting its business, and the like, no change can be made which will deprive a member of a substantial right conferred expressly or impliedly by the contract itself. That is beyond the power of the Legislature as well as the association, for the obligation of every contract is protected from state interference by the Federal Constitution. Article 1, sec. 10. . . . The reservation of a general power to amend the by-laws, without reserving the specific right to so amend them as to restrict the occupation, did not permit an amendment in that respect, and the attempt made without the consent of the assured was beyond the power of the defendant and absolutely void as to him. The effort was not to reduce the amount of insurance, but to destroy it altogether, unless the assured would conform to a by-law passed in violation of a vested right, for the privilege, allowed because not forbidden, of engaging in any lawful business was a vested right." *Citing* pages 285, 286, 287, of 188 N. Y. p. 1021 of 80 N. E. The court also said in the Dowdall case just cited that it was much stronger in favor of the plaintiff than the Ayres case in regard to the agreement in the application as to compliance with existing and future by-laws, rules, and regulations of the association and continues, after comparing the same, in regard to the Dowdall case that: "There is no suggestion that the laws, rules, and requirements could at any future time be amended, or new ones enacted, so as to affect the contract."

the member had agreed in his application, upon which the certificate was issued, to comply with by-laws, rules, regulations in force or thereafter adopted and this is so notwithstanding the certificate of incorporation provided for the payment, under the certificates issued to members, "of such sum as the by-laws of such association from time to time prescribe." [13] Finally as to New York, it is held

[13] Evans v. Southern Tier Masonic Relief Assoc. 182 N. Y. 453, 75 N. E. 317, rev'g 88 N. Y. Supp. 162, 94 App. Div. 541, and following Beach v. Supreme Tent of the Knights of Maccabees, 177 N. Y. 100, 69 N. E. 281. The Evans case is *cited* in Hannes v. Nederland Israelitish Sick Fund, 136 N. Y. S. 742, 152 A. D. 140, 41 I. L. J. 1685, in dissenting opinion per McLaughlin J., to point that "agreement to be 'guided' by the by-laws which might thereafter be adopted had reference to matters of administration and not to his rights which were then fixed and vested." Evans case is also cited in Fort v. Iowa Legion of Honor, 146 Iowa, 183, 123 N. W. 224, 39 Ins. L. J. 3. The Evans decision is also *considered* in another New York case, Dowdall v. Supreme Catholic Mutual Benefit Assoc. 196 N. Y. 405, 31 L.R.A. (N.S.) 417n, 89 N. E. 1075, 39 Ins. L. J. 87, rev'g 122 N. Y. Supp. 1130, 123 App. Div. 913, where the court per Bartlett J., said: "It was held that the beneficiary named in a certificate issued by a fraternal benefit or life insurance association to a deceased member thereof, upon which all dues and assessments required by the by-laws of the association, have been paid, cannot be deprived of the benefit specified in the certificate by amendments to the by-laws adopted subsequent to the issuance of the certificate, notwithstanding that the application for membership, upon which the certificate was issued, contained a clause in which the applicant agreed to conform in all respects to the by-laws, rules, and regulations of the association then in force, or which might thereafter be adopted by its board of directors. The fact that the certificate of incorporation of the association contains a clause to the effect that the payment to the beneficiaries under the certificates of the association shall be 'of such sum as the by-laws of such association may from time to time prescribe,' does not distinguish the present case from the rule." The court also said, in the Dowdall case just cited, that it was much stronger in favor of the plaintiff than the Evans case in regard to the agreement in the application as to compliance with existing and future by-laws, rules, and regulations of the association and continues after comparing the same in regard to the Dowdall case that: "There is no suggestion that the laws, rules, and requirements could at any future time be amended, or new ones enacted, so as to affect the contract."

Other New York decisions are: Beach v. Supreme Tent Knights of Maccabees of the World, 177 N. Y. 100, 69 N. E. 281 (*considered* and *quoted* from in Dowdall v. Supreme Catholic Mutual Benefit Assoc. 196 N. Y. 405, 31 L.R.A.(N.S.) 417n, 89 N. E. 1075, 39 Ins. L. J. 87; *cited* in dissenting opinion per McLaughlin, J., in Hannes v. Nederland Israelitish Sick Fund, 136 N. Y. Supp. 742, 152 App. Div. 140, 41 Ins. L. J. 1685, to point that "agreement to be 'guided' by the by-laws which might thereafter be adopted has reference to matters of administration, and not to his" [the member's] "rights which were then fixed and vested." *Quoted* from in Smythe v. Supreme Lodge Knights of Pythias [U. S. D. C.] 198 Fed. 967, 980); Shipman v. Protected Home Circle, 174 N. Y. 398, 63 L.R.A. 347, 67 N. E. 83; Langan v. Supreme Council American Legion of

that the amount agreed to be paid under a certificate issued by a fraternal beneficiary society cannot, by an amendment thereafter made, be reduced, even under a reserved power to amend the by-laws and although the insured paid the reduced assessments, where it did not appear that such payments were made with knowledge of said reduction amendment.[14]

Honor, 174 N. Y. 266, 66 N. E. 932, rev'g 75 N. Y. Supp. 1127, 69 App. Div. 616 (*cited* in Fort v. Iowa Legion of Honor, 146 Iowa, 183, 123 N. W. 224, 39 Ins. L. J. 3); Weber v. Supreme Tent Knights of Maccabees of the World, 172 N. Y. 490, 494, 92 Am. St. Rep. 753, 65 N. E. 258. (This decision is considered in another New York case, Dowdall v. Supreme Catholic Mutual Benefit Assoc. 196 N. Y. 405, 31 L.R.A.(N.S.) 417n, 89 N. E. 1075, 39 Ins. L. J. 87, rev'g 122 N. Y. Supp. 1130, 123 App. Div. 913, where the court per Bartlett, J., said: "An action was brought upon a certificate of insurance. The defense interposed was that the insured took his own life, and hence a recovery could not be had, because at the time of his death, the by-laws and rules of the order provided that should an insured commit suicide within five years from the time of admission into the order, whether sane or insane, the contract should be void. Weber's contract of insurance provided that it should be void if the insured committed suicide within one year whether sane or insane. During Weber's lifetime, after the issuance of the certificate, the defendant amended its by-laws and rules so as to extend the time from one year to five in the suicide clause. The opinion of the court near the close states: 'This contract insured Weber against unintentional self-destruction after one year, and defendant had not the power to take away the right thus secured without his consent.'"); Parish v. New York Produce Exchange, 169 N. Y. 34, 56 L.R.A. 149, 61 N. E. 977; Hannes v. Nederland Israelitish Sick Fund, 136 N. Y. Supp. 742, 152 App. Div. 140, 41 Ins. L. J. 1685; Heath v. New York Safety Reserve Fund, 125 N. Y. Supp. 852, aff'd (mem.) 129 N. Y. Supp. 1126, 69 Misc. 452; Rockwell v. Knights Templars & Masonic Mutual Aid Assoc. 119 N. Y. Supp. 515, 134 App. Div. 736, 39 Ins. L. J. 105 (amendment of by-laws not stipulated for. Case *quoted* from in Smythe v. Supreme Lodge Knights of Pythias (U. S. D. C.) 198 Fed. 967, 979); Mock v. Supreme Council of Royal Arcanum, 106 N. Y. Supp. 155, 121 App. Div. 474 (does not interfere with vested rights); Wiedynska v. Pulaski Polish Benev. Soc. 97 N. Y. Supp. 413, 110 App. Div. 932 (cannot divest vested rights); McCloskey v. Supreme Council American Legion of Honor, 96 N. Y. Supp. 347, 109 App. Div. 309 (can reduce assessments when power reserved case also of waiver or estoppel); Williams v. Supreme Council American Legion of Honor, 80 N. Y. Supp. 713, 80 App. Div. 402.

[14] Smith v. Supreme Council American Legion of Honor, 88 N. Y. Supp. 44, 94 App. Div. 357. The court, per Hatch, J., said: "We think the learned court was correct in the conclusion which it reached. It is settled by indubitable authority that the reserved right to amend the laws which constitute a part of the contract between the insured and the defendant does not confer authority to destroy vested rights, and without the consent of the holder of the certificate to such change it is inoperative and void. This was so held in respect to the amendment now under consideration. Langan v. Supreme Council American Legion of Honor, 174 N. Y. 266, 66 N. E. 932; Williams v. Supreme Council, 80 N. Y. Supp. 713, 80 App. Div. 402. And also as applied to

In a *North Carolina* case it seems to be settled that a member's vested rights cannot be destroyed by changes or amendments of the

other similar contracts sought in like manner to be so changed. Parish v. New York Produce Exchange, 169 N. Y. 34, 56 L.R.A. 149, 61 N. E. 977; Weber v. Supreme Tent Knights of Maccabees of the World, 172 N. Y. 490, 92 Am. St. Rep. 753, 65 N. E. 258. We should not deem this discussion necessary were it not for a decision of the Third Department in Evans v. Southern Tier Masonic Relief Association, 78 N. Y. Supp. 611, 76 App. Div. 151, decided by a divided court. Therein it was held, upon a state of facts quite similar to the present, that the payment of the reduced assessment was notice to the insured of a change in the by-laws and that by such payment he acquiesced therein. There, as here, such change operated to destroy vested rights. The decision proceeded upon the ground that the insured was presumed conclusively to have knowledge of the by-laws of the association, and, consequently, of this amendment, at the time when he was making the payment, and that, aside from this presumption, the change, in the method of assessment was actual notice to him of the change in the by-laws. We hesitate in disagreeing with the learned court who made this decision, but, with all deference thereto, we are of opinion that it is in conflict with the law as announced in the Second Department in Simons v. Supreme Council American Legion of Honor, 81 N. Y. Supp. 1014, 82 App. Div. 617, and with the law of the case. Nor do we think the authorities cited by the learned court in support of its conclusion decide the question as therein announced. For the first proposition, the court relies upon Bacon on Benefit Societies Life Insurance, sec. 81, wherein it is stated as a general proposition that the by-laws of a society are binding upon all the members, and all are conclusively presumed to know them; but it is evident from a reading of the entire section, to which reference is made, that it has regard to laws, and by-laws existing at the time when the insured becomes a member. By the provisions of secs. 79, 80, which discuss the authority to make and change laws, it is shown that the laws, to be binding upon all members, must be perfectly adopted, and must be such laws as the corporation has the power to make. Therein it is said: 'If the charter, or the fundamental agreement of the members prescribe the mode in which the by-laws shall be made and adopted in order to insure their validity, that mode must be strictly pursued.' And further, 'No by-laws can be repealed so as to impair or affect vested rights, for the members have the right to rely upon the by-laws, which, as between themselves, are contracts. A by-law that will destroy a vested right is unreasonable.' The cases cited fully support the text. There can be no presumption that a member has notice of a law which is invalid and which destroys his vested property right. The member is only presumed to know of the existence of such laws and rules as the corporation has authority to make. Indeed, the presumption is that the corporation will not pass a law which is illegal, unreasonable and void; otherwise, by a presumption, a member would be bound by an illegal act which destroyed his property right. It is evident that such a rule of law does not exist, and may not be invoked as a protection for an illegal act constituting a breach of contract and which works a destruction of vested rights. Nor do the cases cited support the doctrine of acquiescence. In Koeth v. The Knights Templars and Masonic Life Indemnity Company, 55 N. Y. Supp. 768, 37 App. Div. 146, the sole question involved was whether it was

constitution and by-laws reducing the amount of indemnity even though there is a general consent of a member that changes may be

competent for the defendant when sued upon its indemnity certificate, to show that an amendment was adopted to its laws without opposition, and that the certificate holder, as a member of the organization, voted in favor of such amendment. This proof having been excluded on the plaintiff's objection, who was seeking to hold the certificates held by the person who had voted in favor of the amendment, the court held such ruling to be error, sustained the defendant's exception, and ordered a new trial. The court speaking through Judge Follett, said: 'It was competent for the defendant to show that the insured expressly assented, January 14, 1896, to a change of the contract, existing between him and the defendant, as to the manner of giving notices of assessments and when such assessments became payable.' Therein also the question presented was not only to show the affirmative act and the express assent of the certificate holder to the change in the laws, but the law itself was such a one as the society was authorized to change. In McDowell v. Ackley, 93 Pa. 277, the amendment to the law was made by all the members of the association and provided that a suspended member who should fail for three months to pay in full all credits, dues, and assessments should forthwith cease to be a full member of the association; that he might thereafter be restored to full membership by favorable report of the standing committee and by paying in full all arrears of gratuities, dues and assessments. The court held that the members of the associations had the power to make such a change in the laws, and that they were binding upon the members. The sole point in the case was whether the failure of the member 'to pay his dues and assessments, and his second suspension, worked a forfeiture of his contingent rights.' Therein it appeared that the member had the right to participate in the change in the constitution, and the subject-matter of it constituted a regulation having regard to a compliance by the member with the terms of his contract. The court held that, as the member had failed to comply with the term of his contract his beneficiary ceased to have any interest in the fund upon his death. Two things, therefore, concurred: One that the amendment to the constitution was by the body itself, had relation to a subject over which it had the power to legislate, and in legislating it the effect which followed neglect upon the part of a member to comply with the terms of his contract. In Bogards v. Farmers Mutual Insurance Company, 79 Mich. 440, 44 N. W. 856, the plaintiff was the holder of a policy of insurance issued by the defendant which was organized under an act authorizing the incorporation of mutual fire insurance companies. Policies were issued to the members, and membership was maintained by the payment of certain fees and 1 mill per cent. on the amount insured at the time of issuing the policy, with the assessment made therefor. In the charter of the company power was expressly conferred upon the members to pass by-laws, at any annual or special meeting, which should be binding alike upon the corporation and the directors. The policy was issued and received under an express agreement to be subject to all changes which should thereafter be made by the charter and by-laws and the charter provided that at the annual meeting members present might determine among other things, a single hazard. At a regular meeting the company adopted a by-law that it should not be liable for loss by fire from steam power used on or about the premises

made therein.[15] The court per Douglas, J., declares after citing prior decisions in that state that "with one exception the principles governing the case at bar are so nearly identical and have been so fully discussed in those cases that it seems useless for us either to repeat or enlarge upon what we have said. We must adhere to what may now be considered the settled ruling of this court, that 'whatever may be the power of a mutual association to change its by-laws, such changes must always be in furtherance of the essential objects of its creation, and not destructive of vested rights.' While relying upon our own decided cases we are not without authorities in well considered cases in other jurisdictions" and the claim will not be sustained that a stipulation was not to pay a fixed sum but only an agreement to pay some indefinite sum not exceeding said amount as such a stipulation is in legal effect one for the full amount so specified where the company receives premiums in full based on said amount.

In *Ohio* the reservation of a right to alter or change a by-law does not enable the society to repudiate a debt and reduce the amount to which a member is entitled for benefits by a by-law enacted after the right of the claimant has accrued.[16]

In *Tennessee* where the increase in rates is not unreasonable the member is bound if the policy is conditioned for compliance with the laws, rules and regulations thereafter enacted "by the supreme commandery to govern said commandery and fund, and that if the

of any member of the company, and a copy of this by-law was given immediately to the plaintiff. It was held that a loss suffered by reason of the exception contained in this by-law created no liability against the company. This case was clearly well decided, for the chartered power in express terms gave the right to make the limitation; the plaintiff had the right to participate in its action; it related to a subject which was clearly within the power of the corporation to regulate. Notice was given, and consequently compliance was had with the terms of the contract which had been made; and there was no interference with vested rights. The court took occasion to distinguish that decision from Becker v. Farmers Mutual Insurance Company, 48 Mich. 618, 12 N. W. 874, where, there being no such reserved power and no authority to make such a change, the attempted modification was held to be a destruction of vested rights. These are all the cases relied upon by the learned court in announcing the doctrine, save one which seems to be not reported. These cases simply serve to show the distinction which exists between an authorized and unauthorized change in the laws governing such contracts, and as we recall them, instead of supporting the doctrine of acquiescence and estoppel, they confirm the views which we have heretofore expressed. See also Morawetz on Corp. (2d ed.) secs. 500, 508; Smith v. Supreme Council American Legion of Honor, 88 N. Y. Supp. 44, 45, 47, 48, 94 App. Div. 357.

[15] Makely v. American Legion of Honor, 133 N. Car. 367, 45 S. E. 649.

[16] Pellazino v. German Catholic St. Josephs' Soc. 16 Wkly. L. Bull. (Cin.) 27.

member failed to pay his assessments when due he should ipso facto stand disconnected with the order," and the rule was extended to include one insane at the time the amendment was adopted. The point, however, of waiver and estoppel existed.[17] But it is also decided in that state that an agreement by the holder of a mutual benefit certificate to be governed by by-laws subsequently enacted does not authorize the reduction of the benefit called for by his certificate, after he has for years paid assessments on its original value, such a by-law is ultra vires and void. The reserved right is one of preservation and not of destruction of the contract.[18]

In *Texas* it is held that by-laws cannot be amended so as to increase assessment rates. So rerating may apply to existing members as well as to those becoming members thereafter and where an association which takes over members from another association, and the certificate is conditioned that the member comply with the rules and regulations thereafter enacted, existing members will be bound by subsequent rerating by-laws increasing the assessments where it is necessary for the association to meet certificate obligations and such increase of rates does not impair contract or vested rights of a member.[19] And an amendment increasing the amount of benefits and reducing dues, and also permitting certain members by declaration in writing to remain under the former plan, binds members not availing themselves of such permission, and also obligates beneficiaries.[20]

In *Wisconsin* even though the member agrees in his certificate to comply with the laws, rules and regulations of the society or order as they may be enacted or amended from time to time in the future the society is not empowered to make changes which materially alter the contract relations between the society and its members as expressed in the contract, in the absence of consent or waiver or of some statutory rule of public policy to the contrary. Such reservation or stipulation relates only to the conduct and government of the society in relation to its members, and while it may authorize a change in the details of transacting business with the members it cannot thereunder force a different contract upon the member from that entered into when the certificate was issued and

[17] Conner v. Supreme Commandery Golden Cross, 117 Tenn. 540, 97 S. W. 306. *Cited* in Fort v. Iowa Legion of Honor, 146 Iowa, 183, 123 N. W. 224, 39 Ins. L. J. 3.

[18] Gaut v. Supreme Council American Legion of Honor, 107 Tenn. 603, 55 L.R.A. 465, 64 S. W. 1070.

[19] Supreme Ruling of Fraternal Mystic Circle v. Ericson, — Tex. Civ. App. —, 131 S. W. 92. Case where member was held to have consented to change of plan from assessment to one of periodical payment.

[20] Duer v. Supreme Council Order of Chosen Friends, 21 Tex. Civ. App. 493, 52 S. W. 109.

accepted.[1] Nor can a fraternal benefit order by amendment to the by-laws, even though assured agrees in his certificate to comply with subsequently enacted by-laws, charge a deficiency in dues or rates created thereby against the member's certificate by advancing members to their attained age at a certain date and charging an advanced rate up to said date from the time of initiation of a member.[2] And even though a power is reserved to make changes in the by-laws, rules and regulations a mutual benefit order cannot by a subsequent amendment of the constitution or by-laws change assured's contract by making payable thereunder an indefinite sum probably much less than that contracted for especially where the member has paid assessments for a long time, contributed to meet maturing obligations of a specified sum for each member as the principle that vested interests cannot be disturbed by retroactive laws applies.[3]

§ 380d. Same subject: changes in by-laws, etc., to prevent financial disaster or dissolution.—Under a *United States* decision a right of amendment reserved in the articles of association coupled with a statutory authorization of a change of plan of insurance from a fraternal co-operative assessment association to a policy with straight premiums and a fixed indemnity does not impair any vested rights of the original members, even though assessments are thereby increased as there exists no vested right to a continuation of a plan of insurance which would result disastrously to the company and its members.[4] But in the Federal Circuit Court where reconstruction was actually necessary to continue the existence of the corporation and prevent a necessary dissolution and where, in order to render more equitable the premium paid for insurance at different ages by different classes of members of a fraternal beneficiary association it became necessary to change the system of assessment from one based upon the age of admission of members to a system based upon

[1] Stirn v. Supreme Lodge of Bohemian Slavonian Benev. Soc. 150 Wis. 13, 136 N. W. 164, 41 Ins. L. J. 1130.

[2] Jaeger v. Grand Lodge of Order of Hermann's Sons, 149 Wis. 354, 39 L.R.A.(N.S.) 494, 135 N. W. 869.

[3] Wuerfler v. Trustees Grand Grove of Wisconsin of the Order of the Druids, 116 Wis. 10, 96 Am. St. Rep. 340, 92 N. W. 433.

[4] Wright v. Minnesota Mutual Life Ins. Co. 193 U. S. 657, 48 L. ed. 832, 24 Sup. Ct. 549, 33 Ins. L. J. 542. *Considered* and *quoted* from in Smythe v. Supreme Lodge Knights of Pythias (U. S. D. C.) 198 Fed. 967, 985 (case aff'd Smythe v. Supreme Lodge Knights of Pythias, 220 Fed. 438, 137 C. C. A. 32), but declared not to sustain defendant's contention, that "on the contrary the facts show that every right of all the old members was protected and preserved, and that, in effect, they were allowed to continue to pay in the old way, and that their beneficiaries were to be paid on the basis of the original plan or contract. . . . The court repeatedly states that the existing contracts were not changed, and that contract rights were not interfered with."

the actual attained age on a certain day, and such change increased markedly the assessments against older members, and, as no fraud or bad faith was charged or insisted upon, the question was whether the new system impaired the obligation of the original contract with the members and whether the certificate of membership completed a contract for assessments on that basis during life. It was decided on motion for preliminary injunction that said question was not sufficiently clear so as to justify a Federal court in another state than that of the creation and domicil to interfere by injunction with the internal management and operation of the association; that the law of the state of domicil governs and should be there interpreted. The injunction was denied and bill dismissed.[5] In *Connecticut* it is held that it is neither unreasonable

[5] Gaines v. Supreme Council of Royal Arcanum (U. S. C. C.) 140 Fed. 978, 35 Ins. L. J. 207. (*Cited* in Fort v. Iowa Legion of Honor, 146 Iowa, 183, 123 N. W. 224, 39 Ins. L. J. 3). The court, per Clark, D. J., said: "It must be apparent that it is an extremely delicate question for the courts of any jurisdiction other than Massachusetts, the state of defendant's creation and the state of its domicil, to interfere by injunction with the internal regulation and management of the affairs of this benevolent association. The contract is, of course, found not only in the certificate of membership, but in the properly adopted by-laws and regulations or the laws of Massachusetts under which the association is incorporated, and it is obvious enough that the law of Massachusetts furnishes the rule for the decision of the question now up for disposition, and all similar questions relating to this association and its powers and authority. If the court may interfere by injunction in a case like this, it must be distinctly upon the closely drawn issue whether vested and constitutionally protected rights are being interfered with or impaired. If the courts of any state may exercise jurisdiction for such purposes outside of the state in which the defendant association was created and has its principal office and domicil, it is equally true that the courts of the forty-three or forty-four different states where members may be, can exercise similar power and authority. If this were done, it would speedily bring about such a situation as would make emphatic the proposition that the court of any state other than Massachusetts should only exercise authority to interfere by injunction with the internal management and operation of the association upon the clearest and most cogent grounds. For these reasons, and because in its last analysis, as I have said, the single practically determinative question is one of contract impairment, in violation of the Constitution, and notwithstanding the magnitude of the case, its disposition on the present occasion and for the purpose of the issue now presented does not seem to require any elaborate opinion, although it has received careful and extended study. I conclude, as already plainly intimated, that the law of Massachusetts furnishes the rule for the decision of this question, and I further conclude, that under the law of Massachusetts, in accordance with the exposition of its court of highest authority, the defendant might, in view of its contract, make the change which it has made, notwithstanding the question is close and that the change is quite fundamental, and has resulted to a large extent, not merely in amend-

nor arbitrary to change a system of rates which would better promote the society's ability to carry out its contracts where the plan was to secure thereby surplus funds for paying death benefits thus adding to the financial stability of the order even though a reserved power to change or amend the laws of the society did not give it the right to divest, impair or disturb vested rights.[6] In *Indiana* it is decided that if it became necessary to increase assessments to provide funds to meet the society's obligations or prevent financial disaster it may do so where the certificate agreement or contract stipulates that the laws, rules, and regulations for its government may thereafter be enacted.[7] In *Massachusetts* a mutual benefit society has power to

ment or modification, but in reconstruction, by which a practically new system is brought about. It seems that such reconstruction as this was actually necessary to continue the existence of this association, and to prevent a necessary wind-up in the court or otherwise. At all events, it is not sufficiently clear, under the law of Massachusetts, that this plan of assessment, and the effect on members, impairs the obligation of the contract, and unless it did so appear obviously this court should not interfere."

[6] Kane v. Knights of Columbus, 84 Conn. 96, 79 Atl. 63, 40 Ins. L. J. 874.

[7] Supreme Lodge Knights of Honor v. Bieler, 58 Ind. App. 550, 105 N. E. 244. The court fully considers the points involved and says: "(1) Counsel for appellant contends that for several reasons this complaint is insufficient. The first of these is that it affirmatively appears therefrom that the insured had failed to pay the assessment made in April, 1907, and there is no averment tending in any way to show that the assessment provided for by the amended by-laws and the amount demanded after such amendment was unauthorized or unreasonable, or that the society did not have the right to demand the payment of such assessment, except that portion of the pleading consisting of a copy of applicant's by-laws in force when the insured became a member, which fixed the amount of assessment of members of the same age at $3.50 for each assessment, and because he failed to pay the April, 1908, assessment, which was for a larger sum, appellee's decedent was not a member of the order at good standing at the time of his death, and therefore no cause of action existed in favor of any one on his certificate. It is the evident theory of the pleader that, when Thieme became a member of appellant society, his rate of assessment was fixed by its by-laws, and that amount could not thereafter be increased, so as to affect him by any change in the by-laws. Broadly stated the contention is that, having once fixed the rate of assessments required to be paid by him to remain in good standing in the order, no power existed in it to modify or change its by-laws so as to affect the vested rights of its pre-existing members without their consent. Such is generally held to be the correct rule in the absence of a provision in the laws of the order or in the certificate issued to the member, permitting the increase of assessments. The question in this case is: What should be the rule when there is an express provision in the certificate of insurance by which the member agreed to abide by laws, rules, and regulations of the order after enacted.

"This particular question has never been determined by the courts of this state, and an examination of the

amend its by-laws so as to increase the assessments on its members, where the existing rate has proved inadequate, under charter author-

cases in other jurisdictions reveals the fact that they are not in harmony, but follow two lines of decisions, one holding that under a general reservation of the right to change by-laws, assessments may be raised, the other denying that power, as an infringement of the obligation of contracts. We believe, however, that the cases which support the right under such provisions to raise assessments, are founded on the best reasoning and supported by the weight of authority.

"Indeed there are some cases which go so far as to hold that, when the purposes of an organization such as appellant are considered, the right to amend its by-laws by fair and reasonable increase of assessment rates to enable it to accumulate funds out of which its legitimate contracts may be paid is but one of the powers incident to its corporate existence. Else, it is reasoned, how can the life of such societies be preserved when it becomes evident that, by reason of the changing conditions of its membership, previous methods of raising funds, and at that time sufficient, have proved inadequate? Before there can be a fund out of which the death claims can be paid, there must be such a rate of assessment against the members as will produce such fund. A less amount can only result in a dissolution of the society and serious damage to all its members. So that in instances where the funds are insufficient under present rates of assessment to meet the death claims against it, although considered sufficient when made, there is an inherent power resting in such fraternal benefit societies to so amend their by-laws as to increase the rate of assessment for the purpose of maturing its contracts so long as such rate of interest is reasonable and proportional, the young and old members contributing according to the risk assumed in carrying each, without arbitrary discrimination, and does not affect any vested rights possessed by any such members. Whether this reasoning is strictly correct we need not decide, for here we have an objecting member, who on his own account has agreed not only to conform to the present laws of the order, but also to such future laws as may be from time to time enacted by the official body governing the same, and as to such contracts the better reasoned cases hold that assessments may be raised by such societies under such reserved power to amend by-laws. Fullenwider v. Supreme Council Royal League, 180 Ill. 621, 72 Am. St. Rep. 239, 54 N. E. 485; Messer v. Grand Lodge Ancient Order of United Workmen, 180 Mass. 321, 62 N. E. 252; Reynolds v. Supreme Council Royal Arcanum, 192 Mass. 150, 7 L.R.A.(N.S.) 1154, 78 N. E. 129, 7 Am. & Eng. Ann. Cas. 776; Ebert v. Mutual Reserve Fund Life Assoc. 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457; Wineland v. Knights of Maccabees, 148 Mich. 608, 112 N. W. 696.

"These cases and many others which might be cited to support the same doctrine are based upon the rule of necessity. Fraternal benefit societies are said to be mutual in character, each member thereof occupying the dual relation of insurer and insured, and the contracts which he has made with the society, containing a reserved right to amend by-laws, will be construed in such a manner as to enable the society to mature its contracts rather than to cause them to be repudiated, upon the ground that a change of the rate of assessment is necessary to fulfill the purpose of its organization. It certainly is not the policy of the law to create these beneficial societies and

ity to provide for the payment of a certain death benefit, to be secured by assessment, and to provide for the amendment of its by-

yet not to permit them, by reasonable provisions of their by-laws, to acquire the necessary funds honestly, fairly, and justly to administer them so as to result in the greatest benefit to the greatest number of their members.

"(2) In opposition to this view, appellee has cited a number of cases, some of which hold that it is an interference with contract rights for a fraternal benefit society by a subsequent by-law to raise the amount of an assessment, others which hold that a subsequent by-law which reduces the amount of the benefit certificate is illegal and void. As we view the proposition, there is a clear distinction between the cases wherein the effect of the change in the by-laws is to entirely alter the promise of the society made with one of its members so as to reduce the promised benefits, and those cases where the changes are made in the rate of assessment for the express purpose of enabling such society to provide a fund sufficient to pay the certificates which it has legally issued as each matures. So far as we are able to discover, all the courts are agreed upon the proposition that, under a reserved power to amend by-laws similar to that contained in the present certificate, no amendment can be sustained which will in any manner affect the promise of the society to pay a stipulated sum to one of its insured members, for as to such a promise the insured has a vested right and may rely upon its strict performance. This subject is fully discussed in the case of Reynolds v. Supreme Council Royal Arcanum, 192 Mass. 150, 7 L.R.A.(N.S.) 1154, 78 N. E. 129, 7 Am. & Eng. Ann. Cas. 776. In that case the court said: 'There are many cases in which it is held that the amount expressly promised to be paid in a certificate like those issued by the defendant, cannot be cut down by an amendment of the by-laws. . . . But in many of these . . . a distinction is made between the express stipulation of the corporation to pay a certain sum and other provisions relating to the methods of the corporation, and the duties of the certificate holders, which properly may be a subject for regulation by by-laws, even though they affect the rights of the parties under their contract. The assessments to be paid for death benefits in this case are provided for by the by-laws, while the promise in writing to pay a certain sum to a particular person is, as to that person, a matter outside of these corporate rules which may be expected to be changed by an amendment of the by-laws . . . then existing or that may afterwards be adopted. The promise of the corporation is stated expressly, without mention of the by-laws. The member occupies a dual position, as the insurer and the insured. As one of the association agreeing to provide for the payments that may become due to members, he agrees to be subject to the by-laws. As the insured person to whom a particular sum of money is promised, he has a right to stand on the terms of the promise.'

"An examination of many of the cases relied on by appellee will disclose that they are those where the by-laws were amended so as to affect the fixed promise made to the certificate holder as the person insured, and have no reference to his duties as a member of the society, which had made the specific promise to each certificate holder that the several amounts called for therein would be paid in full. In some of the cases which deny the right to raise the assessments, the amount of the assessment was provided for in

laws. It cannot be limited to a plan of assessments that would bring

the certificate. However, it would be useless to ignore the fact that there are two lines of authority, and that there is very respectable recent authority which seems to have been followed by the lower court, and we would have to hold, were we to follow it, that the raise in amount of assessment by appellant was an infringement of contract rights. The law in New York seems to be settled on this point, and other states follow the same rule. Wright v. Knights of Maccabees, 196 N. Y. 391, 31 L.R.A. (N.S.) 423, 143 Am. St. Rep. 838, 89 N. E. 1078; Green v. Supreme Council Royal Arcanum, 206 N. Y. 591, 100 N. E. 411; Smythe v. Supreme Lodge Knights of Pythias (D. C.) 198 Fed. 967; Ericson v. Supreme Ruling Fraternal Mystic Circle, 105 Tex. 170, 146 S. W. 161; Poole v. Supreme Circle Brotherhood of America, — N. J. Ch. —, 85 Atl. 821.

"All the authorities are agreed on two general rules: First, that under the reserved power to amend laws, rules, and regulations, the benefit societies may not make an amendment which will impair vested contract rights; second, that under said reserved power, the benefit societies may make reasonable and necessary amendments to its by-laws, rules, and regulations. The conflict arises in the class of cases to which one court applies one of the above rules, while other courts apply the other rule; that is, the courts do not agree as to what are vested rights under benefit contracts, or as to what are reasonable amendments to by-laws. The cases which we have cited to support our position all hold that a reasonable, necessary, and impartial increase in rates is a reasonable amendment of by-laws, under the reserved power of amendment. The certificate sued on contains an express stipulation that it is 'payable upon condition that said member complies with the laws, rules, and regulations now governing this order or that may be hereafter enacted for its government.' This provision, we believe, distinguishes the case from some of those relied upon by appellee. See Norton v. Catholic Order of Foresters, 138 Iowa, 464, 24 L.R.A.(N.S.) 1030, 114 N. W. 893. Questions analogous in general principle to the case under consideration have been passed upon by the Supreme Court of the United States, and its decisions support our conclusions. See Covington v. Kentucky, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. 383, and cases cited.

That portion of the constitution and laws of the order in force when deceased became a member, which provides, 'each and every member, except honorary members, upon presenting himself to receive the Third or Degree of Manhood, shall pay to the financial reporter the following rates into the widows and orphans' benefit fund, and the same amount on each assessment thereafter, whilst he is a member of this order,' means, in our view, that the specified assessment should remain the amount to be paid by the member on such certificate so long as he remained in good standing in the order, provided that assessment should be sufficient to enable the society to pay to the beneficiary of the members the amounts stipulated in their contracts as they matured, not in part, but in full. If conditions arose in the future which clearly made it impossible to meet such demands, then the members had consented that the by-laws might be so amended as to enable the society to realize sufficient funds from all the members to pay all obligations resting on it as expressed in the several certificates which had been properly issued. In this case the society was not limited as to the number of assessments, and even if we were to hold that it had no right to increase the amount of assess-

about its speedy dissolution.[8] But a percentage cannot, by subsequently enacted by-laws, be directly deducted from the face of existing certificates for an emergency fund, even though the statute authorizes the creation of such a fund by assessment companies.[9] Under a *Michigan* decision it appeared that a fraternal insurance association organized under the laws of the Dominion of Canada, and a number of years after the issuance of the certificate in question, obtained a new charter from the parliament of Canada changing its name and authorizing it to make a change against policies issued prior to a certain date and affecting the policy in suit. The

ments, it might accomplish the same results by increasing the number of assessments. It may also be well to remember that from the assessments levied by benefit associations no reserve is created to take care of an increasing risk, that the member simply pays for insurance from assessment to assessment, and if he fails to pay an assessment, is entitled to no extended insurance from a reserve created by former payments, that each assessment is merely a payment for protection for the time for which the assessment is levied, and that, having lived past that time, the member has no right in the proceeds of any past assessment. Therefore, if assessments become higher than a member cares to pay, he, having received the full consideration for his past payments, may at any time resign from the order without losing anything. He who contracts for assessment insurance must be considered to have had in mind when the contract was made that there are disadvantages as well as advantages in this form of insurance as contrasted with other forms. (3) There is no averment in the complaint that the amendments of appellant's by-laws increasing the rate of assessment of deceased were not adopted legally and honestly, nor is there any averment that the increase was not a reasonable one to carry out the purposes and objects of the society, or that there was an abuse of the power reserved to it in the certificate issued to deceased. In cases such as this it must appear that there was an abuse of power, or that the by-laws as amended were so unreasonable as to be void, before an amendment is unauthorized. Supreme Lodge Knights of Pythias v. Knight, 117 Ind. 489, 497, 3 L.R.A. 408, 20 N. E. 479. (4) Although the complaint shows that deceased was paying a very high rate of assessment, and discloses a sudden very large increase in that rate, in the absence of an averment that they were unreasonable, we cannot say, from these facts alone, that the increase in rates was unreasonable as a matter of law. These facts would be circumstances for the consideration of the jury in determining whether the increase was unreasonable. It is a question of fact to be determined from all the circumstances of the case as to whether the increase was reasonable and necessary, and therefore binding on appellee's decedent, if he wished to remain insured under his certificate issued by appellant."

[8] Reynolds v. Supreme Council Royal Arcanum, 192 Mass. 150, 7 L.R.A.(N.S.) 1154, 7 Am. & Eng. Ann. Cas. 776, 78 N. E. 129, 35 Ins. L. J. 673. Under Rev. Stat. Mass. c. 125, sec. 6, c. 119, sec. 2. *Cited* in Fort v. Iowa Legion of Honor, 146 Iowa, 183, 123 N. W. 224, 39 Ins. L. J. 3.

[9] Newhall v. Supreme Council American Legion of Honor, 181 Mass. 111, 63 N. E. 1, 31 Ins. L. J. 389.

insured agreed in his certificate that amendments might be made in relation to the constitution and laws of the order fixing the premiums and rate of assessments. It was decided that it was not against public policy or an infringement upon vested rights, to agree that such changes might be made as to assessments as would enable the association to carry out its insurance agreements. The assessment was proportioned to a valuation deficiency existing as to the class of policies in question, which were paying less than the cost of insurance.[10] In *New Jersey* an increase cannot be made in assessments even under a general reserved power to alter or amend or a stipulation to comply with thereafter enacted by-laws, as the members contract rights cannot be impaired and "It is not an answer to say that the increase is necessary to the prosperity of the order. The plea of necessity is never, as I understand it, a valid defense against the performance of a contract."[11] In a *New York* case it is declared by the court that: "Referring to the statement of defendant's counsel that unless it is invested with the power to increase the amount of a single assessment, as the exigencies of the situation may require, it will be unable to continue its financial life and pay its death losses. . . . This court said, under a different state of facts, in Vought v. Eastern Building & Loan Association:[11a] 'It is contended that if the construction we have given this contract is to prevail, it will affect the responsibility of the defendant, if it does not result in its bankruptcy. If that be true, yet it affords no proper reason why we should disregard the plain and unqualified terms and provisions of the contract. Nor does it furnish any excuse for us to disregard well established principles of law to hold it unenforceable.'" The court then considers certain reports concerning the company's status and concludes: "This very severe arraignment of the business methods of the defendant coming as it does from its officials in high position, goes far to establish the fact that the peril of coming insolvency is due to a failure to observe the fundamental principles of life insurance."[12] In another case in that state it is also said: "The defendant seeks to sustain its action in increasing the rate of assessment by invoking the general power to amend and pleading that the exercise thereof was essential to its existence. The court did not find, as matter of fact or law, that a reduction of benefits was necessary, nor did it find as a fact that an increase in the rate of assessments was necessary, but found that 'the

[10] De Graw v. Supreme Court Independent Order of Foresters, 182 Mich. 366, 148 N. W. 703.

[11] Poole v. Supreme Circle Brotherhood of America, 80 N. J. Eq. 259, 85 Atl. 821, 42 Ins. L. J. 482, quotation from opinion, per Walker, V. C.

[11a] 172 N. Y. 508, 518, 92 Am. St. Rep. 761, 65 N. E. 496, 499.

[12] Dowdall v. Supreme Catholic

increase in the rate, or the number of assessments, was necessary for the continued existence of the defendant.' Necessity bears only on the question whether the amendments are reasonable. While they were desirable as a matter of policy, they were not necessary, for the old by-laws gave the defendants power to raise all the money needed for every purpose by simply increasing the number of assessments. It is true that a great increase in this respect might reduce the membership, still that did not make an increase in the rate of assessments necessary, for it cannot be necessary for a corporation to violate its contract in order to preserve its existence.[13] Moreover the existence of the defendant, according to the findings, is not now threatened, nor will it be until after the lapse of from eighteen to twenty-five years, and no one can foresee the changes that will take place in the meantime. If the wonderful growth of the defendant as stated by its counsel continues, the danger now apprehended as to what may take place a quarter of a century hence, may wholly disappear before that period expires." [14] Again, an amended by-law which discriminates against female members by reducing their weekly sick benefits is illegal and void even though their dues are correspondingly reduced. Nor is such an amendment justified by the claim that the society would become bankrupt by payment of the benefit, and there is no possible legal ground for sustaining such amendment as against one who refuses to acquiesce.[15] In *Tennessee* where an increase in rates was held binding upon a member under a reserved power or agreement to amend it appeared that the old plan was a failure and that some change was necessary to accomplish the purposes of the order and save it from dissolution.[16] So in *Texas* an increase of assessments which was necessary to enable the society to meet its obligations was held not unreasonable. The change of plan was, however, consented to by the member.[17]

Mutual Benefit Assoc. 196 N. Y. 405, 31 L.R.A.(N.S.) 417n, 89 N. E. 1075, 39 Ins. L. J. 87, rev'g 122 N. Y. Supp. 1130, 123 App. Div. 913, per Bartlett, J.

[13] *Citing* Vought v. Eastern Building Loan Assoc. 172 N. Y. 508, 92 Am. St. Rep. 761, 65 N. E. 496.

[14] Wright v. Knights of Maccabees of the World, 196 N. Y. 391, 31 L.R.A.(N.S.) 423, 89 N. E. 1078, 39 Ins. L. J. 95.

[15] Feldblum v. Congregation Bikur Cholim of Brooklyn, 116 N. Y. Supp. 289, 131 App. Div. 854. See further on this point Simmerbuick v. Supreme Court I. O. F. 130 N. Y. Supp. 803, 71 Misc. 535 rev'd 136 N. Y. Supp. 527, 152 App. Div. 892; Rockwell v. Knights Templars & Masonic Mut. Aid Assoc. 179 N. Y. Supp. 515, 134 App. Div. 736, 39 Ins. L. J. 105; Mock v. Supreme Council Royal Arcanum, 106 N. Y. Supp. 155, 121 App. Div. 474.

[16] Conner v. Supreme Commandery Golden Cross, 117 Tenn. 540, 97 S. W. 306.

[17] Supreme Ruling Fraternal Mystic Circle v. Ericson, — Tex. Civ. App. —, 131 S. W. 92.

§ 380e. Same subject: classification of risks: discrimination.— Where amendments to by-laws classify members and provide for a graduation of dues, a division of funds between said divisions and for separate trusts limited to each division, said amendments cannot be enforced where the contract rights of members are violated.[18] Nor can a member's contract on which he has paid large sums of money be destroyed in value without his consent by a resolution which places him in a class and assesses that class in a manner different from the rule applied to newer members.[19] And where the contract of a member of a co-operative or assessment company calls for the payment of assessments for existing death claims and said contract and the company's constitution provides that the ratio, upon which the assessment shall be based, shall be upon the entire membership in force when the liability of the assessment accrued, it constitutes a violation of said contract to provide by a subsequent resolution that members be classified and assessments apportioned among them according to the age of each member and to assess him at his attained age, and other members, of the same age, as of the age of their entry, and said resolution is therefore void.[20] So an amended by-law which discriminates as to weekly sick benefits by depriving female members thereof contrary to their original contract is illegal and void, especially so as to a female member who protested against enactment of said by-law.[1] Again, where there was a new classification as to hazardous occupations under an accident policy it was held that the association could not thereby cut down or reduce the amount of indemnity contracted for, although if the original contract had provided as it did not in terms so provide, that changes might be made in the rules or by-laws which would have bound the assured.[2]

But it is also held that the classification of members of a mutual benefit society according to age, in a by-law readjusting methods of

[18] Parks v. Supreme Circle, Brotherhood of America, 83 N. J. Eq. 131, 89 Atl. 1042, s. c. 81 N. J. Eq. 330, 86 Atl. 432.

On validity of retrospective by-law or other rule of benefit association excluding certain class of members from benefits or reducing benefits of that class, see note in 24 L.R.A. (N.S.) 1030.

[19] Strauss v. Mutual Reserve Fund Life Assoc. 126 N. Car. 971, 54 L.R.A. 605, 36 S. E. 352, 128 N. Car. 465, 39 S. E. 55.

[20] Benjamin v. Mutual Reserve Fund Life Assoc. 146 Cal. 34, 79 Pac. 517, 34 Ins. L. J. 614. See Gaines v. Supreme Council (U. S. C. C.) 140 Fed. 978, 35 Ins. L. J. 207; Kane v. Knights of Columbus, 84 Conn. 96, 79 Atl. 63, 40 Ins. L. J. 874.

[1] Feldblum v. Congregation Bikur Cholim of Brooklyn, 116 N. Y. Supp. 289, 131 App. Div. 854.

[2] Morse v. Fraternal Accident Assoc. 190 Mass. 417, 112 Am. St. Rep. 337, 77 N. E. 491.

assessment, is not illegal.[3] And a mutual benefit society whose laws bind a member to those thereafter enacted may, after the death of a member whose certificate was payable out of the general mortuary fund, reclassify or create a new class of members and a separate mortuary fund from receipts from their certificates, without impairing the obligation of contracts or interfering with a beneficiary's vested rights.[4] Again, a reclassification of risks as to hazardous occupations is held not to impair vested rights.[5] And under a Texas decision a rerating and increase of assessments under a new by-law, the insured having agreed to comply with rules and regulations thereafter enacted, is not an arbitrary change, where such change imposes an equal burden on members of the same class.[6] Where, subsequent to a change in a merchants exchange charter, the members are divided into participating and nonparticipating classes, an amendment of the by-laws authorizing members in the former class to change to the latter is within the power of the corporation where its charter of incorporation authorized changes in the by-laws and it was stipulated in the application for membership that future amendments might be made.[7]

§ 380f. Right of member or beneficiary to object to amendments: waiver or estoppel.—The doctrine of waiver and of estoppel applies in determining the rights of members or their beneficiaries under amended constitutions, by-laws, etc., of the company, association or society. The following decisions sufficiently illustrate the principle: A member who continues to pay assessments after a change in the by-laws in relation thereto is generally estopped to deny the power to amend such by-laws.[8] And a member joining a beneficial association before the adoption of a new charter is bound by the later charter and the constitution and by-laws thereunder where assured had knowledge that it was obtained and that it acted under the same for years, where the subordinate lodges had like knowledge, and assured had also agreed in his application to comply with subsequent regulations.[9] So a member of a mutual benefit

[3] Reynolds v. Supreme Council, Royal Arcanum, 192 Mass. 150, 7 L.R.A.(N.S.) 1154, 78 N. E. 129.

[4] Ellison v. District Grand Lodge No. 23, United Order of Odd Fellows, 11 Ala. App. 442, 66 So. 872.

[5] Norton v. Catholic Order of Foresters, 138 Iowa, 464, 24 L.R.A. (N.S.) 1030n, 114 N. W. 893. *Considered* more fully under § 380b herein.

[6] Supreme Ruling of Fraternal Mystic Circle v. Ericson, — Tex. Civ. App. —, 131 S. W. 92.

[7] French v. New York Mercantile Exchange, 80 N. Y. Supp. 312, 80 App. Div. 131.

[8] Struve v. Grand Lodge Ohio Ancient Order of United Workmen, 5 Ohio C. C. 471, 26 Week. L. Bull. 471.

[9] Bollman v. Supreme Lodge Knights of Honor, — Tex. Civ. App. —, 53 S. W. 722.

society is bound by a new by-law, by estoppel, where he makes personal inquiry concerning the same of the society's secretary, and acquiesces by paying new assessments thereunder for over two years without protest and with the understanding that the society's liability would be reduced by the reduction of assessments under said new laws.[10] It may also be shown, upon the point whether a preexisting policy or contract is within the terms of an amendment to the constitution of the company, that the member whose policy is in question voted therefor and that it was adopted unanimously.[11] And an estoppel arises from knowledge by the member of the adoption of the amended by-laws of the circumstances under which adopted, and by paying assessments thereunder without dissenting.[12] And this applies to an amendment of the constitution of a mutual benefit order on the assessment plan.[13] There is also a waiver or estoppel where the member has knowledge of an amendment to the constitution providing that sick benefits should not be paid in excess of a certain sum and also increasing death benefits, and said member had received such benefits up to the specified amount, had attended the meetings of the association and had acquiesced therein for several years.[14] So a member who surrenders his original certificate and takes a new one under amended by-laws submits to said amendments and accepts them as they then existed.[15] So assured assents to an amendment reducing the certificate amount where he changes his beneficiary thereafter and accepts a policy payable to such newly designated beneficiary.[16]

Again, in case of a reduction of benefits by an amendment to a by-law a settlement with the beneficiaries, acceptance of a reduced

[10] Ankele v. Workingmen's Relief Societies, A. U. V. O. 182 Ill. App. 470, *citing* Clymer v. Supreme Council American Legion of Honor (U. S. C. C.) 138 Fed. 470; Supreme Council American Legion of Honor v. McAlarney, 135 Fed. 72, 67 C. C. A. 546; Supreme Council American Legion of Honor v. Lippincott, 69 L.R.A. 803, 134 Fed. 824, 67 C. C. A. 650.

[11] Koeth v. Knights Templars' & Masons' Life Indemnity Co. 55 N. Y. Supp. 768, 37 App. Div. 146.

[12] Allen v. Merrimack County Odd Fellows' Mutual Relief Assoc. 72 N. H. 525, 57 Atl. 922.

[13] Fort v. Iowa Legion of Honor, 146 Iowa, 183, 123 N. W. 224, 39 Ins. L. J. 3.

[14] Berg v. Badenser Understuetzungs Verein von Rochester, 86 N. Y. Supp. 429, 90 App. Div. 474.

[15] Breslow v. Southern Tier Masonic Relief Assoc. 94 N. Y. Supp. 786, 107 App. Div. 123. See Supreme Lodge Knights of Pythias v. Clement, 113 Tenn. 40, 81 S. W. 1249; Messer v. Grand Lodge United Workmen, 180 Mass. 321, 62 N. E. 252, *considered* in Smythe v. Supreme Lodge Knights of Pythias (U. S. D. C.) 198 Fed. 967, 984, but held not in point.

[16] Jaeger v. Grand Lodge Order of Hermann's Sons, 149 Wis. 354, 135 N. W. 869, 39 L.R.A.(N.S.) 494.

amount and a release obligates them.[17] Consent to amended by-laws reducing the amount payable under the certificate is also held to have been given where the member had agreed to fully comply with thereafter enacted by-laws of the supreme council and had paid a number of the reduced assessments.[18] And a right to object to amended by-laws increasing dues is waived where the member is present when such laws are read, pays increased dues without dissent, and also expresses himself as satisfied with the change.[19] And where the contention was that a separate plan of assessment under an amended by-law was not legally adopted it did not appear that there was any provision of the laws of the order requiring notice, but it was held that even if such a provision had existed laches estopped complainants from seeking the aid of a court of equity where they had continued their membership for several years, actively shared in such new plan and had done nothing in denial of it except to enter an occasional protest for the failure to apportion the reserve funds in reduction of assessments.[20] So where payments have been made of assessments on an illegally reduced amount of a certificate under an invalid by-law the effect as an estoppel is not avoided by the fact that insured was ill at the time the by-law was enacted.[1]

[17] Simons v. Supreme Council American Legion of Honor, 178 N. Y. 263, 70 N. E. 776.

[18] McCloskey v. Supreme Council American Legion of Honor, 96 N. Y. Supp. 347, 109 App. Div. 309. But *examine* Gaut v. Supreme Council American Legion of Honor, 107 Tenn. 603, 55 L.R.A. 765, 64 S. W. 1070.

As to right to increase assessments or reduce amount of benefits, see §§ 380c, et seq. herein.

[19] Pokrefky v. Detroit Firemen's Fund Assoc. 131 Mich. 38, 90 N. W. 689, 96 N. W. 1057.

[20] Kane v. Knights of Columbus, 84 Conn. 96, 79 Atl. 63, 40 Ins. L. J. 874. See also Voss v. Northwestern National Life Ins. Co. 137 Wis. 492, 118 N. W. 212 (prompt election necessary: delay of four years coupled with knowledge and payment of increased premiums without protesting estops member).

Association estopped to assert by-law not properly adopted, see § 365c herein.

[1] Attorney General v. Supreme Council American Legion of Honor (Hackett, In re) 207 Mass. 586, 93 N. E. 797, 40 Ins. L. J. 444. See further as to this litigation Attorney General v. Supreme Council American Legion of Honor (Newton, In re) 206 Mass. 193, 92 N. E. 151, 39 Ins. L. J. 1212; Same v. Same (Weiss, In re) 206 Mass. 190, 92 N. E. 150, 39 Ins. L. J. 1209; Same v. Same (Corfield, In re) 206 Mass. 186, 92 N. E. 148, 39 Ins. L. J. 1205; Same v. Same (Law, In re; Mandeville, In re) 206 Mass. 183, 92 N. E. 147, 39 Ins. L. J. 1202; Same v. Same (Dreyfus, In re; Johnson, In re) 206 Mass. 180, 92 N. E. 145; Same v. Same (Doleac, In re; Bullock, In re; Skinner, In re; Stone, In re) 206 Mass. 175, 92 N. E. 143; Same v. Same (Dunlavy, In re; Clement, In re; Osterhout, In re; Tuska, In re) 206 Mass. 168, 92 N. E. 140; Hackett v. American Legion of Honor, 206 Mass. 139, 92 N. E. 133.

In the case of a member of a benefit society who is bound by a new by-law by estoppel, the reduction of the society's liability, and the reductions of his assessments are held to constitute a sufficient consideration for a new agreement that the new by-laws should be binding.[2]

§ 380g. Same subject: when waiver or estoppel not applicable.—In the following decisions it is determined that there is no waiver or estoppel although some of said decisions are not in harmony with those considered under the last preceding section. So a payment of illegal assessments to avoid a risk of forfeiture constitutes no estoppel against a member or his beneficiary to assert the illegality of a subsequently attempted invalid assessment.[3] Nor is a member estopped from claiming his rights under his original contract, even though he makes payments of assessments under a changed plan increasing them, where said contract does not authorize any amendment of the by-laws of such a character, as such payments are illegally exacted.[4] And where the contract rights of a member are violated by a subsequently enacted resolution classifying members and assessing them thereunder, and said amendment is therefore void, a claim that an estoppel arises to assert the invalidity of a call for assessments under such amendment, by reason of payments without complaint for several years prior thereto of similar calls which were subject to the same claim of invalidity will not be sustained.[5] It is also determined that assured in a mutual benefit order

[2] Ankele v. Workingmen's Relief Societies, A. U. V. O. 182 Ill. App. 470.

[3] Covenant Mutual Life Assoc. v. Tuttle, 87 Ill. App. 309. See also Covenant Mutual Life Assoc. v. Kenter, 188 Ill. 431, 58 N. E. 966.

[4] Rockwell v. Knights Templars' & Masons' Mutual Aid Assoc. 119 N. Y. Supp. 515, 134 App. Div. 736. See also Williams v. Supreme Council American Legion of Honor, 80 N. Y. Supp. 713, 80 App. Div. 402.

As to right to increase assessments or reduce amount of benefits, see §§ 380c, et seq. herein.

[5] Benjamin v. Mutual Reserve Fund Life Assoc. 146 Cal. 34, 79 Pac. 517, 34 Ins. L. J. 614. The court per Lorigan, J., said: "It affords no ground for invoking an estoppel, for at least two reasons. In the first place, the appellant cannot take advantage of its own wrong, which would be the result if its claim of estoppel were sustained. All these prior calls, if levied upon the same theory and at the same ratio as that of call 98, were equally illegal with it, and it was wrong for the association to have levied them, or to have insisted upon their payment. They were demanded under an implied threat that, unless paid, his policy would be forfeited, and were paid under a moral compulsion. And, as said in Duggans v. Covenant Mutual Life Assoc. 87 Ill. App. 416, *quoting* approvingly from a prior decision of that court: 'It certainly cannot be said that Tuttle, in paying previous illegal assessments, acted fraudulently, or that he wilfully did anything calculated to mislead others to their injury. When he paid illegal assessments he did so under a moral compulsion and a threat implied, at least, that if he did

on the assessment plan is not estopped to assert the invalidity of subsequently enacted illegal by-laws even though he has consented to prior amendments by paying assessments.[6] So where a change in the by-laws decreases the amount payable and so repudiates the contract a continued payment of assessments after the enactment of said amendment made with the expectation of the repeal of the amendment does constitute an election to treat the contract as in force and preclude rescission by estoppel.[7] And a member who protests against the reduction, by amendment of the by-laws, of death benefits with a reduction of premiums or assessments, and continues to pay the old rates for a year is not estopped to recover back such part of the amount so paid as represents the canceled insurance.[8] And if a benefit society arbitrarily reduces the amount of insurance stipulated in a membership to be paid, payment of the assessments on the reduced basis cannot be construed as a consent by the member to the reduction when made under protest and with tender of the full amount due without such reduction.[9] It is further determined that an estoppel cannot be based upon the mere fact of paying reduced assessments without knowledge or notice of or consent to or ratification of the by-law reducing the amount of the certificate

not pay his certificate would be forfeited, and the provisions made for his wife in case of his death be thereby lost. Can appellant be permitted to take advantage of its own wrong? We say it cannot.' In the second place, and independent of the proposition that the association could not take advantage of its own wrong, the rule is general that the fact of prior illegal demands having been paid imposes no legal obligation to continue to pay them. The doctrine of estoppel has no application to such a case: Schultz v. Citizens' Mutual Life Ins. Co. 59 Minn. 308, 315, 61 N. W. 331; Farmers' Mutual Fire Ins. Co. of Palmyra v. Knight, 162 Ill. 470, 44 N. E. 834."

[6] Fort v. Iowa Legion of Honor, 146 Iowa, 183, 123 N. W. 224, 39 Ins. L. J. 3. "That plaintiff agreed to prior amendments is no evidence that he agreed to subsequent ones, and having agreed to prior ones does not estop him from challenging the validity of illegal subsequent ones." Id. per Deemer, J., *Citing* Benjamin v. Mutual Reserve Fund Life Assoc. 146 Cal. 34, 79 Pac. 517; Covenant Mutual Life Assoc. v. Kentner, 188 Ill. 431, 58 N. E. 966; Schultz v. Citizens Mutual Life Ins. Co. 59 Minn. 308, 61 N. W. 331.

[7] Supreme Council American Legion of Honor v. Batte, 34 Tex. Civ. App. 456, 79 S. W. 629. *Compare* Voss v. Northwestern National Life Ins. Co. 137 Wis. 492, 118 N. W. 212 (where there was held to be an estoppel to deny validity of amendment increasing premiums).

[8] Makeley v. Supreme Council American Legion of Honor, 133 N. Car. 367, 45 So. 649. See also Supreme Council American Legion of Honor v. Champe, 127 Fed. 541, 63 C. C. A. 282.

As to return of premiums and assessments, see §§ 1390 et seq. herein.

[9] Russ v. Supreme Council American Legion of Honor, 110 La. 588, 98 Am. St. Rep. 469, 34 So. 697. See Williams v. Supreme Council American Legion of Honor, 80 App. Div. 402, 80 N. Y. Supp. 713.

or death benefit.[10] And where a power is reserved in the certificate to amend or change the constitution, etc., the assured does not thereby consent to a change in his certificate, because he continues to pay his assessments for many years after he had notice of a change in the by-laws especially where the answer to a complaint contains no such allegation of consent, but on the contrary admits on its face that he never consented to such change. In addition assured had a right to continue said payments of assessments in order to keep the certificate in force and was under no obligation to surrender it for cancelation.[11] Nor is acquiescence to be deduced from the facts that a member remains silent although he has notice of an amended by-law, providing for suspension of members for delinquency in meeting assessments where such notice does not mention his suspension, and no condition of that character was in the by-laws when he became a member, and this is so held even though the articles of association expressly conferred upon the directors the power to enact by-laws, and he had agreed to be bound by changes in the latter.[12] Again, a representative of the subordinate lodge or lodges who is sent as a representative to the grand lodge has no power to bind a member of the former by agreeing to illegal amendments to the constitution changing his contract rights.[13]

§ 380h. Waiver by or estoppel against association, society, etc., or officers thereof: amendments.—An association waives the enforcement of a by-law and is estopped from enforcing it against the beneficiary by receiving assessments at the rate required at the time the certificate was issued, where the insured has no information of the terms of said amendment.[14] And a society which wrongfully refuses to accept assessments from a member on the ground that he was engaged in the prohibited occupation of selling liquor waives the right to a tender of further assessments and to forfeit the certificate for nonpayment thereof.[15] So the knowledge and acts of a

[10] Smith v. Supreme Council American Legion of Honor, 94 App. Div. 357, 88 N. Y. Supp. 44.

[11] Stirn v. Supreme Lodge of Bohemian Slavonian Benevolent Soc. 150 Wis. 13, 136 N. W. 164, 41 Ins. L. J. 1130.

[12] Farmers' Mutual Hail Assoc. v. Slattery, 115 Iowa, 410, 88 N. W. 949.

[13] Fort v. Iowa Legion of Honor, 146 Iowa, 183, 123 N. W. 224, 39 Ins. L. J. 3. *Citing* Supreme Council of American Legion of Honor v. Getz, 112 Fed. 119, 50 C. C. A. 153; Supreme Council of American Legion of Honor v. Jordan, 117 Ga. 808, 45 S. E. 33; Hill v. Mutual Reserve Fund Life Assoc. 128 N. Car. 463, 39 S. E. 56. See also Fargo v. Supreme Tent of Knights of Maccabees of the World, 96 App. Div. 491, 89 N. Y. Supp. 65.

[14] Boman v. Bankers' Union of the World, 76 Kan. 198, 11 L.R.A.(N.S.) 1048, 91 Pac. 49.

[15] Barrett v. Grand Lodge Ancient Order of United Workmen, 63 Misc. 429, 117 N. Y. Supp. 125.

local union of a fraternal order, and of the president and financial secretary and all the officers and members of said union, that an intending member was about to change his occupation to a more hazardous one, and that such change was made, constitutes, when coupled with the receipt of assessments and dues thereafter, a waiver by said association of any rights it might otherwise have had.[16] In Kansas a fraternal beneficiary association on the lodge system was organized prior to the statute of 1909 relating to such societies.[17] The members application stipulated that it was subject to amendments which might thereafter be made to the constitution and by-laws of the order. Subsequent to the issuance of the certificate amended by-laws provided for a plan less favorable to members and beneficiaries, but did not refer to or provide for outstanding certificates, and the association continued to accept unconditionally and without objection, payments as provided for in one of the old certificates, until it became fully paid up and the holder under the terms thereof became entitled to a new paid-up certificate. A year and a half after said completion of payments the association for the first time adopted a by-law providing a new plan for the old outstanding certificates reclassifying them and materially reducing the benefits stipulated for therein. The association was held estopped from making such changes and reduction and that the holder was entitled to the paid-up certificate according to his contract under the certificate and by-laws in force when it was issued although amendments were stipulated for and that delay in suing did not preclude maintaining the action, even though the plan was found impracticable, as the contract was not unconscionable.[18]

[16] Brotherhood of Painters, Decorators & Paperhangers v. Moore, 36 Ind. App. 580.

On waiver of provision as to change of occupation by continued receipt of dues, see notes in 27 L.R.A. (N.S.) 446, and L.R.A.1916F, 755.

[17] Stat. 1909, secs. 4303–4318.

[18] Hart v. Life & Annuity Assoc. 82 Kan. 318, 120 Pac. 363. *Citing* or *considering:*

Kansas.—Boman v. Bankers Union, 76 Kan. 198, 11 L.R.A.(N.S.) 1048, 91 Pac. 49; Grand Lodge Ancient Order United Workmen v. Haddock, 72 Kan. 35, 1 L.R.A.(N.S.) 1064, 82 Pac. 583.

Missouri.—Smith v. Supreme Lodge Knights of Pythias, 83 Mo. App. 512.

New Jersey.—O'Neill v. Supreme Council, American Legion of Honor, 70 N. J. L. 410, 1 Am. & Eng. Ann. Cas. 422, 57 Atl. 163.

New York.—Wright v. Knights of Maccabees of the World, 196 N. Y. 391, 31 L.R.A.(N.S.) 423, 134 Am. St. Rep. 838, 89 N. E. 1078; Langan v. Supreme Council American Legion of Honor, 174 N. Y. 266, 66 N. E. 932.

Oregon.—Wist v. Grand Lodge Ancient Order United Workmen, 22 Ore. 271, 29 Pac. 610.

Pennsylvania.—Becker v. Berlin Beneficial Soc. 144 Pa. St. 232, 22 Atl. 699.

Tennessee.—Gaut v. American Legion of Honor, 107 Tenn. 603, 55 L.R.A. 465, 64 S. W. 1070.

But a receipt of assessments by the recorder of insured's local lodge does not operate as a waiver of a forfeiture of membership for engaging in the liquor business contrary to the provisions of an amended law, or estop the society from claiming a forfeiture where it is expressly provided by a by-law, that receipt of assessments after forfeiture shall not constitute a waiver. In addition it was no part of said recorder's duty when not engaged in official duties to concern himself with the matter of annulment of contracts or the business of the member, nor was it any part of his duty to record the fact or to notify the grand recorder that the member was engaged in the prohibited business.[19] And the officers of a mutual benefit association cannot waive provisions of by-laws relating to the substance of the contract between the individual member and his associates, in their corporate capacity, where the appointment of officers and the scope of their powers and duties is limited by the constitution and by-laws which forbid the alteration and amendment thereof except by the governing body in the mode provided, and where the members of the association have agreed as part of their membership contract to strictly comply with its laws, rules and regulations.[1]

If the enforcement of a new by-law is waived it cannot be availed of against a surviving member under a joint certificate even though both members have agreed to be bound by subsequently adopted by-laws.[2]

§ 381. Construction of by-laws.—In construing by-laws, they will be given effect as far as possible.[3] They should also be con-

Wisconsin.—Wuerfler v. Trustees, Grand Grove of Wisconsin of the Order of Druids, 116 Wis. 19, 96 Am. St. Rep. 940, 92 N. W. 233 and notes 31 L.R.A.(N.S.) 417; 83 Am. St. Rep. 706; 10 Am. & Eng. Ann. Cas. 625; 1 Id. 427.

[19] Grand Lodge Ancient Order United Workmen v. Burns, 84 Conn. 356, 80 Atl. 157, 40 Ins. L. J. 1676. The court per Hall, C. J. said: "But the general law by which an officer of a corporation in the transaction of official business may be treated as the principal does not apply with the same force to the officers of the defendant corporation under its constitution and laws as it does to officers of ordinary corporations."

As to payment of dues and assessments to officers, etc., see § 1278 herein.

As to waiver where agent fails to take advantage of forfeiture, see § 541 herein.

As to waiver and estoppel and knowledge not obtained in course of employment; or what agent might have learned; or knowledge obtained in individual capacity, see §§ 544–546 herein.

On waiver by subordinate lodge of right of benefit association to insist upon forfeiture of benefit because of violation of laws of association, see note in 10 L.R.A.(N.S.) 136.

[1] Kocher v. Supreme Council Catholic Benevolent League, 65 N. J. L. 649, 52 L.R.A. 861, 48 Atl. 544.

[2] Boman v. Bankers Union of the World, 76 Kan. 198, 11 L.R.A.(N.S.) 1048, 91 Pac. 49.

[3] Elsey v. Odd Fellows' Assoc. 142 Mass. 224, 7 N. E. 844. They should

strued in connection with the certificate or policy.[4] They will also be construed to sustain the contract, rather than uphold a forfeiture;[5] and a reasonable construction will be given, due regard being had to the rights of members and the purpose of such enactment; trivial reasons will not warrant their being held invalid, nor will they be closely scrutinized with that intent.[6] Again, laws of mutual benefit societies will not be construed so as to render it impossible to comply with their requirements where such a result can be avoided, especially so where such a construction would operate to completely destroy member's rights and also as a repudiation of the society's obligations and this applies likewise to changes, etc., in said laws.[7] They must be liberally and reasonably interpreted, and if susceptible of two interpretations that construction should be adopted which will effectuate as nearly as possible the objects or purposes of the association or society and in favor of assured as forfeitures of rights of members or of their beneficiaries are not favored.[8] And

be construed liberally: Morawetz on Corporations (ed. 1882) sec. 369; 1 Id. 2d ed. sec. 497.

[4] Brashears v. Perry County Farmers' Protective Assoc. 51 Ind. App. 8, 98 N. E. 889.

Construction: What is part of the policy: Effect of subsequent amendment of by-laws or enactment or new by-laws. See §§ 189, 189a herein.

[5] Evans v. Phœnix Mutual Relief Assoc. 9 Lanc. Law Rev. (Pa.) 59; 49 Leg. Intell. 15; Schmick v. Gegenzeiter, 44 Wis. 369; Erdmann v. Mutual Ins. Co. 44 Wis. 376. See § 220a herein.

[6] St. Mary's Beneficial Soc. v. Burford, 70 Pa. St. 321; Genest v. L'Union St. Joseph, 141 Mass. 417, 6 N. E. 380; Fritz v. Muck, 62 How. Pr. (N. Y.) 69, 72.

[7] Wist v. Grand Lodge Ancient Order United Workmen, 22 Ore. 271, 29 Am. St. Rep. 603, 29 Pac. 610.

[8] Maynard v. Locomotive Engineers Mutual Life & Accident Assoc. 16 Utah, 145, 47 Am. St. Rep. 602, 51 Pac. 259, 27 Ins. L. J. 208, 26 Ins. L. J. 579.

See also the following cases:

California.—Journeymen Butchers' Protective & Benevolent Assoc. of the Pacific Coast v. Bristol, 17 Cal. App. 576, 120 Pac. 787, 41 Ins. L. J. 704.

Georgia.—Starnes v. Atlanta Police Assoc. 2 Ga. App. 237, 58 S. E. 481.

Illinois.—Knights Templars' & Masons' Life Indemnity Co. v. Vail, 206 Ill. 404, 68 N. E. 1103; Supreme Lodge Order of Mutual Protection v. Meister, 105 Ill. App. 471, aff'd 68 N. E. 454.

Kansas.—Grand Lodge Ancient Order United Workmen v. Smith, 76 Kan. 509, 92 Pac. 710.

Mississippi.—Masonic Mutual Benefit Assoc. v. Hoskins, 99 Miss. 112, 56 So. 169, 40 Ins. L. J. 1671.

New York.—Graves v. Knights of Maccabees of the World, 199 N. Y. 397, 92 N. E. 792, 39 Ins. L. J. 1664.

Oklahoma.—Woodmen of the World v. Gilliland, 11 Okla. 384, 67 Pac. 485.

South Carolina.—Lagrone v. Timmerman, 46 S. Car. 372, 3 Am. & Eng. Corp. Cas. N. S. 510, 24 S. E. 290, 26 Ins. L. 15.

Texas.—Haywood v. Grand Lodge of Texas Knights of Pythias, — Tex. Civ. App. —, 138 S. W. 1194; Supreme Lodge National Reserve Assoc. v. Mondrowski, 20 Tex. Civ. App. 322, 49 S. W. 919.

a provision for forfeiture will be construed strictly against the association.[9] And this applies to waiver of forfeitures.[10] So a by-law enacted by a fraternal benefit association subsequent to the issuance of a fraternal benefit certificate will be strictly construed against the association.[11] But such liberal construction does not mean that the obvious or plain intent should be controlled by a strained construction;[12] for a liberal construction in view of the common and ordinary use of words should be given.[13] So a by-law which attempts to prohibit proximity of risks should clearly state such intention, and a by-law which is meaningless and unintelligible as to such prohibition will be rejected.[14]

Where the policy and by-laws conflict the latter govern, since a corporation cannot contract in violation of its laws but this rule does not apply where the policy as required by statute specifies the exact amount of indemnity in which case a conflicting recital in the policy controls the by-laws.[15] And a provision in the certificate as to the time of payment will control a different stipulation in a by-law where the charter provides for payment as specified either by the certificate or by-laws.[16] So an amendment to a by-law as to accidental injury may be so construed as to make the true meaning of the original by-law clearer or more apparent instead of conflicting therewith.[17] And if there is any doubt as to which of two beneficiaries is entitled to the fund the interpretation should favor the one having the natural right as legal heir.[18]

[9] Briggs v. Royal Highlanders, 84 Neb. 834, 122 N. W. 69.

[10] Montano v. Missanellese Society of Mutual Aid, 72 Misc. 515, 130 N. Y. Supp. 455.

[11] Lange v. Royal Highlanders, 75 Neb. 188, 10 L.R.A.(N.S.) 1066, 121 Am. St. Rep. 786, 106 N. W. 224, 110 N. W. 1110.

[12] Grand Lodge Ancient Order United Workmen v. Crandall, 80 Kan. 332, 102 Pac. 843.

[13] Mund v. Rehaume, 51 Colo. 129, Ann. Cas. 1913A, 1243, 117 Pac. 159. Graves v. Knights of Maccabees of the World, 199 N. Y. 397, 92 N. E. 792, 39 Ins. L. J. 1664.

[14] Boulware v. Farmers' & Laborers' Co-operative Ins. Co. 77 Mo. App. 639, 2 Mo. App. Repr. 128.

[15] Courtney v. Fidelity Mutual Aid Assoc. 120 Mo. App. 110, 94 S. W. 768, Rev. Stat. 1899, sec. 7903.

On conflict between by-laws and certificate or policy, or mutual benefit society or insurance company, see note in 47 L.R.A. 681.

[16] Failey v. Fee, 83 Md. 83, 32 L.R.A. 311, 34 Atl. 839.

[17] Maynard v. Locomotive Engineer's Accident Assoc. 16 Utah, 145, 47 Am. St. Rep. 602, 51 Pac. 259, 27 Ins. L. J. 208, 26 Ins. L. J. 579.

[18] Journeymen Butchers' Protective & Benevolent Assoc. of the Pacific Coast, 17 Cal. App. 576, 120 Pac. 787, 41 Ins. L. J. 704. See Mund v. Rehaume, 51 Colo. 129, Ann. Cas. 1913A, 1243, 117 Pac. 159.

The reasonableness of a by-law is a question of construction for the court.[19] Although it may become a question of mixed law and fact where the intention must be discovered by the aid of extrinsic evidence.[20]

[19] People v. Throop, 12 Wend. (N. Y.) 186; Commonwealth v. Worcester, 3 Pick. (20 Mass.) 462; Angell & Ames on Corporations (9th ed.) sec. 357.

[20] Montano v. Missanellese Society of Mutual Aid, 72 Misc. 515, 130 N. Y. Supp. 455.

CHAPTER XXII.

AGENTS OF INSURER—APPOINTMENT, ETC.—POWERS.

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§ 415. Partnership as agent: joint agents.
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§ 386. Corporations act through agents.—Insurance corporations must act through agents, especially so in case of corporations doing business in foreign territory. Every member of a corporation or association is therefore presumed to agree, on becoming such member, that the organization shall act through such agents as are reasonably necessary for the transaction of its business, and unless the charter or act of appointment provides otherwise, that they shall possess or exercise all such powers as the nature of their appointment shall require.[1]

§ 387. Charter provisions concerning agents.—We have already given some consideration to the question of limitations imposed upon insurance corporations and associations by the charter or articles of association.[2] There are certain class agents, such as general officers and boards of directors, managing officers, and the like, who derive their authority, directly or impliedly, from the charter. Although their general authority permits the exercise of a wide discretion, nevertheless, if the charter prescribes the mode of exercise of their authority, and it is apparent that the legislature intended such mode as exclusive of all others, the prohibition must be observed.[3] An agent has apparent authority to insure in the

[1] Woodbury Savings Bank v. Charter Oak Ins. Co. 31 Conn. 517, 528, per Dutton, J.; Lattomus v. Farmers' Mut. Fire Ins. Co. 3 Houst. (Del.) 404; Protection Life Ins. Co. v. Foote, 79 Ill. 361, per Scholfield, J.; Insurance Co. of New York v. Gibson, 72 Miss. 58, 64, 17 So. 13, per Whitfield, J; Imperial Fire Ins. Co. v. Dunham, 117 Pa. St. 460, 12 Atl. 668.

See Angell & Ames on Corporations (9th ed.) secs. 231, 276 et seq.; Bliss on Life Insurance (ed. 1872) secs. 273 et seq. As to the powers of corporate agents generally, see Thompson on Corporations (ed. 1895–96) c. civ. secs. 4873 et seq. When acts of agents binding, when not binding, see Id. (2d ed.) secs. 159 et seq. See also Clark & Marshall on Corp. (ed. 1905) pp. 459 et seq.

Insurance companies like other corporations necessarily act through their agents as a legal entity the only knowledge or information it can acquire must come through its agencies. Funk v. Anchor Fire Ins. Co. 171 Iowa, 331, 153 N. W. 1048, 1051, per Gaynor, J. "Defendant being a corporation could act only through agents." Sternaman v. Metropolitan Life Ins. Co. 170 N. Y. 13, 19, 57 L.R.A. 318, 88 Am. St. Rep. 625, 62 N. E. 763, 31 Ins. L. J. 276, 282.

[2] See §§ 35, 36, 53, and chapters 13, 17 herein.

As to appointment of agents: charter provisions, see § 390 herein.

As to powers of mutual companies and ultra vires, see §§ 350 et seq. herein.

As to charter provisions concerning by-laws, see § 366 herein.

[3] See § 35 herein. *Examine* Angell & Ames on Corporations (9th ed.) secs. 231, 280, 291.

modes authorized by the company's charter, and upon the terms and conditions inserted in their policies in ordinary use.[4] Insurance companies are bound by the acts of agents not prohibited by their charter and within the limits which may reasonably be presumed by the public from the character of the business and the general mode of transacting it.[5] It is held in an Illinois case[6] that an authorized agent has power to sign an agreement giving permission for an enhanced premium which was paid to remove property, although the charter required that agreements relating to insurances should be signed by the president and secretary.[7]

§ 388. Who are insurance agents.—Insurance agents are persons expressly or impliedly authorized to represent either the insurer or insured in matters relating to insurance. Agents may directly represent the principal, or they may belong to the class designated as subagents, who are employed by the principal agent, and frequently brokers are thus employed.[8] A person was held to be an agent of the company where it appeared that a circular signed by the general agent was addressed to such person as "agent," referring to his "agency," and fully instructing him as to his duties in that capacity. He thereafter acted as agent, informed the general agent of the loss, and received a reply and instructions from him.[9] And the possession by an insurance agent of blank policies, to

[4] De Grove v. Metropolitan Ins. Co. 61 N. Y. 594, 19 Am. Rep. 305, and note, 309. See Reynolds v. Continental Ins. Co. 36 Mich. 131.

[5] Kenton Ins. Co. v. Shea, 6 Bush (69 Ky.) 174, 99 Am. Dec. 676.

[6] Farmers' & Merchants' Ins. Co. v. Chestnut, 50 Ill. 111, 99 Am. Dec. 492.

[7] See §§ 35, 36 herein, for a consideration of this question.

[8] See Ewell's Evans on Agency, c. i. for definitions of the different kinds of agents and distinctions between them. See also 1 Words & Phrases, pp. 261 et seq.; Id. (2d series) pp. 154 et seq.

Agent defined under statutes: Code *Ga.* 1911 (Civ.) sec. 2443. (sec. 2054); *Mo.* Rev. Stat. 1909, sec. 7052 (Rev. Stat. sec. 8000); 2 Lord's *Ore.* Laws (1910) sec. 4641, p. 1767 (*defined* and *construed*). *Tex.* Rev. Civ. Stat. 1911, art. 4961 (*applied* in Austin Fire Ins. Co. v. Sayles, — Tex. Civ. App. —, 157 S. W. 272) 2 Rem. & Bal. Code *Wash.* sec. 6191 (*construed* in Miller v. Spring Garden Ins. Co. 202 Fed. 442, 120 C. C. A. 548, 42 Ins. L. J. 715. See § 512 herein.

"An agency is created by contract express or implied. It 'is a legal relation by virtue of which one party (the agent) is employed and authorized to represent and act for the other (the principal) in business dealings with third persons. The distinguishing features of the agent are his representative character and his derivative authority.' Mechem, Ag. sec. 1; Story, Ag. sec. 3. 'To constitute agency there must be consent both of principal and agent;' Whart. Ag. sec. 1." Sternaman v. Metropolitan Life Ins. Co. 170 N. Y. 13, 19, 57 L.R.A. 318, 88 Am. St. Rep. 625, 62 N. E. 763, 31 Ins. L. J. 276, 282, per Vann, J.

[9] Hamilton v. Home Ins. Co. 94 Mo. 353, 7 S. W. 261. See § 718 herein.

which the signatures are affixed of the company's president and secretary, afford sufficient evidence of a general agency to justify a person's contracting for insurance with him, and to accept a policy delivered by him.[10] So a party employed as a watchman by the owner of the property may issue a policy thereon as agent of an insurance company.[11] Where a soliciting agent solicits one to become a member of a mutual benefit association, pretending to be its agent, and produces and fills out the application which is sent to the association, acted on by it in issuing a certificate, and said certificate is sent to the apparent agent, who delivers it to assured and collects the premium, an agency is established.[12]

§ 389. Classification of agents.—In classifying agents a distinction has been made as to their powers, between the different kinds of agents, and between those representing the different kinds of insurance, such as life, fire, and marine.[13] This distinction may be of some importance where third parties dealing with such agents have knowledge of whatever limitations such distinction may import. But the main questions are, What authority was the agent held out by the principal to possess? Were the agent's acts within the scope of his real or apparent authority? Did the person dealing with such agent have knowledge of restrictions or limitations upon the agent's authority?[14] As a general rule, the general

[10] Howard Ins. Co. v. Owens, 94 Ky. 197, 21 S. W. 1037, 13 Ky. Law Rep. 237.

[11] Northrup v. Germania Fire Ins. Co. 48 Wis. 420, 33 Am. Rep. 815, 4 N. W. 350.

[12] Whitney v. National Masonic Accident Assoc. 57 Minn. 472, 480, 59 N. W. 943, per Collins, J.: *distinguishing* Gude v. Exchange Fire Ins. Co. 53 Minn. 220, 54 N. W. 1117; and *citing:*

United States.—Abraham v. North German Ins. Co. 40 Fed. 717.

Illinois.—Pierce v. People, 106 Ill. 11, 46 Am. Rep. 683; Gosch v. State Mutual Fire Ins. Assoc. 44 Ill. App. 263.

Iowa.—Stone v. Hawkeye Ins. Co. 68 Iowa, 737, 28 N. W. 47.

Maine.—Packhard v. Dorchester Mutual Ins. Co. 77 Me. 144.

Oregon.—Hahn v. Assurance Co. 23 Ore. 576, 37 Am. St. Rep. 709, 32 Pac. 683.

Ohio.—Insurance Co. v. Williams, 39 Ohio St. 584, 48 Am. Rep. 474.

West Virginia.—Deitz v. Providence Washington Ins. Co. 31 W. Va. 851, 13 Am. St. Rep. 909, 8 S. E. 616, s. c. 33 W. Va. 526, 25 Am. St. Rep. 108, 11 S. E. 50.

[13] See Richards on Insurance, pp. 20–26, secs. 16–19; Id. (3d ed.) sec. 155, p. 188. "There seems to be no very well defined distinction between the powers of general agents, local agents and subagents:" 1 May on Insurance (3d ed.) 221, sec. 126. "The distinction between special and general agents is of little or no practical value, so far at least as regards the principal and third parties:" Ewell's Evans on Agency, 2. See § 395 herein.

[14] See chapters, post, on Agents; Ewell's Evans on Agency (ed. 1879) c. i. pp. 2 et seq.; Story on Agency, sec. 127, note; Union Mutual Life Ins. Co. v. Wilkinson, 13 Wall. (80

principles of agency applicable to all agents govern the acts of insurance agents.[15]

§ 390. Appointment of agents.—An agent's authority may arise by virtue of a valid express appointment by deed, or writing under seal, or it may rest in parol.[16] It may be implied from usage, from custom, or from a course of dealing sanctioned by the principal; or it may exist under an express ratification by the principal; or the implied authority may arise where the party's own acts are such as to constitute him an agent, or the agency may be created by a necessity justifying immediate action.[17] So a presumption exists that a person does not act for another for a long time as agent unless he is so authorized.[18] And this is true not only of agents of the insurer, but also of agents of the insured.[19]

Where the charter and by-laws prescribe the performance of certain formalities as conditions precedent to the agent's authority to act, such matters relate to the management of the internal affairs of the company. Therefore, a party who deals with such agents has, in the absence of notice to the contrary, the right to assume that such formalities have been complied with, and may deal with the agent within the scope of his apparent authority. The corporation is also estopped from setting up noncompliance by the

U. S.) 222, 235, 20 L. ed. 617, 2 Wood on Fire Ins. (2d ed.) 860, sec. 416.

[15] See Markey v. Mutual Benefit Ins. Co. 103 Mass. 78, 93. "There are no principles which belong exclusively to agency in insurance matters; none, that is, which are not recognized as a part of the general law of agency. But there are some peculiarities in the application of these principles:" 2 Parsons on Marine Ins. (ed. 1868) 416. "The same rules apply to insurance companies as apply in the case of individuals, and a person who is clothed with power to act for them at all is treated as clothed with authority to bind them, as to all matters within the scope of his real or apparent authority:" 2 Wood on Fire Ins. (2d ed.) 822, sec. 408, *citing* Bodine v. Exchange Fire Ins. Co. 51 N. Y. 117, 10 Am. Rep. 566; Eclectic Fire Ins. Co. v. Fahrenkrug, 68 Ill. 463; Warner v. Peoria Mutual & Fire Ins. Co. 14 Wis. 318, and numerous other cases.

[16] Ewell's Evans on Agency, 22–32, *16–*23; Swazey v. Union Mfg. Co. 42 Conn. 556; Perkins v. Washington Ins. Co. 4 Cow. (N. Y.) 646. As to appointment of agents under statutes, see § 391 herein.

[17] See Mechem on Agency (ed. 1889) c. iv. secs. 80 et seq.; Story on Agency (9th ed.) c. v. secs. 45 et seq.; Wharton on Agency, sec. 134; Union Gold Mining Co. v. Rocky Mountain National Bank, 2 Colo. 248.

If relations exist which will constitute an agency, it will be an agency, whether the parties understand it to be such or not. Their private intentions will not affect it. Bradstreet Co. v. Gill, 72 Tex. 115, 2 L.R.A. 405, 9 S. W. 753.

[18] Russell v. Palentine Ins. Co. 106 Miss. 290, 63 So. 644.

[19] See Barlow v. Leckie, 4 Moore, J. B. 8; Ewell's Evans on Agency. (ed. 1879) 22–32, side pp. 16–23.

agent with the prescribed conditions.[20] But so far as the appointment itself is concerned, it is not valid unless made in conformity with such formalities as the charter prescribes, where the charter sets forth the requirements,[1] although an irregular or informal appointment may be ratified, either expressly or impliedly, by acts of the corporation.[2] In regard to special or class agents, the charter may prescribe who shall act as agents in transacting and managing certain affairs of the corporation; such charter agents, therefore, must look to the charter as the source of their authority.[3] Where an agent's written commission expressly excludes authority to insure manufactories and other special hazards, it cannot be assumed merely from the fact that he is the company's local agent, that his authority is unlimited as to risks and terms. Nothing more can be implied therefrom than an authority to insure in the mode required by the company's charter, and to take only such risks as the policies ordinarily used by the company would warrant.[4]

A person may by his own acts become an agent where he had no prior authority. So where a third party collects and holds premiums, he thereby becomes a bailee of the company, and must account to it or its agent for money so received and held.[5] An agent's authority may also arise from a habit and course of business acquiesced in by the principal.[6]

§ 391. Appointment of agents: statutes.—In the case of foreign insurance companies, the statutes of many states impose certain conditions upon them in relation to the appointment of agents acting within the state.[6a] The failure to comply with such require-

[20] Bank of United States v. Dandridge, 12 Wheat. (25 U. S.) 64, 70, 6 L. ed. 552, per Story, J.; In re County Life Assur. Co. L. R. 5 Ch. 293, per Giffard, L. J.; Insurance Co. v. McCain, 96 U. S. 84, 24 L. ed. 653; 2 Morawetz on Private Corp. (2d ed.) secs. 637 et seq.

[1] Henning v. United States Ins. Co. 47 Mo. 425, 4 Am. Rep. 332; Head v. Providence Ins. Co. 2 Cranch (6 U. S.) 127, 2 L. ed. 229. See Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co. 19 How. (60 U. S.) 318, 15 L. ed. 636; Badger v. American Popular Life Ins. Co. 103 Mass. 244, 4 Am. Rep. 547.

[2] Farmers' Mutual Ins. Co. v. Taylor, 73 Pa. St. 342; 2 Morawetz on Corp. (2d ed.) sec. 637; Ewell's Evans on Agency (ed. 1879) c. iv. p. 192, side pp. 136 et seq.

[3] See Bank of U. S. v. Danbridge, 12 Wheat. (25 U. S.) 113, 6 L. ed. 552, per Marshall, C. J.; Beatty v. Marine Ins. Co. 2 Johns. (N. Y.) 109, 3 Am. Dec. 401; Washington & Pittsburgh Turnpike Co. v. Cullen & Crane, 8 Serg. & R. (Pa.) 517, 521, 522; Angell & Ames on Corp. (9th ed.) sec. 279.

[4] Reynolds v. Continental Ins. Co. 36 Mich. 131.

[5] Fagan & Trezevant v. N. Missouri Ins. Co. 31 Ark. 54.

[6] Franklin v. Globe Mutual Life Ins. Co. 52 Mo. 461; Putnam v. Home Ins. Co. 123 Mass. 324, 25 Am. Rep. 93.

[6a] See §§ 327 et seq., 512 herein.

ments goes to the question of the validity of acts done by such agents.[7] Where a person, as "inspector" of risks for a foreign company not authorized to do business in a certain state, solicits insurance therein, assuming to act as an agent, and reports a risk to the company, which issues in consequence a policy and receives the premium, he is an agent of the company, and is within the prohibition of the statutes relating thereto.[8] But the insurance commissioner has no power to prescribe requirements in addition to those prescribed by statute concerning licensing agents of companies or associations organized for the insurance of each others property.[9]

§ 391a. Statute confining business of agent or broker to certain class, unconstitutional.—A statute, the purpose of which is to confine the business of broker in procuring insurance to those who should make that their principal business, or who should be real estate agents or brokers is unconstitutional as confining the business of agents or brokers to a certain class.[10]

§ 392. Appointment of agents: territory: contract with principal. —If a person secures an appointment for an insurance company as

[7] Cases where failure to comply invalidates:

Illinois.—Cincinnati Mutual Health Assur. Co. v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 626.

Kentucky.—Franklin Ins. Co. v. Louisville & A. Packet Co. 9 Bush (72 Ky.) 590.

Massachusetts.—Williams v. Cheney, 8 Gray (74 Mass.) 206.

New Hampshire.—Haverhill Ins. Co. v. Prescott, 42 N. H. 547, 80 Am. Dec. 123.

Pennsylvania.—Thorne v. Travelers' Ins. Co. 80 Pa. 15, 21 Am. Rep. 89, 5 Ins. L. J. 169.

Cases contra:

United States.—The Manistee, 5 Biss. (U. S. C. C.) 381, Fed. Cas. No. 9027. See Crutcher v. Kentuck, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. 851.

Massachusetts.—Provincial Ins. Co. v. Lapsley, 15 Gray (81 Mass.) 262.

Missouri.—Clark v. Middleton, 19 Mo. 53.

Oregon.—Guy L. Wallace & Co v. Ferguson, 70 Ore. 306, 140 Pac. 742, aff'd 141 Pac. 542, under Laws 1911, pp. 376–7, secs. 1–4 (commissioner cannot prescribe additional conditions).

Pennsylvania.—Thornton v. Western Reserve Fire Ins. Co. 31 Pa. St. 529.

As to actions against agents of foreign companies, see §§ 713, 715 herein.

On effect of agent's failure to procure license, see note in 1 L.R.A. (N.S.) 1159.

[8] List v. Commonwealth, 118 Pa. St. 322, 12 Atl. 277, under Pa. act, April 4, 1873.

Statute requiring certificate on application to agent of foreign company selling stock of the corporation and taking notes. Hughes v. Four States Life Ins. Co. — Tex. Civ. App. —, 164 S. W. 898.

[9] Guy L. Wallace & Co. v. Ferguson, 70 Ore. 306, 140 Pac. 742.

[10] Hauser v. North British Mercantile Ins. Co. 206 N. Y. 455, 42 L.R.A. (N.S.) 1139n, 100 N. E. 52, aff'g 136 N. Y. Supp. 1015, 152 App. Div. 91, sec. 142 Ins. Law, first inserted in 1911, c. 748, as am'd by Laws 1912, c. 1, is unconstitutional.

district agent for a certain territory, under a contract which does not stipulate for an exclusive right to act as sole agent therein, it is not a breach of the contract to appoint another agent in the same territory where the contract also provides that commissions shall be divided between him and other agents on business obtained by them acting conjointly in the given district.[11] A general agent's commission to act for the insurer within certain territory should be liberally construed in favor rather than in derogation of his authority especially so in view of the fact that the jurisdiction of local offices is customarily extended in fact and in practice to the immediate neighborhood and the language of his commission is consistent with such authority.[12] It is also held that where an agent is appointed to act in a certain locality and its vicinity, the word "vicinity" will include a village within ten miles of such locality.[13] And where one is appointed as a manager of a certain department, embracing the whole of one state and such portions of two other states as are "acceptable to the association," the principal may terminate the contract, and is not liable in damages where the agent fails to secure a certain amount of new business provided for in the contract, nor is the company unconditionally obligated to keep open the two other states.[14]

The company may validly stipulate that the agent shall serve on its president or secretary a written statement of his claim a certain number of days before bringing an action thereon against the company, and such an agreement is binding on the agent in the absence of fraud.[15]

§ 393. Relative powers of agents of stock and mutual companies. —Some discussion has been had upon the point whether any dis-

[11] Lester v. New York Life Ins. Co. 84 Tex. 87, 19 S. W. 356. See Insurance Company of North America v. Thornton, 130 Ala. 222, 55 L.R.A. 547, 89 Am. St. Rep. 30, 30 So. 614.

[12] Sun Insurance Office of London v. Mitchell, 186 Ala. 420, 65 So. 143. The court notes a prior decision as contrary to the recognized rule which decision holds that territorial restrictions upon even a general agent's authority are effectual even as to uninformed persons, so that the company is not bound by the agent's acceptance of risks outside of restricted territory. Insurance of North America v. Thornton, 130 Ala. 222, 55 L.R.A. 547, 89 Am. St. Rep. 30, 30 So. 614, "but in that case the agent's commission expressly declared that 'all policies shall be null and void and of no binding effect upon this company if issued upon property not situated within the district (Dotham and vicinity) in which the agent issuing the same shall reside and for which he is appointed.'"

[13] Howard Ins. Co. v. Owens, 94 Ky. 197, 21 S. W. 1037, 13 Ky. L. Rep. 237.

[14] Sibley v. Mutual Reserve Fund Life Assoc. 87 Ga. 738, 13 S. E. 838.

[15] Better v. Providential Ins Co. 16 Daly (N. Y.) 344, 32 N. Y. 686, 11 N. Y. Supp. 70.

tinction exists between the powers of agents of stock and mutual insurance companies. It is held by some courts that the agents of stock companies are invested with larger powers, in matters relating to completion of the contract and waiver of its terms, than are possessed by agents of companies formed on the mutual system, where the rights of all the members are alike regulated and governed by the by-laws which enter into and form a part of the contract with every member.[16] This distinction may be important, so far as concerns the authority of the agent to act on matters relating to the contract subsequent to its completion. But it is well settled that an applicant for insurance in a mutual company is a stranger to the by-laws, nor does the presumption of knowledge thereof arise against him until he becomes a member.[17] And the fact that one becomes a member of a mutual insurance company cannot operate to convert the previous acts of examination and description by the agent of the company into the acts of the insured, and change them into representations made by him,[18] although it is held that all persons applying to become members of an incorporated insurance

[16] Pitney v. Glens Falls Ins. Co. 65 N. Y. 6. See Brewer v. Chelsea Mutual Fire Ins. Co. 14 Gray (80 Mass.) 203; Kausal v. Minnesota Farmers' Mutual Fire Ins. Assoc. 31 Minn. 17, 47 Am. Rep. 776, 16 N. W. 430, per Mitchell, J.; Susquehanna Ins. Co. v. Perrine, 7 Watts & S. (Pa.) 348; Bacon on Benefit Societies and Life Ins. sec. 147; 1 May on Ins. (3d ed.) sec. 127.

[17] Meyers v. Lebanon Mutual Ins. Co. 156 Pa. St. 420, 425, 27 Atl. 39, per Williams, J. See Kausal v. Minnesota Farmers' Mutual Fire Ins. Assn. 31 Minn. 17, 47 Am. Rep. 776, 779, 16 N. W. 430; Franklin Fire Ins. Co. v. Martin, 40 N. J. L. 579, 11 Vroom, 568, 29 Am. Rep. 271, 280, per Depue, J.; Eilenberger v. Protective Mutual Fire Ins. Co. 89 Pa. St. 464; Columbia Ins. Co. v. Cooper, 50 Pa. St. 331, 340, per Woodward, C. J.; In re County Life Assur. Co. L. R. 5 Ch. 288, 293. "There is no general rule compelling persons dealing with a corporation at their peril to take notice of its by-laws." 2 Morawetz on Private Corporations (2d ed.) sec. 593. See Conover v. Mutual Ins. Co. of Albany, 1 N. Y. 292. But see Susquehanna Ins. Co. v. Perrine, 7 Watts & S. (Pa.) 348, 351, per Gibson, C. J.

[18] See Lycoming Fire Ins. Co. v. Woodworth, 83 Pa. St. 223, per Gordon, J. *Examine* next following chapters.

See also the following cases:

Connecticut.—Beebe v. Hartford Mutual Fire Ins. Co. 25 Conn. 51, 65 Am. Dec. 553.

Illinois.—Union Ins. Co. v. Chipp, 93 Ill. 96; Commercial Ins. Co. v Ives, 56 Ill. 402.

Maryland.—Lycoming Fire Ins. Co. v. Langley, 62 Md. 196.

Minnesota.—Kausal v. Minnesota Farmers' Mutual Fire Assoc. 31 Minn. 17, 47 Am. Rep. 776, 16 N. W. 430.

Mississippi.—Planters' Ins. Co. v. Myers, 55 Miss. 479, 30 Am. Rep. 521, 531.

Pennsylvania.—Kister v. Lebanon Mutual Ins. Co. 128 Pa. St. 553, 15 Am. St. Rep. 696, 5 L.R.A. 646, 18 Atl. 447; Eilenberger v. Protection Ins. Co. 89 Pa. St. 464; Cumberland Valley Mutual Protective Ins. Co. v. Schell, 29 Pa. St. 31.

company must be presumed to have known the terms of its charter and by-laws.[19] Though there are many decisions to the contrary upon the general proposition in courts of last resort.[20] So it is declared in an Illinois case.[1] "It has been held by this court that the doctrine of waiver applies not only to insurance companies having a capital stock, insuring for pecuniary profit, but also to mutual benefit associations. . . . The nature and objects as well as the organization and government of such associations, render the application of general rules of law in most cases the same as mutual benefit associations not organized for pecuniary profit." [2] The better opinion, however, would seem to be that by-laws as to persons not members of the company, in so far as they limit an agent's apparent authority, are substantially secret restrictions thereon, and, in the absence of actual or constructive notice, are not binding on those dealing with such agent.[3] At least such a rule ought to govern upon analogous principles with those from which a like rule is deduced in cases of agents of stock companies, especially where the by-laws contain conditions of which the applicant had no knowledge prior to the completion of the contract, and which he could not, under the law, be presumed to have had in contemplation in negotiating for insurance.

§ 394. Same subject: powers after completion of contract.—If, under the by-laws of a mutual insurance company, its agent in a certain place has authority to take applications and receive premiums, and to deliver the same to the company, and no application or renewal is binding upon the company until approved by the secretary, and such agent only receives a specified sum, in case of acceptance, he ceases to be the company's agent immediately the contract is completed, and has no authority after the contract is completed to waive any of its conditions.[4] Where the contract

[19] Belleville Mutual Ins. Co. v. Van Winkle, 12 N. J. Eq. 333.

[20] See the following cases:

Massachusetts.—McCoy v. Metropolitan Life Ins. Co. 133 Mass. 82, 85; Kibbe v. Hamilton Mutual Ins. Co. 11 Gray (77 Mass.) 163. See Mulrey v. Shawmut Fire Ins. Co. 4 Allen (86 Mass.) 116, 81 Am. Dec. 689.

New Jersey.—Franklin Fire Ins. Co. v. Martin, 41 N. J. L. 568, 29 Am. Rep. 271.

Ohio.—Smith v. Farmers' Mutual Ins. Co. 19 Ohio St. 287.

Pennsylvania.—Susquehanna Ins. Co. v. Perrine, 7 Watts & S. (Pa.) 348.

Rhode Island.—Wilson v. Conway Mutual Fire Ins. Co. 4 R. I. 141.

[1] Dromgold v. Royal Neighbors of America, 261 Ill. 60, 103 N. E. 584.

[2] Id. per Carter, J.

[3] See In re County Life Assur. Co. L. R. 5 Ch. 288, 293; Fay v. Noble, 12 Cush. (66 Mass.) 1, 16 et seq., per Shaw, C. J.; Union Mutual Life Ins. Co. v. White, 106 Ill. 67, and other cases *cited* in 2 Morawetz on Private Corporations, (2d ed.) secs. 593, 594. See also cases in note 18 above.

[4] Bourgeois v. Mutual Fire Ins. Co. 86 Wis. 402, 407, 57 N. W. 38, per Cassaday, J.; *citing* Hankins v. Rockford Ins. Co. 70 Wis. 4, 35 N.

has been completed and a person has become a member of a mutual insurance company, the above considerations become merged in the fact that as such member such person is, as already stated, charged with notice of whatever restrictions on the agent's authority are imposed by the charter and by-laws. The question then resolves itself into that of whether such inhibitions are conclusive or not. The determination of this point must necessarily involve the kindred ones, viz.: 1. To what extent, if at all, can the company itself, or through its agent, enter into contracts which are not strictly warranted by the charter? or 2. To what extent can it in a particular case waive by-laws which are applicable alike to all members by reason of the mutuality of the system of insurance? In the case of Kausal v. Minnesota Farmers' Mutual Fire Insurance Association [5] the court considers the question of whether any distinction exists between agents of stock and mutual companies, and holds that such a distinction did not exist in that case, for there the stipulations claimed to bind the assured were only in the policy, and the court adds: "We fail to see any distinction between the two kinds of companies, and we feel confident that the average applicant for insurance is rarely aware of any." But the force of this statement is somewhat modified as to dealings with the agent subsequently to effecting the policy, for it is evident that the court had in mind only negotiations concerning the application; that is, acts and representations of the agent before completion of the contract. The court concludes as follows: "But in applying and contracting for insurance the applicant and the company are as much two distinct persons as in case of a stock company, and we see no reason for holding the agent who takes the application any less the agent of the insurer in the one case than in the other. The membership does not begin until the policy is issued. As to all previous negotiations the agent acts only for the company." Many courts of high authority have held to a strict construction in such matters in favor of the insurer, and have declared unequivocally that officers and agents of mutual insurance companies have no authority to waive its by-laws; [6] although it is

W. 34; Knudson v. Hekla Fire Ins. Co. 75 Wis. 198, 43 N. W. 954; Bosworth v. Merchants' Fire Ins. Co. 80 Wis. 393, 49 N. W. 750; Stevens v. Queen Ins. Co. 81 Wis. 335, 51 N. W. 555, 29 Am. St. Rep. 905.

[5] 31 Minn. 17, 47 Am. Rep. 776, 16 N. W. 430.

[6] See §§ 34 et seq., 53, 509 herein. *Examine* the following cases:

Colorado.—Modern Woodmen of America v. International Trust Co. 25 Colo. App. 26, 136 Pac. 806.

Indiana.—Leonard v. American Ins. Co. 97 Ind. 299; Behler v. German Mutual Fire Ins. Co. 68 Ind. 347, 354.

Massachusetts.—Evans v. Tremontain Mutual Fire Ins. Co. 9 Allen (91 Mass.) 329; Brewer v. Chelsea Mut.

held that the directors of a mutual company or their officers, by their direction or approval, may so act as to entitle a person to become a member who, by their fault, has been prevented from depositing his note, and as to authorize a court of equity to compel his being received, or to give the same relief he would be entitled to if he was.[7] We have seen, however, that the courts will, in certain cases, uphold contracts, even though made in excess of the charter powers of corporations,[8] although the general rule is to the contrary,[9] and that by-laws may likewise be waived, especially where the matter is not mandatory nor of the essence of the contract.[10] It is said in a Minnesota case that there is no difference

Fire Ins. Co. 14 Gray (80 Mass.) 203, 209; Hale v. Mechanics' Mutual Fire Ins. Co. 6 Gray (72 Mass.) 169, 66 Am. Dec. 410.

New Jersey.—Miller v. Hillsborough Fire Assoc. 42 N. J. Eq. 459, 7 Atl. 895.

New York.—Meserean v. Phœnix Mutual Life Ins. Co. 66 N. Y. 274. *Examine* 1 Morawetz on Private Corp. (2d ed.) sec. 501.

Oklahoma.—Modern Brotherhood of America v. Beshara, 42 Okla. 684, 142 Pac. 1014 (power was limited by by-laws).

Texas.—Sovereign Camp Woodmen of the World v. Wagnon, — Tex. Civ. App. —, 164 S. W. 1082 (but so held under Rev. Stat. 1911, sec. 4847).

On waiver by officer of subordinate lodge of forfeiture for nonpayment of assessments, see notes in 4 L.R.A. (N.S.) 421; 38 L.R.A.(N.S.) 571; and L.R.A.1915E, 152.

[7] Belleville Mutual Ins. Co. v. Van Winkle, 12 N. J. Eq. 340, per Elmer, J.

[8] §§ 35, 36 herein.

[9] See §§ 35, 36 herein; Head v. Providence Ins. Co. 2 Cranch (6 U. S.) 127, 2 L. ed. 229; Leonard v. American Ins. Co. 97 Ind. 299; Brewer v. Chelsea Mutual Fire Ins. Co. 14 Gray (80 Mass.) 203; Borgraefe v. Supreme Lodge Knights & Ladies of Honor, 22 Mo. App. 127.

[10] See §§ 35, 36, 407, 515 herein.

Examine the following cases:

Arkansas.— Peebles v. Eminent Household of Columbian Woodmen, 111 Ark. 435, 164 S. W. 296.

Connecticut.—Peck v. New London County Mutual Fire Ins. Co. 22 Conn. 575.

Illinois.—Dromgold v. Royal Neighbors of America, 261 Ill. 121, 103 N. E. 584, 43 Ins. L. J. 176.

Iowa.—Kesler v. Farmers' Mutual Fire & Lightning Ins. Assoc. 160 Iowa, 374, 141 N. W. 954.

Kentucky.—Masonic Life Assoc. v. Robinson, 156 Ky. 371, 160 S. W. 1078.

Minnesota.—Dougherty v. Supreme Court of Independent Order of Foresters, 125 Minn. 142, 145 N. W. 813.

Missouri.—Griffith v. Supreme Council of Royal Arcanum, 182 Mo. App. 644, 166 S. W. 324; Keys v. National Council Knights & Ladies of Security, 174 Mo. App. 671, 161 S. W. 345; Wallace v. Prudential Ins. Co. 174 Mo. App. 110, 157 S. W. 1028.

Nebraska.—Kreeck v. Supreme Lodge of Fraternal Union of America, 95 Neb. 428, 145 N. W. 859.

New Hampshire.—Union Mutual Fire Ins. Co. v. Keyser, 32 N. H. 313, 64 Am. Dec. 377.

Pennsylvania.—Cumberland Valley Mutual Protective Ins. Co. v. Schell, 29 Pa. St. 31.

Texas.—Splawn v. Chew, 60 Tex. 532.

Wisconsin.—Morrison v. Wiscon-

between agents of stock and mutual companies,[11] and it would seem, in so far as their acts within the apparent scope of their authority are concerned, that there can be no difference. If an agent of a stock company can waive express provisions of the policy, where his authority is broad enough, why should a contract with a mutual company be peculiarly protected? The by-laws, though a part of a member's contract, ought not to impose greater obligations than the express stipulations of a policy in a stock company; and if the power to waive a by-law, which is neither mandatory nor of the essence of the contract, rests in the company, why not, then, in an agent having the requisite authority? Certainly, if the company is empowered to vest discretionary powers in its agents in such matters, it cannot be said to abrogate the principle of mutuality. Thus in a New York case [12] the court declares that it is the duty of incorporated companies to see to it at their peril that their officers and agents understand their powers and duties, and that they do not habitually transcend such powers. We believe the above expressions are in accord with the conclusions of other writers and with the tendency of opinion at the present time.[13]

§ 395. Who is general agent.—A distinction is made under the law of agency, as to the extent of their authority, between general and special agents.[14] This distinction Evans, in his work on Agency, asserts to be of little or no practical value, and this is true, so far at least as regards the principal and third parties, since the question in case of dispute as to the agent's powers does not

sin Odd Fellows' Mutual Life Ins. Co. 59 Wis. 162, 169, 18 N. W. 13.

The courts of Massachusetts distinguish as to these by-laws which are not of the essence of the contract: Brewer v. Chelsea Mutual Fire Ins. Co. 14 Gray (80 Mass.) 209; Priest v. Citizens' Mutual Fire Ins. Co. 3 Allen (85 Mass.) 602.

[11] Kansal v. Minnesota Farmers' Mutual Fire Ins. Assoc. 31 Minn. 17, 47 Am. Rep. 776, 16 N. W. 430.

[12] Conover v. Mutual Ins. Co. 1 Comst. (N. Y.) 290.

[13] Union Mutual Life Ins. Co. v. Wilkinson, 13 Wall. (80 U. S.) 222, 20 L. ed. 617; Peck v. New London Mutual Fire Ins. Co. 22 Conn. 575. See 1 May on Ins. (3d ed.) sec. 126, p. 220; secs. 127, 139, 140, 145–49; Bacon on Benefit Societies and Life Ins. (ed. 1888) secs. 147, 151, 156–58, 171, 307, 426.

[14] Crugan v. Smith, 41 Ind. 288; Lattomus v. Farmers' Mutual Fire Ins. Co. 3 Houst. (Del.) 404. See also 2 Wood on Fire Insurance (2d ed.) 873, sec. 421; Richards on Ins. (ed. 1892) p. 21, secs. 17 et seq., p. 95; sec. 93, p. 101; sec. 95. "There seems to be no very well-defined distinction between the powers of general agents, local agents, and subagents." 1 May on Ins. (3d ed.) sec. 126, p. 221.

Who are general and who special agents, see Great West Mining Co. v. Woodmas of Alston Mining Co. 12 Colo. 46, 13 Am. St. Rep. 204, 90 Pac. 77; Union Stock Yards & Transit Co. v. Mallory Son, & Zimmerman Co. 157 Ill. 664, 48 Am. St. Rep. 341, 41 N. E. 888.

Special agent defined, see Thompson v. Michigan Mutual Life Ins. Co. 56 Ind. App. 502, 105 N. E. 780.

rest alone upon whether the authority is general or special, but inquiry is necessitated as to whether the agent's acts are within the scope of his real or apparent authority,[15] and this is especially applicable to insurance agents. So it is declared in a Minnesota case that: "'The designation of agents as 'general,' 'special,' 'local' and 'soliciting' agents in a rough way serves to indicate their powers, but it is of little importance as between the principal and persons who deal with the agent. It is commonly said that a general agent is one who has power to transact all the business of his principal of a particular kind, or in a particular place, and a special agent is one who is authorized to act only in a specific transaction.[16] The mere fact that an agent's authority is limited to a particular business does not make his agency special, if the authority is general and gives him power to perform all acts necessary for the transaction of that business and he is so held out to the world.[17] Locality or extent of territory is not the test of general or special agency." [18] In Iowa there is also no distinction between soliciting and recording agencies.[19] We will consider, however, some of the decisions relating to general agents. A general agent is one who is authorized to transact all the business of his principal, or all of his business of some particular kind, or at some particular place, but an agent's authority is not made special by being limited to a particular business it may be as general in regard to that as though of unlimited range.[20] An agent who is required to write policies, and is authorized to settle the terms of insurance and investigate losses, is a general agent, with authority to waive preliminary proofs of loss.[1] So agents are general agents; where they fully represent the company within a certain district, are authorized to solicit insurance, receive moneys and premiums, issue and renew policies, appoint subagents, and adjust losses;[2]

[15] Ewell's Evans on Agency, p. 21. See Id. p. 134, side pp. 101 et seq. See also Thompson on Corp. (ed. 1895–96) secs. 4878, 4879.

[16] *Citing* Lord Ellenborough, Whitehead v. Trickett, 15 East 400; Story, Agency, sec 17; Mechem, Agency, sec. 6; Clark & Skiles, Agency, sec. 193.

[17] *Citing* Crain v. First Nat. Bk. 114 Ill. 519.

[18] Kilborn v. Prudential Ins. Co. 99 Minn. 176, 108 N. W. 861, 35 Ins. L. J. 844, *citing* Butler v. Maples, 9 Wall. (76 U. S.) 766; Continental Ins. Co. v. Ruckman, 127 Ill. 364.

[19] Funk v. Anchor Fire Ins. Co. 171 Iowa, 331, 153 N. W. 1048, 1051, Code 1897, secs. 1749, 1750.

[20] Thompson v. Michigan Mutual Life Ins. Co. 56 Ind. App. 502, 105 N. E. 780; Cruzan v. Smith, 41 Ind. 291, 297, 298, *quoting* from 1 Wait's Law & Pract. p. 215. See 5 Words & Phrases, p. 4202.

[1] Travelers' Ins. Co. v. Harvey, 82 Va. 949, 5 S. E. 553. See Painter v. Industrial Life Assoc. 131 Ind. 68, 73, 30 N. E. 876 (held general agent without regard to extent of territory or scope of powers).

[2] German Ins. Co. v. Gray, 43 Kan.

where they have power within a certain territory to receive proposals of insurance, to fix rates of premium, receive moneys, countersign, issue, and renew policies of insurance;[3] where they solicit and receive applications, countersign and issue policies;[4] one who has control at times of the local agencies in the state, approves risks, attends to the details of the company's business, and at the request of the secretary examines the same, signs his name to letters, and uses letterheads with his name thereon as general agent;[5] a person employed to negotiate and complete contracts of insurance, accept risks, receive premiums and premium notes, and renew policies;[6] and where one writes up and delivers a policy to the assured indorsed with his name thereon as "agent," he is a general agent, with authority to waive conditions in the policy.[7] So an agent intrusted with blank policies and renewal receipts has impliedly a general authority to do everything necessary to their issue.[8]

§ 395a. Same subject.—An agent authorized to issue policies, to fix rates and premiums, and to countersign, renew, and sign the transfer of policies in a certain locality is a general agent within that district,[9] and as such agent he may take risks outside of the locality to which his agency is limited where the insured has no knowledge of such limitation.[10] So a party is a general agent who acts in a certain locality under a written commission authorizing him to receive proposals for insurance, countersign, issue, and renew policies, and consent to the transfer of the same, although he is subject to the instructions of the company's officers and to the rules and regulations of the company,[11] and the local agents of

497, 503, 504, 19 Am. St. Rep. 150, 8 L.R.A. 70n, 23 Pac. 637, per Johnston, J.

[3] Phœnix Ins. Co. v. Munger, 49 Kan. 178, 33 Am. St. Rep. 360, 30 Pac. 120.

[4] Sun Insurance Office of London v. Mitchell, 186 Ala. 420, 65 So. 143.

[5] King v. Council Bluffs Ins. Co. 72 Iowa, 310, 315, 33 N. W. 690.

[6] Hartford Fire Ins. Co. v. Orr, 56 Ill. App. 629; Pitney v. Glens Falls Ins. Co. 61 Barb. (N. Y.) 335, 65 N. Y. 6, 21; Post v. Ætna Ins. Co. 43 Barb. (N. Y.) 351; Devendorf v. Beardsley, 23 Barb. (N. Y.) 656; South Bend Toy Mfg. Co. v. Dakota Fire & Marine Ins. Co. 2 S. Dak. 17, 52 N. W. 866, affirming s. c. 48 N. W. 310.

[7] Millville Mutual Marine & Fire Ins. Co. v. Mechanics' & Workingmen's Bldg. & Loan Assoc. 43 N. J. L. 652.

[8] Carroll v. Charter Oak Ins. Co. 40 Barb. (N. Y.) 292. See Little v. Phœnix Ins. Co. 123 Mass. 380, 25 Am. Rep. 96, where it was held that agent was general agent with authority to settle loss and waive formal preliminary proofs.

[9] West v. Norwich Union Fire Ins. Co. 10 Utah, 442, 448, 37 Pac. 685, per Borteh, J.

[10] Lightbody v. North American Ins. Co. 23 Wend. (N. Y.) 18.

[11] Howard Ins. Co. v. Owens, 94 Ky. 197, 21 S. W. 1037, 13 Ky. L. Rep. 237; Phœnix Ins. Co. v. Mun-

a foreign insurance company appointed by a general agent, located without the state, are general agents, and may bind the company by acts within the scope of their general authority, though in violation of limitations thereupon not brought home to the knowledge of the party dealing with them.[12] So a local agent of a foreign company is a general agent where he is empowered to effect contracts of insurance, fix rates of premiums, consent to change in and increase of risks, and generally to exercise supervision over the property covered by the company's policies issued through him. As such agent he may, in the absence of known limitations on his authority, dispense with conditions and waive forfeitures.[13] Again, a person is a general agent who has charge of the company's business for a state, and who acts under general instructions to such agents and without special limitations upon his authority.[14] An agent authorized to make contracts of insurance, collect premiums, and issue and renew policies, and to that end is furnished with printed forms of policies signed in blank by the president and secretary, to enable him without conference with them to countersign and issue policies, is the general agent of the company.[15] But an agent of a foreign life insurance company who has authority to solicit risks, take applications, issue and deliver policies, receive premiums, and deliver receipts, is not necessarily a general agent in point of law, and as such empowered to waive payment of premiums,[16] nor is one a general agent who has merely authority to work a certain territory and to receive applications under instructions from the company.[17] And the fact that a person is a local agent does not determine whether he is a general or a special agent for a local agent may be either as the term "local" limits the territory and not the authority in the particular business within said territory.[18] So the term "agent" embraces general agents and also agents whose authority is limited or special.[19] The term "general agent" does not imply that a representative of a corporation is an officer thereof.[20] Again, a statute may make foreign in-

ger, 49 Kan. 178, 33 Am. St. Rep. 360, 30 Pac. 120.

[12] Miller v. Phœnix Ins. Co. 27 Iowa, 203, 1 Am. Rep. 262.

[13] Viele v. Germania Ins. Co. 26 Iowa, 9, 96 Am. Dec. 83, and note, 112.

[14] Southern Life Ins. Co. v. Booker, 9 Heisk. (56 Tenn.) 606, 24 Am. Rep. 344.

[15] Machine Co. v. Insurance Co. 50 Ohio St. 558, 22 L.R.A. 768, 35 N. E. 10, 60, per Williams, J.

[16] Meserean v. Phœnix Ins. Co. 66 N. Y. 274.

[17] Martin v. Farmers' Ins. Co. of Cedar Rapids, 84 Iowa, 516, 51 N. W. 29.

[18] Thompson v. Michigan Mutual Life Ins. Co. 56 Ind. App. 502, 105 N. E. 780.

[19] Queen of Arkansas Ins. Co. v. Malone, 111 Ark. 229, 163 S. W. 771.

[20] Vardeman v. Penn Mutual Life Ins. Co. 125 Ga. 117, 5 Am. & Eng. Ann. Cas. 221, 54 S. E. 66.

surance companies responsible for the acts of those who assume to aid them in the transaction of their business, and this is the effect of the statute of the state of Illinois declaring that "the term 'general agent' used in this section shall include an acknowledged agent, surveyor, broker, or any other person or persons who shall in any way aid in transacting the insurance business of any insurance company not incorporated by the laws of this state." [1]

§ 396. Power of agents to delegate authority.—Authority is either original or derivative. Whenever a person possesses the power in himself of his own right to do an act, he may delegate that power to another, for, in general, whatever a man can do by himself he can do by another, provided, of course, that the act is not illegal.[2] This consideration is of importance in connection with the right of agents of insurance companies to waive conditions of a policy, since in case of insurance corporations their powers are limited by charter.[3] If the authority is derivative, as where a person is appointed to act as the agent of another, and no express power to delegate exists, the maxim, "Delegatus non potest delegare," applies as a general rule since the authority of the agent is exclusively personal,[4] upon the ground that the principal may rely upon the experience, skill, and integrity of the particular person whom he has appointed as his agent. There are, however, important exceptions to the rule: noticeably, in cases where usage or custom or the particular nature of the employment warrant an implied authority to delegate. So in cases where the power delegated does not involve the exercise of discretion, or in case the employment of subagents is necessitated to carry out the instructions of the principal, or where the act of substitution is ratified by the principal.[5]

The following authorities will illustrate the above points: Thus, where the authority conferred on the agent is such as to require the exercise of skill and discretion, and no power of substitution is given, the authority is exclusively personal, and the principal would not be bound by the act of a subagent.[6] So an adjuster selected

[1] Continental Ins. Co. v. Ruckman, 127 Ill. 364, 11 Am. St. Rep. 121, 20 N. E. 77.

[2] See Ewell's Evans on Agency (ed. 1879) c. vi. p. 47, side pp. 35 et seq., for rule and exceptions thereto.

[3] But see §§ 35, 36 herein.

[4] See Smith v. Soublett, 28 Tex. 163; Bocock v. Pavey, 8 Ohio St. 270, 32 Am. Dec. 707n; Ewell's Evans on Agency (ed. 1879) c. vi. p. 51, secs. 2 et seq.; Story on Agency (2d ed.) secs. 13–34a.

[5] See Ewell's Evans on Agency (ed. 1879) 57.

That authority to employ subagent may be implied from circumstances or usages of trade, see Appleton Bank v. McGilvray, 4 Gray (70 Mass.) 518, 64 Am. Dec. 92.

[6] See remarks of the court in Brown v. Railway Pass. Assur. Co. 45 Mo. 221; Sayre v. Nichols, 7 Cal. 535, 68 Am. Dec. 280; Lyon v. Jerome, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271.

because of his special ability, skill, and fitness cannot delegate his authority by the appointment of a subadjuster without the company ratifies the act.[7] So an agent in whom is vested discretionary power cannot delegate his authority except under an express grant of authority.[8] Therefore, a general agent, whose power in issuing policies of insurance calls for the exercise of discretion, cannot delegate the same to another,[9] nor can an agent delegate the power to countersign policies where he is agent to issue policies which are not to be valid till countersigned.[10] But an act of the agent's clerk in signing the policy is a mere ministerial act when done in pursuance of the slip which the agent himself had signed under a power of attorney, the act of the clerk being held not to require the exercise of any discretion or judgment. Another factor entered into this case which strengthened the ruling, and that was, that the evidence showed no adoption of the policy by the underwriter.[11]

An agent, without express authority to appoint a subagent, cannot make another an agent of the company by agreeing, without the company's knowledge, to divide commissions with him on insurance procured.[12] But a general agent of a life insurance company, with authority to employ subagents, may make a contract with a subagent as to salary, which will bind the company, and in such case it, and not the agent, is responsible therefor:[13] and an agent may employ a subagent to procure applications which he himself acts upon and forwards to the company.[14] And the acts of a subagent employed by a duly authorized agent to solicit insurance are as binding as those of the agent himself,[15] as such subagent's power to bind the insurer is coextensive with that of his principal within the limits of the authority delegated.[16] It may also be generally stated that an agent with general powers, such as the authority to make contracts, deliver policies, and collect premiums, may appoint subagents, clerks, surveyors, and

[7] Ruthven v. American Fire Ins. Co. 92 Iowa, 316, 60 N. W. 663.

[8] Farmers' Fire Ins. Co. v. Chase, 56 N. H. 341. But see Morawetz on Private Corp. (ed. 1882) sec. 249.

[9] McClure v. Mississippi Valley Ins. Co. 4 Mo. App. 148.

[10] Lynn v. Burgoyne, 13 B. Mon. (52 Ky.) 400. See Copeland v. Mercantile Ins. Co. 6 Pick. (23 Mass.) 198, 203.

[11] Mason v. Joseph, 1 Smith (N. Y.) 406. One member of a partnership who are the agents of an insurance company has all the powers of the firm: Kennebec Co. v. Augusta Ins. & Banking Co. 6 Gray (72 Mass.) 204.

[12] Phœnix Ins. Co. v. Spiers, 87 Ky. 285, 10 Ky. L. Rep. 254, 8 S. W. 453.

[13] Cotton States Life Ins. Co. v. Mallard, 57 Ga. 64.

[14] Rossiter v. Trafalgar Life Assur. Assoc. 27 Beav. 377.

[15] McGonigle v. Aurora Fire Ins. Co. 168 Pa. St. 1, 31 Atl. 868.

[16] Austin Fire Ins. Co. v. Brown, — Tex. Civ. App. —, 160 S. W. 973.

other subordinates to exercise similar powers.[17] So a general agent may delegate his power to a clerk, assistant, or subagent to the extent of authorizing the latter to agree that a policy to be issued shall obtain a condition permitting the buildings insured to remain vacant for a period not exceeding thirty days without notice to the insurer.[18] An agent of an accident insurance company, with absolute power to effect insurances, may appoint a subagent where the skill and discretion are not required and the tickets are made out and signed at the company's offices and sent to the various agencies to be sold indifferently to all who apply.[19]

If an insurance company specially authorizes its agent to cancel a policy, he cannot delegate such power, but where all necessary acts to effect a cancelation have been performed by him, he is not personally obligated to deliver the notice and tender the premium to the insured; these acts may be performed by another acting for such agent.[20] A local agent may appoint a subagent with the knowledge of the company.[1]

If one acts as agent for the original agent, with the knowledge and consent of the company, the latter is bound.[2] It is held that if the general agent employs a subagent to procure risks, the company is bound, unless the subagent knew the general agent to be without authority to employ him.[3] If the power of substitution is exercised by an agent acting without full power, and the act is ratified by the principal, the agent is not liable for the loss consequent upon such substitution.[4] But it is also held that an agent cannot bind his principal by ratifying the act of a subagent which said agent had no power to appoint.[5]

It is another general rule, applicable as well to a contract of insurance as to any other, that the original agent is not responsible for the acts of his subagent where his employment is expressly or impliedly authorized, whether by usage or express authority to substitute, or by instructions of the principal or otherwise, unless the original agent was guilty of fraud or gross negligence in the ap-

[17] Mayer v. Mutual Life Ins. Co. 38 Iowa, 304, 18 Am. Rep. 34; Eclectic Life Ins. Co. v. Fahrenkrug, 68 Ill. 463.

[18] Continental Ins. Co. v. Ruckman, 127 Ill. 364, 11 Am. St. Rep. 121, 20 N. E. 77.

[19] Brown v. Railway Passenger Assur. Co. 45 Mo. 221.

[20] Runkle v. Citizens' Ins. Co. 6 Fed. 143, 149.

[1] Goit v. National Protective Ins. Co. 25 Barb. (N. Y.) 189.

[2] Van Schoick v. Niagara Fire Ins. Co. 68 N. Y. 434.

[3] Equitable Life Assur. Co. v. Brobst, 18 Neb. 526, 26 N. W. 204.

[4] Smith v. Cologan, 2 Term Rep. 188 n.

[5] Thompson v. Michigan Mutual Life Ins. Co. 56 Ind. App. 502, 105 N. E. 780. See Trudo v. Anderson, 10 Mich. 357, 81 Am. Dec. 795.

pointment or substitution, or unless the subagent's damaging acts and omissions were co-operated in by him. By force of the authority to substitute, a privity is established, between the latter and the principal, and the responsibility is directly to him.[6] This general rule would seem, perhaps, to be more broadly stated by the court in a New York case, where it is said, in substance, that the ordinary course of business frequently necessitates the employment of clerks by the agents to assist them. In agencies doing a large business, it is presumed that clerks may be employed to attend to the details of the business. An agent can authorize the clerk to contract risks, deliver policies, collect premiums, and other matters of like import, and the act of the clerk in such matters binds the company, and the maxim, "Delegatus non potest delegare," does not apply in such cases,[7] but from an examination of the case and an application of these words to the facts, it might be reasonably assumed that the court did not evidently intend to enlarge the general rule, since the acts of the subagent were in accordance with a general course of dealing sanctioned by the company. He had procured policies and renewal certificates from the company, and frequently delivered them to the insured waiving prepayment of the premiums.[8]

An authority to employ a subagent may impliedly arise from the character of the agency, or where the instructions are such as to require the appointment of a subagent to execute them, or where it is indispensable to accomplish the purpose of the agency;[9] the principle underlying this rule being analogous to the rule that an agent may employ the usual and necessary means to execute his authority,[10] and there is no reason why the rule should not be equally applicable to agents of insurance companies as well as to those of other companies. So the general agent of a foreign insur-

[6] 2 Duer on Ins. (ed. 1810) sec. 4, p. 187, *citing* Story on Agency (2d ed.) secs. 201, 217–33. See generally Mechem on Agency (ed. 1889) secs. 197, 728; Strong v. Stewart, 9 Heisk. (56 Tenn.) 137; Louisville & Nashville R. R. Co. v. Blair, 4 Baxt. (63 Tenn.) 407; Equitable Life Ins. Co. v. Brobst, 18 Neb. 526, 26 N. W. 204; Langdon v. Union Mutual Fire Ins. Co. 14 Fed. 272; Mound City Life Ins. Co. v. Huth, 49 Ala. 529; Mayer v. Mutual Life Ins. Co. 38 Iowa, 304, 18 Am. Rep. 34; Eclectic Life Ins. Co. v. Fahrenkrug, 68 Ill. 463; Kuney v. Amazon Ins. Co. 36 Hun (N. Y.) 66. But see Waldman v. North British Mercantile Ins. Co. 91 Ala. 170, 8 So. 666, 24 Am. St. Rep. 883.

[7] Bodine v. Insurance Co. 51 N. Y. 117, 123, 10 Am. Rep. 566, 571, per Earl, J.

[8] See Kuney v. Amazon Ins. Co. 36 Hun (N. Y.) 66.

[9] Ewell's Evans on Agency, p. 59, side p. 44; Morawetz on Private Corp. (ed. 1882) sec. 248.

[10] See Owen v. Brockschmidt, 54 Mo. 285; Merrick v. Wagner, 44 Ill. 266; Strong v. Stewart, 9 Heisk. (56 Tenn.) 147, per Sneed, J.; Birdenbecker v. Lowell, 32 Barb. (N. Y.) 9,

ance company is presumed to have power to appoint subagents.[11] And a general insurance agent authorized for several counties to receive applications, fix premium rates, receive money, countersign, issue, renew, and consent to the transfer of policies does not exceed his authority by appointing a subagent to receive applications and forward them to him.[12] So the territory to which an agent is appointed may be such as to impliedly authorize the appointment of subagents and their acts done within the limits of their power will be binding upon the principal.[13]

The power conferred upon an agent by a fraternal order may be such that it may be delegated.[14]

§ 397. Officers of insurance corporations and associations and their powers.—We have seen that corporations are presumed to act through agents,[15] and that in the absence of charter provisions therefor there is an implied consent on the part of those becoming members of mutual companies that the necessary officers and agents shall be employed.[16] It is a settled, general rule of agency that officers of a corporation or association are special agents, whose powers are limited and prescribed by the charter or articles of association and by-laws, and that persons dealing with them are chargeable with notice of these limitations.[17] But the acts of the officers of a society within the lawful scope of his authority are binding on the company,[18] for an insurance company must act by its officers, and their acts and statements as such, done and made in the discharge of their duty in that capacity and in relation thereto, are evidence against the company.[19] Although an agent's powers are limited by the by-laws, yet if such agent belongs to a particular class, the functions and duties of which are settled by general custom, such agent may be legally assumed to possess such powers as are usually exercised by the class within the category of which his agency

17; Ewell's Evans on Agency (ed. 1879) 59, *44; 1 Wait's Actions and Defenses, 221, sec. 2.

[11] Keeney v. Amazon Ins. Co. 36 Hun (N. Y.) 66.

[12] Krumm v. Jefferson Fire Ins. Co. 40 Ohio St. 225.

[13] Insurane Co. of North America v. Thornton, 130 Ala. 222, 55 L.R.A. 547, 89 Am. St. Rep. 30, 30 So. 614.

[14] Supreme Lodge Knights of Pythias v. Connelly, 185 Ala. 301, 64 So. 362.

[15] § 309 herein; Angell & Ames on Corp. (9th ed.) secs. 276 et seq.

[16] Protection Life Ins. Co. v. Foote, 79 Ill. 361; § 386 herein.

[17] Alexander v. Cauldwell, 83 N. Y. 480; City Fire Ins. Co. v. Carrugi, 41 Ga. 660; Silliman v. Fredericksburg, Orange & Charlottesburg R. R. Co. 27 Gratt. (Va.) 119; 2 Morawetz on Corp. (2d ed.) sec. 591; Angell & Ames on Corp. (9th ed.) secs. 291 et seq.

[18] Hackney v. Alleghany County Mutual Ins. Co. 4 Pa. St. 185, 187.

[19] First Baptist Church v. Brooklyn Fire Ins. Co. 18 Barb. (N. Y.) 69; Muhlman v. National Ins. Co. 6 W. Va. 508.

falls.[20] But the officers and directors may not ratify acts of the president which they themselves could not have originally done.[1]

It is held that the officers of mutual insurance companies have no authority to waive the by-laws and provisions adopted by the members of the company for their mutual protection.[2] But where the waiver is of some matter which relates rather to the remedy than to the substance of the contract, the officers of the company have power to waive the by-laws,[3] and where the affairs of a mutual company are managed by a board of directors, who select all the officers of the company, such officers have power to waive defects and ratify invalid policies of insurance.[4] But the officers cannot waive a condition of the policy in a mutual company which provides that in case of any change in the facts or in the condition of the premises the policy should be void, except upon written notice to and written consent of the directors signed by the secretary, and the payment of an additional premium or deposit.[5] So where a by-law of a mutual company provides that consent to other insurance may be given only by the president and secretary, it is error to charge the jury that it may be given by a director or the secretary.[6] The officers of the company may waive a breach of condition of an insurance policy by neglecting to cancel the policy and thereafter collecting an assessment with knowledge of the facts.[7] So the company may waive its right to have the values stated in detail by its officers accepting an aggregate valuation of all the property covered by the application;[8] and if officers of a company, with knowledge of the actual condition of the title of the applicant, choose to accept the risk, the policy is not voided because the interest of the assured is other than that of an entire, uncon-

[20] See Commercial Ins. Co. v. Union Ins. Co. 19 How. (60 U. S.) 318, 15 L. ed. 636; Union Mutual Life Ins. Co. v. White, 106 Ill. 67; Minor v. Mechanics' Bank, 1 Pet. (26 U. S.) 46, 7 L. ed. 47.

[1] Crimm's Appeal, 66 Pa. St. 474. See §§ 455 et seq. herein.

[2] Mulrey v. Shawmut Mutual Fire Ins. Co. 4 Allen (86 Mass.) 116, 81 Am. Dec. 689; Behler v. German Mutual Fire Ins. Co. 68 Ind. 347, 354; Lyon v. Supreme Assembly, 153 Mass. 83, 26 N. E. 236; Baxter v. Chelsea Mutual Fire Ins. Co. 1 Allen (83 Mass.) 294, 79 Am. Dec. 730 and note 733; Westchester Fire Ins. Co. v. Earle, 33 Mich. 150; Wilson v. Conway Mutual Fire Ins. Co. 4 R. I. 141.

[3] Brewer v. Chelsea Ins. Co. 14 Gray (80 Mass.) 203, 209. See §§ 35, 36, 407 herein.

[4] Pratt v. Dwelling-house Mutual Fire Ins. Co. 130 N. Y. 206, 29 N. E. 117, 41 N. Y. 303.

[5] Evans v. Tremountain Mutual Fire Ins. Co. 9 Allen (91 Mass.) 329.

[6] Stark County Mutual Ins. Co. v. Hurd, 19 Ohio, 149. See §§ 401, 404 herein.

[7] Osterloh v. New Denmark Ins. Co. 60 Wis. 126, 18 N. W. 749. *Examine* Ware v. Millville Fire Ins. Co. 45 N. J. L. 177.

[8] Residence Fire Ins. Co. v. Hannawold, 37 Mich. 103.

ditional, and sole ownership as required by the policy.[9] So parol evidence is admissible to show that a misdescription contained in the policy arose from the mistake of the officer of the company, to whom the building was accurately described.[10] But an officer's knowledge acquired by rumor or in his individual capacity does not operate as constructive notice to the company.[11] And where the question was whether a policy had been forfeited for breach of condition as to the building being unoccupied, it was held immaterial that the officers knew of the vacancy.[12]

Where the president and director of the company go at once upon the ground after the fire, for the purpose of examining into the circumstances, this is sufficient evidence of notice, although the policy provides that notice of loss be given forthwith.[13] So the company waives the right to demand formal proofs of loss where the officer to whom such proofs should be made visits the ground subsequent to loss, and agrees with the insured as to the valuation of the property destroyed;[14] but if the personal examination be made by the officer subsequent to the thirty days' limit it does not constitute a part of the proofs,[15] although the agreement of an officer of the company and the insured to adjust a loss does not necessarily raise an estoppel against the company to claim a forfeiture for breach of conditions.[16] It is a sufficient compliance with a condition requiring that preliminary proofs of loss be delivered at the office, if there be an actual delivery there to any officer in charge; such officer may also waive further proofs than those submitted.[17] It is held in California[18] that the officers of an insurance company had no power to bind the company for the payment of the premium on a policy by acting as agents of an applicant in procuring insurance from another company.

In a suit by a bank upon a surety bond, in the nature of a fidelity insurance contract, an instruction that the officers of the bank are required to give the same supervision and care over the

[9] Union Ins. Co. v. Chipp, 93 Ill. 96.

[10] Moliere v. Penn Ins. Co. 5 Rawle (Pa.) 342, 28 Am. Dec. 675. See §§ 505–507 herein.

[11] Keenan v. Dubuque Mutual Fire Ins. Co. 13 Iowa, 375. See §§ 544–546 herein.

[12] Hermann v. Adriatic Fire Ins. Co. 85 N. Y. 162, 39 Am. Rep. 644. See §§ 565, 566 herein.

[13] Roumage v. Mechanics Fire Ins. Co. 13 N. J. L. (1 Green) 110; Georgia Home Ins. Co. v. Allen, 119 Ala. 436, 24 So. 399, 28 Ins. L. J. 199. See §§ 575 et seq. herein.

[14] Susquehanna Mutual Fire Ins. Co. v. States, 102 Pa. St. 529. See §§ 575 et seq. herein.

[15] Winnesheik Ins. Co. v. Schueller, 60 Ill. 465. See §§ 575 et seq. herein.

[16] Colonius v. Hibernia Fire Ins. Co. 3 Mo. App. 56. See §§ 575 et seq. herein.

[17] Edgerly v. Farmers' Ins. Co. 48 Iowa, 644.

[18] Hutchinson v. State Investment & Ins. Co. 53 Cal. 622.

management of the affairs of the bank as an ordinarily prudent business man would give is correct.[19]

§ 398. Powers of officers of mutual benefit societies.—Committees and officers of mutual benefit societies, in so far as the management of the affairs of such organization devolve upon them, are clothed to a certain extent with the powers of general agents, while in other respects they occupy no other footing than that of agents with special authority, defined and limited largely by the laws governing the body for which they act. They resemble, in many particulars, directors and officers of corporations, so far as their authority is concerned. But the rule of limitation of their powers is flexible to the extent that the authority which they are held out to the world to possess cannot be held to yield to restrictions and limitations which are unknown to the parties with whom they deal. Their principals are bound by their ostensible authority, subject to those limitations upon the power of the principal and upon their own powers, which are in the charter or constitution or by-laws,[20] and we see no reason why they should not be bound, subject to the above limitations, by the same rules as like agents in other companies.[1] Again, the by-laws, articles of association, and certificates of membership of mutual benefit associations determine the rights of the members and of the association, and may be enforced by the parties and beneficiaries according to their respective rights as therein provided.[2] And while a member of such a society is bound to comply with the requirements of the valid by-laws of the association, the officers cannot defeat his claim by arbitrarily rejecting his proofs as unsatisfactory, or by wrongfully declaring that he had not done what his contract and the by-laws of the association required of him.[3] So a local officer of a benefit association, required by its by-laws to collect dues from members, is the agent of the association, and a member discharges his obligation to the association when he pays his dues to such agent. He has a right to rely upon their proper application.[4]

§ 399. Powers of president.—In insurance companies a wide discretion is usually vested in the president, and he, as well as the

[19] Bank of Tarboro v. Fidelity & Deposit Co. 128 N. C. 366, 83 Am. St. Rep. 682, 38 S. E. 208.

[20] See Bacon's Benefit Societies and Life Ins. (ed. 1888) secs. 133, 134, 145; Niblack on Mutual Benefit Soc. c. vi. sec. 311.

[1] As to agency of subordinate lodges, see § 407 herein.

[2] Union Mut. Assoc. v. Montgomery, 70 Mich. 587, 14 Am. St. Rep. 519, 38 N. W. 588.

[3] Supreme Council of the Order of Chosen Friends v. Forsinger, 125 Ind. 52, 21 Am. St. Rep. 196, 9 L.R.A. 501, 25 N. E. 129.

[4] Supreme Tribe of Ben Hur v. Hall, 24 Ind. App. 316, 79 Am. St. Rep. 262, 56 N. E. 780.

secretary, may generally, in all matters relating to the transaction of the company's business at its office, bind the company by acts which are within the legitimate scope of the business and of his ostensible authority.[5] The president of an insurance company may indorse its notes although the charter requires that all contracts and other agreements made by the company in the necessary course of business shall be in writing or in print, and signed by the president and secretary, or by such other officer or officers as the directors may appoint therefor, and in such case it is not necessary to prove a formal vote of the directors.[6] So if the president is authorized to adjust and pay losses, he may indorse notes and deliver them;[7] and an ex-president acting as president may by indorsement pass title to a promissory note payable to the company, especially where the company accepts the benefit thereof by converting the proceeds to its use.[8] The president may also validly transfer a premium note in payment of a loss where the act is in the ordinary course of business, and in conformity with a usage and a standing by-law of the company, although the charter provides that the corporate business shall be transacted by trustees and agents whom they may appoint, and although the act was not expressly authorized by the board of trustees.[9] But it is held that if the president is not authorized by the charter or by-laws to indorse and negotiate the company's notes, that he has no authority as such officer to do so,[10] and if he gives a promissory note

[5] See Dilleber v. Knickerbocker Life Ins. Co. 76 N. Y. 567, aff'g 7 Daly, 540; Cotton States Ins. Co. v. Edwards, 74 Ga. 220; Smith v. Smith, 62 Ill. 493, per Walker, J.; Bacon v. Mississippi Ins. Co. 31 Miss. 116; St. Nicholas Ins. Co. v. Howe, 7 Bosw. (N. Y.) 450.

See, generally, as to powers of president and other officers and agents of corporations, Sparks v. Dispatch Transfer Co. 104 Mo. 531, 24 Am. St. Rep. 351, 12 L.R.A. 714n, 15 S. W. 417; Ceeder v. H. M. Loud & Sons Lumber Co. 86 Mich. 541, 24 Am. St. Rep. 134, 49 N. W. 575; Sherman Center Town Co. v. Swigart, 43 Kan. 292, 19 Am. St. Rep. 137, 23 Pac. 569; Thompson on Corp. (ed. 1895–96) secs. 4613 et seq., 4697 et seq., 4716 et seq., 4846 et seq., 4873 et seq.

[6] Topping v. Beckford, 4 Allen (86 Mass.) 120.

[7] Baker v. Cotter, 45 Me. 236. See Bank of Attica v. Pottier & Stymus Mfg. Co. 1 N. Y. 483, 49 Hun, 606, 17 N. Y. St. Rep. 327; Fifth National Bank v. Navassa Phosphate Co. 119 N. Y. 256, 23 N. E. 737.

[8] Patten v. Moses, 49 Me. 255. See Tuscaloosa Cotton-Seed Oil Co. v. Perry, 85 Ala. 158, 4 So. 635.

[9] Howland v. Myer, 3 Comst. (N. Y.) 290; affirming Aspinwall v. Meyer, 2 Sand. (N. Y.) 180. See in connection with this case the statute of New York (1 Rev. Stat. 722, sec. 8) in regard to act to prevent the insolvency of moneyed corporations, it being held that a transfer of a note for more than one thousand dollars, without a resolution of the board of trustees, was not in violation of that act, as the charter was granted subsequently to the passage of the act.

[10] Marine Bank v. Clements, 3 Bosw. (N. Y.) 600.

as president of the company, it is not the company's note, but his own;[11] and if he issues forged certificates of stock for an individual loan the company is not bound.[12] Where the general supervision of the affairs of a company are vested under its by-laws in the president, and a policy upon a special risk, signed, as required by the by-laws, by the president and secretary, is issued, and such officers have full knowledge of all facts material to the risk, the policy is valid and enforceable, although the rules of the company provide that such special risks shall be approved by the executive committee and three directors before the policy is issued, and the rule is not complied with.[13]

The president has authority to employ counsel.[14] He may waive a forfeiture for nonpayment of premiums, as in case the insured relies upon his statements that the company would give him whatever accommodation was necessary, and the company thereafter, for several years, receives overdue premiums.[15] So it is held that he may make a contract with a special agent, whose life is insured by the company, to charge the premiums, although a by-law provides that all premiums shall be paid in cash, and this although the agent was indebted to the company when such agreement was made by him with the president.[16] He may waive a deviation from the risk where such act is in accordance with a uniform practice of the company and there is an extra compensation paid therefor. In such case an indorsement written across the policy without any new signature and recorded by the secretary is sufficient.[17] And it is held that knowledge of the president is knowledge of the company.[18] So the president alone, or with concurrence of any director, may settle a loss where the charter and by-laws give him specifically such authority, although its charter and by-laws also provide that the company's affairs shall be managed by a board of directors, who may appoint such other officers as are necessary for the transaction of its business.[19] Where the president is held out as having

[11] Barker v. Mechanics' Fire Ins. Co. 3 Wend. (N. Y.) 94, 20 Am. Dec. 664. But see as to same principle, Thompson v. Bell, 10 Ex. 10, 23 L. J. Ex. 321.

[12] Manhattan Life Ins. Co. v. Forty-Second St. & Grand St. Ferry Co. 46 N. Y. St. Rep. 130, aff'd 139 N. Y. 146, 34 N. E. 776.

[13] Merchants' & Manufacturers' Ins. Co. v. Curran, 45 Mo. 142, 100 Am. Dec. 361.

[14] Oakley v. Workingman's Benefit Soc. 2 Hilt. (N. Y.) 487.

[15] Dilleber v. Knickerbocker Life Ins. Co. 7 Daly, 540, 76 N. Y. 567.

[16] Missouri Valley Life Ins. Co. v. Dunklee, 16 Kan. 158.

[17] Warren v. Ocean Ins. Co. 16 Me. 439, 33 Am. Dec. 674.

[18] Pomeroy v. Rocky Mountain Ins. & Savings Inst. 9 Col. 295, 59 Am. Rep. 144, 12 Pac. 153.

[19] Mercer County Mutual Ins. Co. v. Stranahan, 104 Pa. St. 246.

authority to make oral contracts for insurance, third persons are not affected by secret limitations on his authority where they deal with him in good faith and without notice of such limitations.[20]

But where the by-laws require the written consent of the president to other insurance, and the by-laws are attached to the policy, it is held that in such case his oral consent is insufficient. It was also provided in the policy in this case that the by-laws could not be altered except by a vote of two-thirds of the stockholders or directors.[1] And where the act incorporating an insurance company provides that no losses shall be settled or paid without the approbation of at least four of the directors, with the president or assistants, or a plurality of them, the acceptance of an abandonment by the president and assistants alone will not be binding on the company.[2]

So it is held that the president of a mutual company has no authority to waive conditions of an insurance policy dependent upon the by-laws, and make a different contract from that authorized by such by-laws.[3] It is also held that he has no power to waive or dispense with any of the conditions of the policy, unless authorized thereto by the charter or by-laws or the board of directors;[4] that he cannot waive full preliminary proofs of loss;[5] that he has no power to waive a by-law requiring prepayment of the premium

[20] Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co. 19 How. (60 U. S.) 318, 15 L. ed. 636, 2 Curt. (C. C.) 524, Fed. Cas. 14372).

Cited in *United States.*—Ball & Sage Wagon Co. v. Aurora Fire & Marine Ins. Co. 20 Fed. 232, 235; Constant v. Allegheny Ins. Co. 20 Fed. 235.

Colorado.—Union Gold Mining Co. v. Rocky Mountain National Bank, 2 Colo. 257; Oro Mining & Milling Co. v. Kaiser, 4 Colo. App. 219, 226, 35 Pac. 677.

Indiana.—St. Joseph Hydraulic Co. v. Globe Tissue Paper Co. 156 Ind. 665, 675, 59 N. E. 995.

Maine.—Walker v. Metropolitan Ins. Co. 56 Me. 371, 378; Sanborn v. Firemen's Ins. Co. 16 Gray (82 Mass.) 448, 454.

Missouri.—Huggins Cracker & Candy Co. v. People's Ins. Co. 41 Mo. App. 530, 545.

New Jersey.—Fifth Ward Savings' Bank v. First National Bank, 48 N. J. Law, 513, 528, 7 Atl. 318.

New York.—Ellis v. Albany City Fire Ins. Co. 50 N. Y. 402, 405, 10 Am. Rep. 495; Perry v. Council Bluffs City Waterworks Co. 67 Hun (N. Y.) 466, 22 N. Y. Supp. 151; Post v. Ætna Ins. Co. 43 Barb. (N. Y.) 351, 363.

North Dakota.—McCabe Bros. v. Ætna Ins. Co. 9 N. D. 19, 23, 47 L.R.A. 644, 81 N. W. 426.

[1] Hale v. Mechanics' Mutual Fire Ins. Co. 6 Gray (72 Mass.) 169, 66 Am. Dec. 410; Worcester Bank v. Hartford Fire Ins. Co. 11 Cush. (65 Mass.) 265, 59 Am. Dec. 145.

[2] Beatty v. Marine Ins. Co. 2 Johns. (N. Y.) 109, 3 Am. Dec. 401.

[3] Priest v. Citizens' Ins. Co. 3 Allen (85 Mass.) 602; Brewer v. Chelsea Fire Ins. Co. 14 Gray (80 Mass.) 203. See §§ 35, 36 herein.

[4] McEvers v. Lawrence, 1 Hoff Ch. (N. Y.) 172.

[5] Dawes v. North River Ins. Co. 7 Cow. (N. Y.) 462.

as a condition precedent to the validity of the policy.[6] In this last case it was also held that the company was not bound by the representations of the president to a mortgagee that the mortgagor had procured insurance upon the mortgaged property, payable to the mortgagee, when in fact the policy had not been delivered, because of the failure of the mortgagor to pay the premium. And the sufficiency of preliminary proofs of loss is not admitted, nor further proof waived, by the statement of the president that "the policy will show," on inquiry being made of him, as to "what further preliminary proof of loss was required."[7] And where such notice of loss is not given within the time required by the by-laws, no waiver arises from the remark of the president, made seventeen months after the loss, that the company knew when the fire occurred that it was its loss, that it would do what was right, and was not surprised that they were not notified.[8] But the president and secretary may, by a statement made in the course of their duties after the loss and when notice of it is received, bind the company, as in case they admit that they had agreed to insure the property or keep it insured, such statement binds the company as much as a certificate of renewal or of payment of the premium.[9]

§ 400. Powers of vice-president.—The vice-president of a corporation may, in certain cases, such as the absence of the president or a vacancy in the office, act in his place and stead, and perform the duties which would have devolved upon the president.[10] Where the title of the assured was not truly stated, but the existence of a mortgage was known to the agent and to the vice-president of the insurance company, it was held that there was no such concealment of the true title as to invalidate the policy, notwithstanding a provision therein that it should be void if the interest of the assured be not stated in the policy where it was not absolute.[11]

§ 401. Powers of secretary.—Where the powers and duties of the secretary are not prescribed by the charter or by-laws, the presumption arises that he possesses and may exercise all such powers as

[6] Baxter v. Chelsea Mutual Fire Ins. Co. 1 Allen (83 Mass.) 294, 79 Am. Dec. 730.

[7] Spring Garden Mutual Ins. Co. v. Evans, 9 Md. 1, 66 Am. Dec. 308.

[8] Smith v. Haverhill Mutual Fire Ins. Co. 1 Allen (83 Mass.) 297, 79 Am. Dec. 733.

[9] First Baptist Church v. Brooklyn Fire Ins. Co. 18 Barb. (N. Y.) 69. See §§ 575 et seq. herein.

[10] Smith v. Smith, 62 Ill. 493, per Walker, J.; Mitchell v. Deeds, 49 Ill. 417, 424, 95 Am. Dec. 621, *cited* in Morawetz on Private Corp. (ed. 1882) sec. 252.

[11] Home Mutual Fire Ins. Co. v. Garfield, 60 Ill. 124, 14 Am. Rep. 27. As to the power of the vice-president to fill vacancies in a committee, see Burton v. St. George's Society, 28 Mich. 161.

the duties of the office reasonably and necessarily require.[12] Such officer of an insurance company is its official agent to carry into effect the votes and directions of the managing body, unless the contrary appears.[13] The secretary of the company is one of its general managing agents, and when in the discharge of the duties of his office represents the corporation. The test of his authority is not whether he acted in the general office of the company or in another state, but whether, at the time, he was engaged in the general duties of his office.[14] The secretary has authority to bind the company by his acts done in the usual course of business, and in such case his consent to an assignment of the policy indorsed thereon is presumptively the consent of the company, although the policy provided that such consent must be in pursuance of the by-laws, and although there was no resolution of the board of directors authorizing the secretary's action.[15] So evidence is not competent of the admissions of the secretary to prove that the property was insured at the time of the fire, when he was not then engaged in any act connected with his agency. Such evidence is not a part of the res gestæ, nor is such testimony competent to disprove the agent's denial of such claimed admission.[16] A secretary who has authority to collect assessments may waive a forfeiture for nonpayment of premiums.[17] So a secretary of a mutual benefit association may bind it by a statement to the insured that he need not pay his dues until certain charges, then pending against him, were determined, where such charges, if true, would operate to forfeit the policy, and such statement is not ultra vires;[18] and it is held that where a policy has lapsed for nonpayment of premiums, it may be extended by the oral agreement of the secretary, made out of the state, where the home office is located.[19] And notice to the company of a sheriff's sale of the property, and of an equitable title thereto in the assured, may be established by proof that the assured had conversed with the secretary of the company in relation to the sale, and had told him that the property was his the same as before the sale, although it was shown, in

[12] See § 387 herein.

[13] Leary v. Blanchard, 48 Me. 269.

[14] Hastings v. Brooklyn Life Ins. Co. 138 N. Y. 473, 34 N. E. 289, rev'g 53 N. Y. St. Rep. 63, 63 Hun, 624, 17 N. Y. Supp. 333.

[15] Conover v. Mutual Ins. Co. of Albany, 3 Denio (N. Y.) 254; aff'd 1 N. Y. 290; Durar v. Hudson Ins. Co. 24 N. J. L. (4 Zab.) 171. But see Loring v. Manufacturers' Ins. Co. 8 Gray (74 Mass.) 28.

[16] First Baptist Church v. Brooklyn Fire Ins. Co. 28 N. Y. 153.

[17] Longbridge v. Iowa Life Endowment Assoc. 84 Iowa, 141, 50 N. W. 568.

[18] Jones v. National Mutual Benefit Assoc. 8 Ky. Law R. 599, 2 S. W. 447.

[19] Hastings v. Brooklyn Life Ins. Co. 138 N. Y. 473, 34 N. E. 289, rev'g 44 N. Y. St. Rep. 37, 63 Hun. 624, 17 N. W. Supp. 333.

connection with this testimony, that there was also a public notice of the sale;[20] though knowledge of the company does not arise, as a matter of law, from the fact that an agent of the company told the secretary of the use of cotton-gins, which increased the risk, where such information was given the secretary on the street and in another town, and he forgot the fact.[1] But knowledge of the secretary of a county mutual fire insurance company, coupled with his consent and the receipt of assessments by the board of directors constitutes a waiver of a condition, even though written consent of the company is required to bind it.[2] And a mutual company is not estopped from claiming the violation of a by-law not set out in the policy, although the treasurer of the company, upon being asked by the holder, in the presence of the secretary, if the policy expressed all the conditions and he replied that it did, the secretary remaining silent.[3] So a change of beneficiaries is not valid, although consented to by the secretary, where such act is not within the scope of his authority, and the provisions of the constitution relating to such changes are not complied with.[4] It is decided that the secretary cannot issue a policy to himself so as to bind the company without its actual knowledge of the facts.[5]

If the secretary undertakes to act in filling out the application, the presumption arises that the company waives inquiry into matters concerning which information is not requested. Statements of facts in the application may be waived by the failure of the secretary who fills it out to insert them therein.[6] Where the proofs of loss were pronounced insufficient by the company, and the evidence is contradictory upon the question whether there was a waiver or not by the secretary, the question of waiver is for the jury.[7] And the assignee of a policy is justified in inferring that it had been canceled by the company where he receives a letter from its secretary stating that all policies were canceled by the company for failure to pay assessments within thirty days.[8] But the secretary of an insurance company has no authority, by virtue

[20] Elliott v. Ashland Mutual Fire Ins. Co. 117 Pa. St. 548, 2 Am. St. Rep. 703, 12 Atl. 676.

[1] Texas Banking Co. v. Hutchins, 53 Tex. 61, 37 Am. Rep. 750.

[2] Kesler v. Farmers' Mutual Fire & Lightning Ins. Assoc. 160 Iowa, 374, 141 N. W. 954.

[3] Miller v. Hillsborough Mutual Fire Assoc. 42 N. J. Eq. 459.

[4] Wendt v. Iowa Legion of Honor, 72 Iowa, 682, 34 N. W. 470.

[5] Pratt v. Dwelling-House Mutual Fire Ins. Co. 130 N. Y. 206, 29 N. E. 117, rev'g 53 Hun (N. Y.) 101, 6 N. Y. Supp. 78, 25 N. Y. St. Rep. 784.

[6] Tiefenthal v. Citizens' Mutual Fire Ins. Co. 53 Mich. 306, 19 N. W. 9.

[7] Susquehanna Mutual Fire Ins. Co. v. Hallock (10 Sadler, 386, Pa. 1888) 14 Atl. 167, 22 Wkly. Not. Cas. 151.

[8] Columbia Ins. Co. v. Masonheimer, 76 Pa. St. 138.

of his office alone, to bind the company by any arrangements which he may choose to make with an insured in the adjustment of the loss.[9] Where it is the duty of the secretary of a mutual insurance company, under its by-laws, to keep records of the doings of the directors and of the company, and to receive notice of loss, his admissions made in letters addressed to the assured are admissible in evidence in a suit upon the policy where they acknowledge notice of loss or refer to the acts of the directors in connection therewith.[10] So the secretary's letter to the assured constitutes a waiver of defects in the proofs of loss, when written upon the receipt thereof, and objecting to the magistrate who signed the certificate, but not to the form of the certificate.[11] So the secretary may bind the company by his admissions, made in the course of correspondence, as to the sufficiency of proofs of loss, where he is generally authorized to answer all communications of the insured;[12] so where the policy requires that notice and preliminary proofs of loss be sent to the secretary, he is the agent of the company, fully empowered to acknowledge the receipt thereof and to determine their sufficiency, and his admissions relating thereto will bind the company;[13] and it is sufficient if such notice of loss be transmitted to the secretary by a local agent of the company, upon knowledge thereof, given the latter by the assured.[14] The company is bound by an oral agreement to pay the loss within a certain time, made by the secretary in the presence of the president of the company, who did not dissent, where the assured also receives a writing, signed by the company's secretary and general agent, notifying him of the acceptance of the proofs of loss.[15] Again, orders for the payment of the loss, signed by the secretary, constitute, if he knew all the facts, a conclusive waiver in writing within the terms of a by-law, providing that there could be no waiver of any conditions of the policy except by indorsement on, or specific acknowledgment in, the policy.[16] Where two companies, doing business under one name, issued a policy which provided that proofs of loss should be given to the companies, it is a sufficient compliance with the conditions if such

[9] Columbian Ins. Co. v. Ashby, 4 Pet. (29 U. S.) 139, 7 L. ed. 809.

[10] Lewis v. Monmouth Mutual Fire Ins. Co. 52 Me. 492.

[11] Bailey v. Hope Ins. Co. 56 Me. 474.

[12] Troy Fire Ins. Co. v. Carpenter, 4 Wis. 20, 32.

[13] Troy Fire Ins. Co. v. Carpenter, 4 Wis. 20.

[14] West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289, 80 Am. Dec. 573.

[15] Farmers' & Merchants' Ins. Co. v. Chesnut, 50 Ill. 111, 99 Am. Dec. 492.

[16] Farmers' Mutual Fire Ins. Co. v. Gargett, 42 Mich. 289, 3 N. W. 594.

proofs are given to a person who acted as secretary for both companies, and by him given to one who acted as president of both companies, and had charge of their loss department.[17] But the secretary has no authority to bind the company by a statement in a letter written to a broker that the company would see that certain policies issued by other offices were adjusted satisfactorily. In this case the company had sent its own policy for part of the amount of insurance requested and those of three other companies for the balance.[18]

The mere fact that an insured did not demand of the secretary of the insurance company in which he held a policy, to show his authority to enter into an arrangement for the settlement of a loss, is not sufficient, as matter of law, to show an admission on his part of such authority.[19]

§ 402. Powers of assistant secretary.—It is held in Virginia[20] that an assistant secretary of a life insurance company may waive the forfeiture of a policy arising from the nonpayment of premiums when due, and that he has authority to reinstate the policy.

§ 403. Powers of treasurer.—The treasurer of an insurance company, from the nature of his office, is authorized to receive moneys, and it becomes his duty to account for the same.[1] But borrowing money to pay benefits in the association is not an act within the scope of his official duties;[2] nor does the fact that he received assessments from the insured, after knowledge of his misrepresentation as to his age, validate the contract.[3] He may, however, bind the company by all acts within the usual course of his business,[4] and if the treasurer of a corporation has been accustomed, with the knowledge and consent of the company, to pursue a certain course of business for a number of years, such as signing and indorsing business paper in its name, and a person, with knowledge of such custom, becomes a purchaser of an accommodation note indorsed to him for value, the company is estopped to deny the authority of the treasurer to perform such act.[5] The last two decisions,

[17] Minnock v. Eureka Fire & Marine Ins. Co. 90 Mich. 236, 51 N. W. 367.

[18] Constant v. Alleghany Ins. Co. 3 Wall. Jr. (U. S. C. C.) 313, Fed. Cas. No. 3136.

[19] Columbian Ins. Co. v. Ashley, 4 Pet. (29 U. S.) 139, 7 L. ed. 809.

[20] Piedmont & Arlington Life Ins. Co. v. McLean, 31 Gratt. (Va.) 517.

[1] See Portage County Mutual Ins. Co. v. Wetmore, 17 Ohio, 330; N. E. Car Spring Co. v. Union India Rubber Co. 4 Blatchf. (U. S. C. C.) 1, Fed. Cas. No. 10153.

[2] Screwmen's Benevolent Assoc. v. Smith, 70 Tex. 168, 7 S. W. 793.

[3] Swett v. Citizens' Mutual Relief Soc. 78 Me. 541, 7 Atl. 394.

[4] Stark Bank v. United States Pottery Co. 34 Vt. 144.

[5] Second National Bank v. Pottier & Stymus Mfg. Co. 18 N. Y. St. R. 954, 2 N. Y. Supp. 644, 56 N. Y. Sup. Ct. 216, annotated case.

while not those relating to insurance, would, however, by analogy be applicable to the acts of treasurers of insurance companies, since the principles underlying them are those applicable to all agents in general.

§ 404. Powers of directors.[6]—It is a general rule that where a body is intrusted by the charter with the management of the affairs of the corporation, and the mode of action is prescribed therein, the company can act only through the designated parties and in the manner specified.[7] But in the absence of provisions in the statutes or by-laws limiting the authority of directors, their powers are supreme.[8] The relation which directors sustain to the corporation or stockholders is fiduciary in its character, and there is an implied rule of law, applicable to all trustees, that they will not abuse the confidence or trust reposed in them.[9] A director cannot vote upon a matter in which he is personally interested.[10] Individual directors cannot act validly in a matter which the charter requires to be done by the board;[11] but the board may act through others by virtue of a statutory authorization, as where they appoint a committee to act.[12] The directors may by their acts, done with full knowledge of the facts, waive conditions in the policy. So if the policy provides that all claims under it shall be forfeited for fraud of the assured in making proofs of loss, and the assured, in good faith, includes therein articles not her own, and such act is done with the knowledge of an officer of the company, and the directors thereafter, knowing all the facts, order the policy paid, they thereby waive the forfeiture.[13] In an Iowa case the by-law of a mutual company provided that the directors might recover the

[6] Under the general corporation law of New York the term "directors," used in relation to corporations, includes trustees or other persons by whatever name known, duly appointed or designated to manage the affairs of the corporation: Laws 1892, c. 687; Laws 1909, c. 28, Consol. Laws, c. 23; Parker's N. Y. Ins. Law (ed. 1915) with "General Corp. Law;" Jones on Business Corporation Law, 88.

[7] See Union Mutual Ins. Co. v. Keyser, 32 N. H. 313, 64 Am. Dec. 375.

[8] Beveridge v. New York Elevated Ry. Co. 112 N. Y. 1, 2 L.R.A. 648, 19 N. E. 489; Gamble v. Queens County Water Co. 123 N. Y. 91, 9 L.R.A. 527, 25 N. E. 201.

[9] Hoyle v. Plattsburg & Montreal R. R. Co. 54 N. Y. 314, 13 Am. Rep. 595, per Johnson, C.; Brinkerhoff v. Bostwick, 88 N. Y. 52; Chase v. Vanderbilt, 62 N. Y. 307.

[10] Beers v. New York Life Ins. Co. 49 N. Y. 182; Gamble v. Queens Co. Water Co. 123 N. Y. 91, 9 L.R.A. 527, 25 N. E. 201.

[11] People's Mutual Ins. Co. v. Westcott, 14 Gray (80 Mass.) 440; Monmouth Mutual Fire Ins. Co. v. Lowell, 59 Me. 504.

[12] Sheridan Electric Light Co. v. Chatham National Bank, 52 Hun (N. Y.) 575, 580, aff'd 127 N. Y. 517, 28 N. E. 467.

[13] Farmers' Mutual Fire Ins. Co. v. Gargett, 42 Mich. 289, 3 N. W. 954.

whole premium note, and annul the policy at their option, upon the nonpayment of an assessment. A member was delinquent in making payment, and the directors voted that he should lose all the benefit under his policy during the period of such default, but that he should be liable for future assessments, and it was decided that the directors had not exceeded their authority by such conditional annulment.[14] So the directors, or an agent authorized by them, may rescind, by mutual agreement with the insured, a contract of insurance, for it is essentially necessary to the safe and proper conduct of the company's business that such a power should exist in its board of directors.[15] The acts of the directors of a mutual company in assessing a premium note are not judicial, and they are obligated in making such assessment to comply with the requirements of the company's charter, or their acts are invalid.[16] So evidence is admissible, in an action on the policy in a mutual company, that an assessment was levied at a meeting where only five directors, out of thirteen, were present, if such a number constitutes a quorum under the by-laws of the company,[17] and the authority of the directors of a mutual company to lay an assessment after a certain date is not taken away by a vote of the board that all outstanding policies shall be canceled on such certain date.[18] But a minority of the directors cannot legally make an assessment to meet losses and expenses for a certain term;[19] nor can the insured bind the company, by giving notice of loss to a director, where the policy provides that such notice must be given to the company's secretary or other authorized officer.[20] But it is held that the directors' acts in consenting to an assignment of a policy constitutes a waiver as to prior insurance, effected contrary to a charter provision that the application shall state the existence of prior insurance or the policy shall be void.[1] Again, the trustees of a mutual benefit society have no power to vote back pay to themselves.[2] And it is held in Connecticut that the knowledge of a director must have been obtained by him while acting officially in the course of his business in order to bind the company, unless he is acting under some special authority other than that merely of

[14] Coles v. Iowa State Mutual Ins. Co. 18 Iowa, 425.

[15] Boland v. Whitman, 33 Ind. 64.

[16] Herkimer County Mutual Ins. Co. v. Fuller, 14 Barb. (N. Y.) 373.

[17] Susquehanna Mutual Fire Ins. Co. v. Tunkhannock Toy Co. 97 Pa. St. 424, 39 Am. Rep. 816.

[18] Fayette Mutual Fire Ins. Co. v. Fuller, 8 Allen (90 Mass.) 27.

[19] Monmouth County Mutual Fire Ins. Co. v. Lowell, 59 Me. 504.

[20] Inland Insurance & Deposit Co. v. Stauffer, 33 Pa. St. 397.

[1] Barnes v. Union Mutual Fire Ins. Co. 45 N. H. 21.

[2] State v. People's Mutual Benefit Assoc. 42 Ohio St. 579.

a director.[3] Parsons,[4] however, denies that this case is a correct statement of the law, and asserts that if the director had the knowledge "in mind when he acted in the company's business," the company would be bound. While this might be true, if the fact were conceded on the trial, we apprehend that otherwise there might be some difficulty in proving that the director "had it in mind when he acted in the company's business." Exactly how late must the knowledge be acquired so as to "be presumably present in the mind of the agent at the time he acts in the business to which it relates?" While the nearness in time when the information was acquired to the time when the director acted "in the company's business" might perhaps afford an inference of knowledge on his part while so acting, it would seem, in the absence of other proof, too nearly hypothetical to justify, as against the company, a deduction of actual knowledge, at such meeting, on the part of the agent. The true test ought always to be, Was the knowledge acquired by the agent under such circumstances as to justify a fair and reasonable presumption that he was acting within the apparent scope of his authority at the time? If so, the company should be bound;[5] and we might add that if the proof is clear that at the time of acting for the principal such knowledge was present to the agent's mind, the principal would be bound. But the evidence ought certainly to be clear and satisfactory.[6] The levy and collection of assessments by the board of directors of a county mutual fire insurance company, coupled with the knowledge and consent of the secretary will constitute a waiver of a condition notwithstanding no written consent of the company is given as required by the policy.[7]

It is not optional with the directorate of mutual life companies not purely stock corporations whether they will declare dividends or to what extent of the so-called surplus such companies are bound to treat the accounts of its policy holders as if they were cestuis que trust and they must keep accurate accounts with their policy

[3] Farrell Foundry v. Barb, 26 Conn. 376. See Stennett v. Pennsylvania Fire Ins. Co. 68 Iowa, 674, 28 N. W. 12; General Ins. Co. v. United States Ins. Co. 10 Md. 517, 69 Am. Dec. 174; Shafer v. Phœnix Ins. Co. 53 Wis. 361, 10 N. W. 381.

[4] May on Insurance (Parsons ed.) sec. 133d. He says: "Time of acquiring knowledge is immaterial if present or so late as to be presumably present in the mind of the agent at the time he acts in the business to which it relates. . . . It would be ridiculous to hold that a board of directors might act as though ignorant of a fact that came to them on the street or otherwise before the hour of board meeting." He cites the two first cases in the last note.

[5] §§ 544, 545 herein.

[6] See Satterfield v. Malone, 35 Fed. 445, 1 L.R.A. 35.

[7] Kesler v. Farmers' Mutual Fire & Lightning Ins. Assoc. 160 Iowa, 374, 141 N. W. 954.

holders as classes failing which no presumption will be indulged in the company's favor when it comes to valuing and applying "surplus" or "dividend additions" to lapsing policies.[8]

§ 405. Powers of superintendent.—The power of a superintendent to represent or bind the company may be expressly conferred or may arise by implication from the acts and declarations of the company; and if an insurance company is responsible for the acts of its superintendent in making such representations, evidence is admissible that delay in bringing an action was caused by such agent's assurances that the company would pay the claim, if just. If such assurances were acted upon, they will estop the company, notwithstanding a provision of the policy that agents of the company are not authorized to waive forfeitures.[9] It further appeared, however, in this case that there had been several communications between the company and the claimant, that the superintendent had received the proof of death, and had put his certificate thereon, and the answer of the company to the claim and proofs were made through him. There was no evidence of his authority other than that given by himself, which was that he had solicited insurances and forwarded applications, and had authority to receive and deliver the amount paid in settlement of just claims. It would seem, therefore, that he was held out by the company as possessing the authority exercised.[10]

§ 406. Powers of general managers.—Where agents of foreign companies represent them as general managers or managers, they have generally large discretionary powers in regard to making insurances and transacting business relating thereto. Their powers are similar to those of officers of the company. A resident agent, designated officially as "manager," has authority to employ another to solicit risks, contract therefor, to deliver policies, and collect premiums, and the acts of the agent so appointed, done within the employment, will bind the company.[11] He may also waive conditions in the policy, and estop the company by his acts within the scope of his authority.[12] And where he has entire control of the company's affairs, he may bind it by acts warranted

[8] United States Life Ins. Co. v. Spinks, 126 Ky. 405, 13 L.R.A. (N.S.) 1053, 96 S. W. 889. Case seems to be first to define "dividend additions" under statutes providing against forfeiture for failure to pay premiums (note, Id. 1053) statutes are also considered.

[9] Jennings v. Metropolitan Life Ins. Co. 148 Mass. 61, 18 N. E. 601.

[10] See §§ 425–427, 393, 394 herein.

[11] Eclectic Life Ins. Co. v. Fahrenkrug, 68 Ill. 463.

[12] See McGurk v. Metropolitan Life Co. 56 Conn. 528, 1 L.R.A. 563, 16 Atl. 263; Eastern R. R. Co. v. Relief Ins. Co. 105 Mass. 570; American Life Ins. Co. v. Mahone, 21 Wall. (88 U. S.) 152, 22 L. ed. 593.

by an established course of business recognized by the members, although no express authority so to act may be conferred on him.[13]

§ 407. Agency of subordinate lodges.— In certain mutual benefit societies which do what is substantially an insurance business on the lodge system, the contract of insurance, or the contract for the payment of money upon the decease of a member, is made through the local lodge with the supreme or grand lodge, while the contract for sick benefits is made with the local lodges, and the payment thereof is made out of the funds of the local lodge. These local lodges may, however, be authorized by the constitution and by-laws to act in the matter of receiving applications for re-admission to the society and restoration to membership therein. Again, membership in such organizations is frequently made dependent by the by-laws upon the continuance of membership in the subordinate society, and where such membership ceases in the subordinate organization, it is terminated in the society.[14] Many questions have arisen from this complex system. The difficulty of formulating any positive and certain rule concerning the exact status of such subordinate or local lodges, as to the member and the society, is also greatly increased by the fact that the provisions of various charters or articles of association are so diverse and the by-laws themselves are frequently so ambiguous; moreover, the decisions in apparently analogous cases are often so widely divergent and conflicting, as to be irreconcilable on any common ground or principle of the law of agency. The starting point in the determination of the extent of authority of such subordinate lodges must be, and necessarily is, the constitution, the charter or articles of association, and the by-laws which govern their action and are the source of their authority, as well as by the law of the land affecting such associations.[15] Another factor to be considered is this that a fraternal benefit association, as required by the Nebraska statute must have a representative form of government. This requires that the directors or other officers who have general charge and control of the business and property of the society and the management of its affairs shall be chosen by the membership thereof either directly or through representatives chosen by the membership for that purpose and the company must not exceed its powers or conduct its business fraudulently and must comply with the state statutes. And the managing officers are trustees for the members.[16] Again, the presumption exists that applicants for membership have acquainted

[13] Topeka Primary Assoc. University Builders v. Martin, 39 Kan. 750, 18 Pac. 941.

[14] See Burbank v. Boston Relief Assoc. 144 Mass. 434, 11 N. E. 691.

[15] See Luch v. Harris, 2 Brewst. (Pa.) 571; Dolan v. Court Good Samaritan, 128 Mass. 439.

[16] State v. Bankers' Union of the World, 71 Neb. 622, 99 N. W. 531.

themselves with the extent of the authority of such lodges,[17] and members at least are assumed to be cognizant of the provisions of the charter and by-laws, which the contract embodies, and to have assented thereto.[18] It would also seem that in so far as these societies do an insurance business, they should be governed by the same principles as apply to other mutual life insurance companies.[19] The general rule may be stated that in societies of the character under consideration the local lodges may be principals in matters relating to the payment of benefits to sick members, where the contract is with them and depends upon their constitution and by-laws. When the contract for the payment of moneys on the death of a member is made, however, with the supreme or highest lodge, acting through the subordinate or local lodge, and the certificate of insurance is issued by the former and the assessments collected by the latter, then the former is the principal, and its constitution and by-laws govern the contract, and the latter act in these matters as the agents of the former, and are subject to their direction and control.[20] The subordinate lodges may also act through their ministerial officers, who then become their agents. The decisions are clearly not reconcilable upon the doctrine of waiver by mutual benefit societies. It has, however, been held that neither subordinate lodges nor their ministerial officers can set aside or waive the positive requirements of the rules of the order, and that therefore the doctrine of waiver by subordinate lodges has no application to forfeitures of membership in such order. In this case dues were payable to the subordinate lodge for local purposes, and also to the supreme lodge for insurance benefits. The member at his decease stood suspended for nonpayment of assessments. The subordinate lodge had treated him, however, as a member, and credited his insurance dues as money payable to the supreme lodge by it; but the court held that no recovery could be had by the beneficiary.[1] In such cases of failure to pay assessments, where the by-laws provide that the delinquent shall cease to be a member, the law is said to be self-executing and the

[17] Supreme Lodge Knights & Ladies of Honor v. Grace, 60 Tex. 569.

[18] Hellenberg v. District No. 1 of Independent Order B'nai Berith, 94 N. Y. 580; Schenck v. Gegenzeiter, 44 Wis. 369.

[19] See Erdmann v. Mutual Ins. Co. 44 Wis. 376, 379, per Cole, J.

[20] See Bacon's Benefit Societies and Life Insurance, secs. 11, 118, 144, 146, 148–50, 266.

[1] Borgraefe v. Supreme Lodge Knights of Honor, 22 Mo. App. 127, per Thompson, J. See Swett v. Citizens' Mutual Relief Soc. 78 Me. 541, 7 Atl. 394; Splawn v. Chew, 60 Tex. 532.

On waiver by subordinate lodge of right of benefit association to insist upon forfeiture of benefit because of violation of laws of association, see note in 10 L.R.A.(N.S.) 136.

nonpayment of itself works a forfeiture.[2] But a forfeiture may, it is held, be waived where the local lodge receives and the supreme lodge retains, with knowledge, assessments made after the death of a member.[3] When the laws of a relief fund association provided that on notice of the disability of a member a board of physicians should examine him and report to the supreme council, that all proofs for death or disability benefits should be approved by the subordinate council, and that, upon approval of satisfactory proofs of a member's disability, he should be entitled to a benefit, it was held that the subordinate council could not finally reject a claim.[4]

§ 407a. Same subject.—Local lodges are agents of the supreme or governing body so that their acts within their jurisdiction are binding upon said body.[5] So it is held in an Illinois case[6] that: "Notwithstanding the declarations of by-laws of mutual benefit societies to the contrary, under the decisions in this state the subordinate lodge or council is the agent of the supreme lodge or council.[7] "This is practically conceded by appellee, but it is insisted that it has never been held by this court that the agency of the subordinate lodge cannot be limited by the by-laws of the association. This court has recently had occasion to consider this question in Love v. Modern Woodmen of America,[8] and there stated that, while the local camp was the agent of the head camp, as to some things, it was not a general agent authorized to do everything that the head camp or its officers could do, but further stated: [8a] 'The subordinate lodge of a benefit association, authorized to receive or collect dues and transmit them to the association, is

[2] Rood v. Railway Passengers' & Freight Conductors' Mutual Benefit Assoc. 31 Fed. 62. See Mandego v. Centennial Mutual Life Assoc. 64 Iowa, 134, 17 N. W. 656, 19 N. W. 877.

[3] See Manning v. Ancient Order United Workmen, 86 Ky. 136, 9 Am. St. Rep. 270, 5 S. W. 385, 9 Ky. L. Rep. 428; Erdmann v. Mutual Ins. Co. of the Order of Hermann's Sons, 44 Wis. 376; Schenck v. Gegenzeiter, 44 Wis. 369; Schen v. Grand Lodge, 17 Fed. 214.

On waiver by officer of subordinate lodge of forfeiture for nonpayment of assessments, see notes in 4 L.R.A. (N.S.) 421; 38 L.R.A.(N.S.) 571; and L.R.A.1915E, 152.

[4] Albert v. Order of Chosen Friends (U. S. C. C.) 34 Fed. 721.

[5] United Moderns v. Pike, — Tex. Civ. App. —, 76 S. W. 774.

[6] Dromgold v. Royal Neighbors of America, 261 Ill. 60, 103 N. E. 584.

[7] *Citing* Johnson v. Royal Neighbors of America, 253 Ill. 570, 97 N. E. 1084; Jones v. Knights of Honor, 236 Ill. 113, 127 Am. St. Rep. 277, 86 N. E. 191; Court of Honor v. Dinger, 221 Ill. 176, 77 N. E. 557; Grand Lodge Ancient Order United Workmen v. Lachmann, 199 Ill. 140, 64 N. E. 1022; Royal Neighbors of America v. Boman, 177 Ill. 27, 69 Am. St. Rep. 201, 52 N. E. 264; Independent Order of Forresters v. Schweitzer, 171 Ill. 325, 49 N. E. 506.

[8] 259 Ill. 102, 102 N. E. 183.

[8a] Id. p. 106.

the agent of the association for that purpose, and its acts within the scope of the agency are binding on the association. So, if a subordinate lodge, with full knowledge of a fact which would render a certificate void, continues to receive dues from a member, the right to forfeit the certificate on account of that fact is waived. A subordinate lodge receiving dues and paying them over to the principal lodge necessarily treats the insurance as in force.' The by-laws of this organization require the members to make their payments to the local camp. They cannot remit directly to the supreme recorder. The officers of the supreme lodge may have had no actual knowledge of what the local recorder had done, but these local lodges are the agents of the order, clothed with authority to act for it in receiving the payment of dues, and with them, alone, the member must deal. If the order permits the subordinate lodge and its officers to act in such a manner that the holder of a certificate is justified in believing that the reasons for forfeiture specified in the by-laws have been waived, it cannot set up a forfeiture incurred by relying upon such action as a defense against the certificate."[9] But the knowledge and acts of an officer of such a society obtained in the exercise and within the scope of his duties is that of the order which he represents, there being no fraud.[10] And the knowledge of officers of a fraternal benefit society as to the business over which they have charge and control will be deemed to be that of the society.[11] So a subordinate lodge clothed with authority under its charter as to the collection of assessments, and the suspension of members for nonpayment is, with its financier, an agent of said lodge and it may waive strict compliance of the requirement as to said payments.[12] And a grand lodge vested by the supreme lodge with the power to perform certain duties and services and with the direction of certain benefit matters within a designated territory is the agent of said supreme lodge, even though the collection and disbursement of its monies is subject to state laws.[13] And the negligence of a secretary of a local lodge in not forwarding dues received is chargeable to the order of which he is an agent and will prevent a forfeiture for nonpayment of dues.[14] So the acts of the grand recorder of a lodge, after a forfeiture, in requesting further special proofs of loss con-

[9] Dromgold v. Royal Neighbors of America, 261 Ill. 60, 103 N. E. 584.

[10] Hendrickson v. Grand Lodge, Ancient Order United Workmen, 120 Minn. 36, 138 N. W. 946.

[11] Griffith v. Supreme Council Royal Arcanum, 182 Mo. App. 644, 166 S. W. 324. See § 515 herein.

[12] Johnson v. Grand Lodge Ancient Order United Workmen, 31 Utah, 45, 86 Pac. 494.

[13] Grand Lodge Ancient Order United Workmen v. Connecticut Grand Lodge Ancient Order United Workmen, 83 Conn. 241, 76 Atl. 533.

[14] Supreme Lodge Knights of

stitutes a waiver.[15] But while the officers of a sovereign camp are its agents for certain purposes they cannot bind their principal when dealing with the members by acting within merely the apparent scope of their authority as that rule does not apply where the party dealing with such agent knows or is bound to know the extent of the agent's powers with reference to a particular matter especially so where powers and duties of such officers are prescribed and regulated by the constitution and by-laws adopted by the sovereign assembly and are a part of his contract and accessible to him.[16]

But it is also held that the collector of a local council is neither an agent nor officer of the society.[17] And a member of a subordinate lodge is held not the agent of the supreme lodge, after the former has received its charter and its officers are elected, so as to bind the society for said members alleged tortious acts while participating in an initiation.[18] And the relation of agency sustained by a local lodge to the governing body has no application where a member of said lodge enters into a contract with the governing body and it cannot waive any stipulation thereafter in favor of the member in the absence of acquiescence therein by the supreme lodge.[19] And the rule that the acts of an agent must be within the scope of his authority in order to bind the principal applies to statements made to a lodge physician in his professional capacity and not otherwise.[20] False reports and forgeries by the financier of a local lodge does not charge the grand lodge with notice of such acts as said agent's knowledge of his own wrong does not bind the principal.[1]

§ 408. Agency arising from necessity or emergency.—It sometimes happens that an agent is called upon to exercise an authority in cases of necessity or special emergency which will justify the act. In such cases the duration and extent of the authority is measured by the necessity or emergency. Thus, if an agent of an insurance company makes a demand upon the insured during a

Pythias v. Withers, 177 U. S. 260, 44 L. ed. 762, 20 Sup. Ct. 611, 30 Ins. L. J. 30.

[15] Hendrickson v. Grand Lodge Ancient Order United Workmen, 120 Minn. 36, 138 N. W. 946.

[16] Bennett v. Sovereign Camp, Woodmen of the World, — Tex. Civ. App. —, 168 S. W. 1023.

[17] Attorney General v. Supreme Council American Legion of Honor (Blair, In re) 206 Mass. 188, 92 N. E. 149.

[18] Grand Temple of Tabernacle of Knights & Daughters of Tabor of the I. O. T. v. Johnson, — Tex. Civ. App. —, 135 S. W. 173.

[19] United Moderns v. Pike, — Tex. Civ. App. —, 76 S. W. 774.

[20] Whigham v. Supreme Court Independent Order of Friends, 51 Ore. 489, 94 Pac. 968.

[1] Grand Lodge Ancient Order United Workmen v. State Bank of Winfield, 92 Kan. 876, L.R.A.1915B, 815, 142 Pac. 974, 144 Pac. 257.

fire to remove his goods, such act of the agent, while it may have been outside his authority, and though it may not fix the liability of the insurer for loss by theft during the removal, it is nevertheless a powerful and significant fact to establish the propriety of the removal,[2] although in such case the insurer would probably be liable on the ground that goods were damaged ex necessitate to protect them.[3] Generally, it is a rule of agency that if the act of the agent is warranted by the necessity or emergency, and is done in good faith, the principal is bound, otherwise the object and purposes of the agency might be defeated.[4]

§ 409. Agent delegated for special purpose. A waiver or estoppel may arise against, or knowledge be imputed to, the company in cases where it specially delegates an agent to act in a particular matter, or where it gives special instructions to the agent in relation to the insurance or to the execution of some act concerning the application, the policy, or the loss.[5] Thus, if the company does not rely upon the statements of the applicant, but sends its own agent to examine the premises, and the agent does so, and inserts a misdescription of the building in the policy, the company is liable for the amount of the insurance in case of loss, even though there is a warranty, and the insured, although acting in good faith, aided in the erroneous description.[6] So an agency may be implied from the acts of an agent of other insurers in matters concerning the loss and adjustment in behalf of said insurers.[7] An implied agency may also arise by the insurer's acts in sending a policy to a person for delivery to insured so as to warrant insured offering to return the same to him.[8] So a subagent, with authority to represent the company in a particular line of its business, becomes, in relation thereto, the company's direct representative, so as to bind it by a notice to him, or by any acts which the nature of the business

[2] Leiber v. Liverpool, London & Globe Ins. Co. 6 Bush (69 Ky.) 639, 99 Am. Dec. 695.

[3] See Gordon v. Remington, 1 Camp. 123; Independent Mutual Ins. Co. v. Agnew, 34 Pa. St. 96, 75 Am. Dec. 638; Witherell v. Maine Ins. Co. 49 Me. 200; Newmark v. Liverpool Fire & Life Ins. Co. 30 Mo. 160, 77 Am. Dec. 608.

[4] See Greenleaf v. Moody, 13 Allen (95 Mass.) 363; See also Williams v. Shackelford, 16 Ala. 318; Judson v. Sturges, 5 Day (Conn.) 556, 560; Goodivillie v. McCarthy, 45 Ill. 186; Lawler v. Keaquick, 1 Johns. Cas. (N. Y.) 175, 179n; Jervis v. Hoyt, 2 Hun (N. Y.) 637; Dusar v. Perit, 4 Binn. (Pa.) 361.

[5] See Cumberland Valley Ins. Co. v. Schell, 29 Pa. St. 31; Roth v. City Ins. Co. 6 McLean, 324, Fed. Cas. No. 12084; Commercial Fire Ins. Co. v. Ives, 56 Ill. 402.

[6] Continental Ins. Co. v. Kasey, 25 Gratt. (Va.) 268, 18 Am. Rep. 681.

[7] Stockton Combined Harvester & Agricultural Works v. Glens Falls Ins. Co. 121 Cal. 167, 56 Pac. 565.

[8] Kuhlman v. Adkins, 180 Ill. App. 611.

intrusted to his care may warrant.[9] And if the company sends two agents at different times to ascertain the loss, and invests them with authority to compromise and settle the same, it thereby waives objection to delay in sending the notice, and is estopped from defending on the ground that the notice was not sent "forthwith;"[10] and where a clerk in another office than that of the company is requested by the general adjuster to go to a certain city and see about a loss, and examine the business, he has authority to adjust the same.[11] Again, if the company places the claim of the insured in the hands of an agent for adjustment, his demands in the course of the business may constitute a waiver of the conditions of the policy in relation to the loss.[12] But it is held that where a general agent is sent to examine into the circumstances surrounding the death of the insured, that the company is not bound by his expression of opinion as to the advisability of a settlement by the company,[13] and where a broker is sent by the agent of whom the company had sought the required information to ascertain the ownership of the property insured, and the broker returns false information, though the assured told him the truth, the company is responsible.[14]

§ 410. Agency: person referred to by company.—Where a party is referred to by the company for information or for conduct of a particular matter, or as a person to exercise certain authority in reference thereto, the powers of such agent, although limited to the subject of reference, is nevertheless co-extensive therewith, and his acts and declarations concerning the same bind the company, although it is held that if he volunteers information not called for where he is to answer certain questions, that the principal is not obligated thereby.[15] Where a party is formally referred to as general agent by the company, in regard to exchanging a paid-up policy, and in consequence of the agent's advising him not to exchange and giving him time to decide, a default is made in the payment of the premium by the assured, the company is bound by the waiver arising from such affirmative act of the agent,[16] and

[9] Massachusetts Life Ins. Co. v. Eshelman, 30 Ohio St. 647.

[10] Lycoming Ins. Co. v. Schreffler, 42 Pa. St. 188, 82 Am. Dec. 501. See Lycoming County Mutual Ins. Co. v. Schollenberger, 44 Pa. St. 259.

[11] Swain v. Agricultural Ins. Co. 37 Minn. 390, 34 N. W. 738.

[12] Brown v. State Ins. Co. 74 Iowa, 428, 7 Am. St. Rep. 495, 38 N. W. 135.

[13] American Life Ins. Co. v. Mahone, 21 Wall. (88 U. S.) 152, 22 L. ed. 593.

[14] Mullin v. Vermont Mutual Fire Ins. Co. 58 Vt. 113, 4 Atl. 817.

[15] See Swett v. Fairlie, 6 Car. & P. 1, per Lord Denman, C. J.; Rawls v. American Mutual Life Ins. Co. 27 N. Y. 282, 294, 84 Am. Dec. 280.

[16] Wyman v. Phœnix Mutual Life Ins. Co. 119 N. Y. 274, 29 N. Y. St. R. 567, 23 N. E. 907.

if the company, on receiving notice of loss, refers the insured to its resident agent for settlement, who is instructed to procure a statement of the loss, he is invested with authority to extend the time for furnishing the proofs.[17] Again, if the secretary and manager refers a person to a clerk of the company as to the validity of the policy, any important information given by the former to the latter, although not reported to the manager, operates as notice to the company.[18]

§ 411. Powers of clerk.—There is no doubt concerning the right of an agent to employ clerks, since it cannot be presumed that an agent will attend personally to all the details of his business. So he may employ them to attend to his office during his absence or sickness;[19] to contract for risks, collect premiums, receive payment thereof in cash, give credit therefor, or take securities;[20] to receive applications, fill out policies and renewals, and attend to whatever business "is transacted behind the counter;"[1] and the act of the clerk is in all such cases the agent's act, and binds the company the same as if done by the agent personally.[2] Acts done and information given by an agent's clerk or employee of an agent in the line of his duty bind the company. The following from the opinion of the court in the case so holding is important: "It was suggested in argument, and some reliance seems to be placed on the suggestion, that inasmuch as the statement that the policy in controversy had been renewed was made by William B. Shepard, who was an employee of Benson & Kirtland, the defendant company is not affected or bound by that representation. The facts with reference to this contention seem to be that Shepard was a confidential employee and book-keeper of the firm of Benson & Kirtland, and had been in their service some years. He was fully posted as to the details of the business carried on by the firm, and in their absence had full charge of the office, and was undoubtedly authorized by them to give information as to whether a particular policy that had been registered on the books of the agency had or had not been removed. . . . The evidence in the case at bar shows that the statement

[17] Lycoming County Mutual Ins. Co. v. Schollenberger, 44 Pa. St. 259. See Lycoming Ins. Co. v. Schreffler, 42 Pa. St. 188, 82 Am. Dec. 501.

[18] Fitzgerald v. Hartford Life Annuity Ins. Co. 56 Conn. 116, 6 N. Eng. Rep. 180, 7 Am. St. Rep. 288, 27 Cent. L. J. 336, 13 Atl. 673, 17 Atl. 411.

[19] Deitz v. Providence Washington Ins. Co. 33 W. Va. 526, 25 Am. St. Rep. 908, 11 S. E. 50.

[20] Bodine v. Exchange Fire Ins. Co. 51 N. Y. 117, 10 Am. Rep. 566.

[1] See Cooke v. Ætna Ins. Co. 7 Daly (N. Y.) 555.

[2] Mound City Life Ins. Co. v. Huth, 49 Ala. 529; Arff v. Starr Fire Ins. Co. 125 N. Y. 57, 21 Am. St. Rep. 721, 10 L.R.A. 609, 25 N. E.

made by Shepard to Gibson, that the policy in question had been renewed, was made in the company's office while Shepard had charge of the same, and while he had custody of the policy register. The statement was made in the line of his duty, not in answer to an idle inquiry, but in response to a question asked by a policy holder, who was interested in knowing if a certain policy had been renewed and continued in force. It does not follow that because a person is employed by an agent of an insurance company, rather than by the company itself, none of such person's acts or representations are binding on the company. It is customary for agents having charge of important agencies to employ persons to perform clerical and much other work in their office, and to assist them generally in the discharge of the various duties which such agents have to perform. The business of insurance could not well be transacted without such assistants, and all insurance companies are doubtless well aware of the practice of employing them. It results from this well-known business usage that acts done and information given by such subordinate employees in the line of their duty should be held binding upon the companies which they represent. We think, therefore, that presumptively Shepard had authority to inform Gibson whether the policy now in question had or had not been renewed, and that the statement made by him should be given the same effect as if it had been made by either Benson or Kirtland." [3]

The insurer is responsible not only for acts of its agents within the scope of their agency, but also for the acts of the agents' clerks, when the company knew or ought to have known that other persons would be employed by and to act for the agents.[4] So the insurer is responsible for not only the acts of its agents within the scope of their authority, but also for the acts of the clerks of such agents where knowledge of the necessity of employing clerks ought to be charged to them.[5] So an insurer is responsible for the acts of, and is affected by notice given to, the clerks and employees of his general agents, who are known to assist such general agents in the

1073; Bodine v. Exchange Fire Ins. Co. 51 N. Y. 117, 10 Am. Rep. 566; Kuney v. Amazon Ins. Co. 36 Hun (N. Y.) 66; Houghton v. Ewbank, 4 Camp. 88.

[3] International Trust Co. v. Norwich Fire Ins. Soc. 71 Fed. 81, 17 C. C. A. 608, 614, 36 U. S. App. 277, per Thayer, C. J.

[4] Duluth Nat. Bank v. Knoxville Fire Ins. Co. 85 Tenn. 76, 4 Am. St. Rep. 744, 1 S. W. 689.

[5] Thompson v. Michigan Mutual Life Ins. Co. 56 Ind. App. 502, 105 N. E. 780, 783; Duluth National Bank v. Knoxville Fire Ins. Co. 85 Tenn. 76, 4 Am. St. Rep. 744, 1 S. W. 689.

discharge of their duties.[6] The fact that the policy provides that no persons shall be considered the company's agent except such "as shall hold the commission of this company," does not operate to prevent such employment being valid.[7] Where a clerk is deputized to examine and report upon certain property, and to write out a policy thereon, the right to recover on such policy is not defeated by a clerical error of the clerk in writing in the name of another than that of the true owner, and such mistake may be corrected in an action on the policy.[8] A clerk may by virtue of his employment be authorized to bind the company by a parol contract;[9] to receive notice of and consent to other insurance;[10] to bind the company by a material alteration of the terms of the policy, where he is a clerk in the company's office and makes the same alteration in the insurer's records, although it is proven that he had no authority to make or alter contracts for them,[11] and he may contract with the insured after a fire to repair the building insured.[12] So the company may be bound by his knowledge of the existence of other insurance on the property where he solicits the risk and takes the application, and the agent employing him therefor issues the policy, and in such case the condition making the policy void for prior insurance without notice is waived.[13] But it is held that a person employed to fill out and issue policies as mere clerical work cannot consent to additional insurance nor waive a forfeiture therefor, and is not an agent to receive notice of additional insurance.[14] It is also held that a clerk in an insurance office cannot bind the company by receiving overdue premiums.[15] But it is also decided that the company is not relieved from liability where the clerk of a local agent fails to note the fact of

[6] Goode v. Georgia Home Ins. Co. 92 Va. 392, 53 Am. St. Rep. 817, 30 L.R.A. 842, 23 S. E. 744.

[7] Arff v. Starr Fire Ins. Co. 125 N. Y. 57, 21 Am. St. Rep. 721, 25 N. E. 1073, 10 L.R.A. 609.

[8] Deitz v. Providence Washington Ins. Co. 33 W. Va. 526, 25 Am. St. Rep. 908, 11 S. E. 50. See Deitz v. Providence & Washington Ins. Co. 31 W. Va. 851, 13 Am. St. Rep. 909, 8 S. E. 616.

[9] Cooke v. Ætna Ins. Co. 7 Daly (N. Y.) 555.

[10] Arff v. Starr Fire Ins. Co. 125 N. Y. 57, 21 Am. St. Rep. 721, 10 L.R.A. 689, 25 N. E. 1073. See criticism on this case in Ostrander on Fire Insurance, 109. The question, however, turned on the point whether the party receiving the notice was a clerk of the agent's or a mere broker, and he was held to be a clerk.

[11] Washington Fire Ins. Co. v. Davison, 30 Md. 91.

[12] Hilton v. Newman, 6 Mo. App. 304.

[13] Bennett v. Council Bluffs Ins. Co. 70 Iowa, 600, 31 N. W. 948.

[14] Waldman v. North British Mercantile Ins. Co. 91 Ala. 170, 24 Am. St. Rep. 883, 8 So. 666.

[15] Koelges v. Guardian Life Ins. Co. 2 Lans. (N. Y.) 480, 58 Barb. 185, 9 Abb. Prac. N. S. (N. Y.) 91.

other insurance in the application which he had written, it appearing that other risks upon the property were held by said agents, and that the clerk was so informed at the time by the assured.[16] So a clerk in the employ of a firm acting as general agent of the company, said clerk being empowered to solicit insurance for the firm, receive premiums, fill out and deliver policies, has power to waive a condition in an accident policy providing against death by intentional injuries.[17] Where one who was either a clerk for or member of a firm of insurance agents promised the assignee of a policy, holding it as mortgagee of the property, that he would either buy the mortgage or obtain a purchaser therefor, such statement is not a waiver of delay in bringing suit where the agents had from the first denied their liability on the ground that the insured had burned the property.[18]

Again, a person who, while not belonging to the class which, by the rules of a benefit insurance society and the statute regulating such associations, is entitled to become a beneficiary, has his name inserted in a benefit certificate, has no right to receive any part of the benefit fund, and the acceptance of assessments paid, after his name has been so inserted, even if with full knowledge of the existing relations, does not confer such rights, as a clerk of the order cannot waive the provisions of a statute which expressly prohibits the payment of benefit funds to any person who is not within the class designated as "beneficiaries." [19]

§ 412. Powers of medical examiner.—A medical examiner is an agent with limited powers, but, nevertheless, his acts in and about the business intrusted to his care are binding within the scope of his authority, and to this extent the same general rules of agency are applicable to him as to other special agents. Where he is required to personally write in the answers to questions in the certificate, and not to allow them to be dictated by any person, and, after the applicant signs the certificate, such agent, without his knowledge, erroneously fills in an answer as to the cause of death of the applicant's sister, the responsibility for the error rests upon the company.[20] And where the examination blanks are sent to

[16] Steele v. German Ins. Co. 93 Mich. 81, 18 L.R.A. 85, 53 N. W. 514.

[17] Henderson v. Travelers' Ins. Co. 69 Fed. 762, 16 C. C. A. 390, 65 Fed. 438, 24 Ins. L. J. 351, s. c. 163 U. S. 708, 41 L. ed. 312, 16 Sup. Ct. 1207. That notice to clerk of general agent with power to solicit insurance and issue policies, except signing, is notice to company, see Phœnix Ins. Co. v. Ward, 7 Tex. Civ. App. 13, 26 S. W. 763.

[18] Coryeon v. Providence & Washington Ins. Co. 79 Mich. 187, 44 N. W. 431.

[19] Modern Woodmen of America v. Comeaux, 79 Kan. 493, 25 L.R.A. (N.S.) 814, 101 Pac. 1.

[20] Grattan v. Metropolitan Life

the medical examiner, with directions to complete the same, and he has to some extent acted as and represented himself to be the company's general agent, and occupied its office, the principal is estopped to set up the falsity of the answers, though erroneously written by such agent;[1] and the same ruling obtains where such physician assumes to write in the answers upon his own knowledge of the facts, instead of relying upon the answers given by the applicant.[2] So the certificate of the medical examiner is conclusive upon the company as to its recitals in the absence of fraud of the applicant in making the representations or in concealing material facts;[3] and in answering the questions of the medical examiner the applicant has the right to rely upon his construction of them at the time, and may answer them in the light of such interpretation.[4] So if such agent, knowing the facts, suggests answers which are made in accordance therewith, the company is bound.[5] Again, an insurance company is bound by the act of its medical examiner in reporting an applicant to be a fit subject for insurance, unless he was purposely misled by the applicant, and inveigled into recommending him as a fit subject for insurance when but for such deception he would not have done so.[6] But where the answers of the applicant given to the medical examiner are false and material and are known by him to be so, his conduct in writing them down and in not communicating his knowledge to his principal constitutes a fraud upon the insurer who is not chargeable with notice thereof and is not estopped to set up their falsity.[7] Such examining physician is the insurer's agent even though the application makes him the applicant's agent and his acts within the scope of his authority are binding upon the association,[8] and the company is estopped to show incompetency of its medical examiner.[9]

Ins. Co. 80 N. Y. 281, 36 Am. Rep. 617, 92 N. Y. 274, 44 Am. Rep. 372.

[1] Flynn v. Equitable Life Ins. Co. 78 N. Y. 568, 34 Am. Rep. 561, Earl, J., dissented. But see the same case, 67 N. Y. 500, 23 Am. Rep. 134.

[2] Pudritzky v. Supreme Lodge Knights of Honor, 76 Mich. 428, 43 N. W. 373.

[3] Holloman v. Life Ins. Co. 1 Woods (U. S. C. C.) 674, Fed. Cas. No. 6623. See Hogle v. Guardian Life Ins. Co. 4 Abb. Pr. N. S. (N. Y.) 346; Valton v. National Fund Life Assur. Co. 17 Abb. (N. Y.) 268, aff'd 4 Abb. Dec. 437.

[4] Connecticut General Life Ins. Co. v. McMurdy, 89 Pa. St. 363.

[5] Higgins v. Phœnix Mutual Life Ins. Co. 74 N. Y. 6. But see Flynn v. Equitable Life Assoc. 67 N. Y. 500, 34 Am. Rep. 561.

[6] Roe v. National Life Ins. Assoc. 37 Iowa, 696, 17 L.R.A.(N.S.) 1144, 115 N. W. 500.

[7] Mutual Life Ins. Co. v. Powell, 217 Fed. 565, 133 C. C. A. 417, 45 Ins. L. J. 127.

[8] Turner v. Modern Woodmen of America, 186 Ill. App. 404.

On medical examiner as agent of insurer or of insured and estoppels

§ 413. Whether one is agent or broker.—Whether one is an agent or broker is a question necessarily dependent upon the particular facts of each case. Thus one employed to solicit applications for insurance, and to fill up and issue policies, is not an insurance broker, within the terms of a city ordinance providing for the payment of a license fee by such broker.[10] Again in a New York case[11] it appeared that one R. who was the agent of several insurance companies, but not of the defendant, whose agent was one J. R. wrote his own name on an application as "general agent," and took a premium note for the regular premium and another note for a portion of the premium payable, at a certain date thereafter, conditioned that the policy should become void in case of nonpayment of the note when due. The policy also contained a like condition. Thereafter, the insured delivered to R. another note for a larger sum, payable to his order, which he discounted and retained the proceeds. The two prior notes were delivered through J. to the defendant. Receipt of the payment of the first premium was acknowledged in the policy. There was no claim nor proof that the insured understood that R. was the agent of the defendant company. The second note was not paid when due, except as above stated. In an action on the policy it was held that R. was merely a broker, and delivery of the last note to him did not operate as a payment, and that the policy was forfeited. A local agent to whom application is made for insurance and who obtains it through the agent of another company, said local agent paying the premiums through the other agent, is only a broker, the policy stipulating that agents must be authorized in writing to act as such.[12] So a firm of insurance agents is held not insurer's special agents but brokers under the Missouri statute which declares who are insurance brokers, but excludes as such appointed agents or officers of the insurer.[13]

§ 414. Whether broker is agent of insured or insurer.—In England, an insurance broker represents the insured in effecting the policy, and in other matters relating thereto, but is the under-

arising by his acts, see note in 41 L.R.A.(N.S.) 506.

[9] Holloman v. Life Insurance Co. 1 Woods (U. S. C. C.) 674, Fed. Cas. No. 6623.

[10] Bernheimer v. Leadville, 14 Col. 518, 24 Pac. 332. See East Texas Fire Ins. Co. v. Brown, 82 Tex. 631, 18 S. W. 713. When person is broker and not insurer's agent; fraud of agent, see Mahon v. Royal Union Mutual Life Ins. Co. 134 Fed. 732, 67 C. C. A. 636.

[11] How v. Union Mutual Life Ins. Co. 80 N. Y. 32.

[12] Wisotzkey v. Hartford Fire Ins. Co. 98 N. Y. Supp. 763, 112 App. Div. 596.

[13] Edwards v. Home Ins. Co. 100 Mo. App. 695, 73 S. W. 881, Rev. Stat. 1899, sec. 7997.

writer's agent in regard to the premium.[14] The custom of having such broker is declared to have arisen from the fact that the person desiring insurance was frequently at a distance, and was unknown to the underwriter.[15] It is not our purpose, however, to consider in this section the question of agency in connection with the insured, but only the point whether the broker is the agent of the insurer or insured in this country. It is said that "what is understood under the designation of an 'insurance broker' is one who acts as a middleman between the insured and the company, and who solicits insurance from the public under no employment from any special company, but, having secured an order, he either places the insurance with the company selected by the insured, or, in the absence of any selection by him, then with the company selected by such broker.".[16] In the United States an insurance broker does not, in the absence of a special agreement, differ from any other broker or agent.[17] It has been held that a broker employed to procure insurance is the agent of the employer.[18] This is also declared to be the rule not only in such case, but also where he is employed to procure the modification of the terms of the policy.[19] And one whose services are performed for a foreign insurer is such company's agent.[20] In another case it was declared that the broker was the agent of the insurer where it appeared that he was paid by commissions received from the company for his services,[1] and the same ruling was made in a case where he received commissions from another agent of the company.[2] But it is also held that an insurance agent to whom a person makes a request for insurance, and who, acting as broker, procures all or part of such insurance through agents of other companies not represented by him may be agent of the insured and the mere fact that he receives a commission from a company which he does not represent for

[14] Minett v. Forrester, 4 Taunt. 541n, per Mansfield, C. J.; East Texas Fire Ins. Co. v. Brown, 82 Tex. 631, 18 S. W. 713.

[15] Power v. Butcher, 10 Barn. & C. 329, 340, 13 Eng. Rul. Cas. 407, per Bayley, J.

[16] Arff v. Starr Fire Ins. Co. 125 N. Y. 57, 21 Am. St. Rep. 721, 10 L.R.A. 609, 25 N. E. 1073.

[17] 1 Phillips on Ins. (3d ed.) 274, sec. 508.

[18] Hamblet v. City Ins. Co. 36 Fed. 118; Pottsville Mutual Fire Ins. Co. v. Minnequa Springs Improvement Co. 100 Pa. St. 137.

[19] Standard Oil Co. v. Triumph Ins. Co. 3 Hun (N. Y.) 591, 5 Ins. L. J. 594. See as to completing contract, Marland v. Royal Ins. Co. 71 Pa. St. 393; Union Ins. Co. v. Chipp, 93 Ill. 96 (case of notice to soliciting broker, being held notice to company).

[20] Commercial Union Assur. Co. v. State, 113 Ind. 331, 15 N. E. 518; Indiana Insurance Co. v. Hartwell, 123 Ind. 177, 24 N. E. 100.

[1] Indiana Ins. Co. v. Hartwell, 123 Ind. 177, 24 N. E. 100.

[2] Meadowcraft v. Standard Ins. Co. 61 Pa. St. 91.

placing the insurance does not make him the agent of the company.[3] In a Michigan case[4] he is held to be the agent for the insured so far as he acts "as an insurance broker."[5] Where one solicited insurance and turned over the order to a firm of "brokers," who sent a written statement of application to the defendant company, whom, however, they did not represent, and had no relations with them, they were held agents of the plaintiff and not of the company.[6] But in another case it is held that if such broker procures the policy for the insured, he is his agent, as to subsequent instalments of premiums paid to the broker, where the policy provides that in transactions relating to the insurance all persons other than the insured who procure the policy shall be the agent of the insured, and not of the insurer.[7] Substantially the same ruling, viz., that the broker is agent of the assured under similar provisions in the policy, has been made in other cases.[8] Brokers who obtain a policy for insured after cancelation of a former one procured by them are insured's agents.[9] Again, it is

[3] McGraw Wooden Ware Co. v. German Fire Ins. Co. 126 La. 32, 38 L.R.A.(N.S.) 614, 52 So. 183, 39 Ins. L. J. 1036.

On insurance broker as agent for insured, see note in 38 L.R.A.(N.S.) 614.

[4] Hartford Fire Ins. Co. v. Reynold, 36 Mich. 502.

[5] See also Lycoming Fire Ins. Co. v. Rubin, 79 Ill. 402, 403, 404, 8 Chi. Leg. News, 150.

[6] Fromherz v. Yankton Fire Ins. Co. 7 S. Dak. 187, 24 Ins. L. J. 672, 63 N. E. 748.

[7] Wilbur v. Williamsburg City Fire Ins. Co. 122 N. Y. 439, 25 N. E. 926, 34 N. Y. St. R. 48. See § 512 herein.

[8] *Alabama.*—Sellers v. Commercial Fire Ins. Co. 105 Ala. 282, 24 Ins. L. J. 354, 16 So. 798.

Connecticut.—Young v. Newark Fire Ins. Co. 59 Conn. 41, 22 Atl. 32.

Massachusetts.—Wood v. Firemen's Ins. Co. 126 Mass. 316; Abbott v. Shawmut Mutual Fire Ins. Co. 3 Allen (85 Mass.) 213.

New York.—Sargent v. National Fire Ins. Co. 86 N. Y. 626, 10 Ins. L. J. 852; Devens v. Mechanics & Traders Ins. Co. 83 N. Y. 168.

Virginia.—Mutual Assur. Soc. v. Scottish Union & National Ins. Co. 84 Va. 116, 10 Am. St. Rep. 819, 4 S. E. 178.

[9] Manhattan Fire Ins. Co. v. Harlem River Lumber & Wood Co. 56 N. Y. Supp. 186, 26 Misc. 194.

When broker is agent of insurer and not of insured and knowledge of agent is insurer's knowledge, see Lehmann v. Hartford Fire Ins. Co. 183 Mo. App. 696, 167 S. W. 1047.

Whether broker agent of insurer or insured: prepayment of premium, see § 73 herein.

When broker agent for insurer, see Western Ins. Co. v. Ashby, 53 Ind. App. 518, 102 N. E. 45; Maryland Casualty Co. v. Gaffney Mfg. Co. 93 S. Car. 406, 76 S. E. 1089 (under Civ. Code 1902, sec. 1810 [Civ. Code 1912, sec. 2712]).

When broker agent for insured, see Lynch v. Travelers' Ins. Co. 200 Fed. 193, 118 C. C. A. 379, 42 Ins. L. J. 453 (application was signed by agent as "broker, solicitor, agent or subagent"); Travelers' Ins. Co. v. Thorne, 38 L.R.A.(N.S.) 626, 180 Fed. 82, 103 C. C. A. 436, 39 Ins. L. J. 1638 (signed same as above); Commonwealth Mutual Fire Ins. Co.

held in Illinois[10] that it might be shown that the broker acted for the company in delivering the policy and collecting the premium, notwithstanding a provision that a broker procuring a policy or its renewal should be the agent of the insured in all transactions relating to the insurance. So where, at the time of making the application, the agent was acting as an insurance broker, although he had not been employed by the company prior thereto, he was held to be the agent of the insured in procuring the policy, and only the agent of the company to collect the premium and deliver the policy, and that the company would not be bound by notice to him of an encumbrance on the property or notice that it stood on leased ground.[11] It is held in New York[12] that there must be some evidence of an authorization, or some fact from which a fair inference of an authorization by the company might be deduced, to make an insurance broker the agent of the company. It is also declared that a broker who affects an insurance policy is the agent of both parties, and that an indorser might be charged by notice to him of abandonment.[13] And in Washington it is held that an insurance broker who is employed to place insurance is the agent of his employer, and not of the insurer, but where a person applies to an insurance company for a gross amount of insurance, without giving instructions to place any portion of such insurance with other companies, and receives thereafter from such company policies for the entire amount of the insurance, signed by several other companies, and indorsed with a statement that the company applied to is the agent of the companies issuing the policies, the company applied to must, for the purpose of defining the relative rights of the applicant and the insurers, be regarded as the agent of the latter, and not of the former.[14] In a Connecticut case where a broker procured insurance for another but by his fraud procured them to be canceled and other policies taken out for his financial advantage, it was held that such fraud did not change his relations with the assured as the fraud was practised upon the insurer. It was also decided that

v. Wm. Knabe & Co. Mfg. Co. 171 Mass. 265, 50 N. E. 516; Condon v. Exton-Hall Brokerage & Vessel Agency, 80 Misc. 369, 142 N. Y. Supp. 548, 42 Ins. L. J. 1351; Morris v. Home Ins. Co. 78 Misc. 417, 139 N. Y. Supp. 674, 42 Ins. L. J. 513.

[10] Newark Fire Ins. Co. v. Sammons, 110 Ill. 166.

[11] East Texas Fire Ins. Co. v. Brown, 82 Tex. 631, 18 S. W. 713.

[12] Allen v. German-American Ins. Co. 123 N. Y. 6, 33 N. Y. St. R. 216, 25 N. E. 309.

[13] Crousillat v. Ball, 3 Yeates (Pa.) 375, 4 Dall. 294, 1 L. ed. 840, 2 Am. Dec. 375.

[14] Mesterman v. Home Mutual Ins. Co. 5 Wash. 524, 34 Am. St. Rep. 877, 32 Pac. 458.

notice of cancelation to a broker employed to procure insurance was not effective after the insurance was procured as his agency then ceased, although the policies had not been delivered, and that he had no power to waive or receive said notice.[15] The court, per Thayer, J., said: "The conclusion of the court that the defendant did not cancel the policies is equally conclusive against a recovery by the plaintiff. It is found that the policies were duly procured, and that there was an attempted cancellation of them prior to the fire, but that for want of the five days' notice required by the policies the attempted cancelation was ineffective. The plaintiff's claim that upon the facts found the defendant after the insurance was procured continued to represent the plaintiff, so that his attempted cancelation of the policies was a waiver by the plaintiff of the five day's notice cannot be sustained. The general rule is that, where an insurance broker or agent is employed by a person to procure insurance for him, the broker or agent becomes his agent until the insurance is procured, so that any knowledge of facts by the agent or false statements made by him when procuring the insurance are imputable to the insured; but, after the insurance has been procured, he ceases to be the agent of the insured, and has no authority to waive or to receive notice of the cancellation of the policies in behalf of the insured.[16] The course of business between the parties may be such as to warrant the inference that the broker still has authority to receive or waive the notice. But, in the absence of facts from which such an inference may be drawn, the rule is as stated. The complaint in the present case alleges, and the court has found, that the defendant was employed to procure insurance upon the plaintiff's property to a specific amount for the specified term of one year. This he did. Under the decisions, he then ceased to be the plaintiff's agent. The case shows no course of business between the parties from which it can be inferred that the defendant still represented the plaintiff, so that he had authority to waive the notice of cancellation provided for in the policies."

It will be seen, therefore, that the decisions are far from unanimous. They, however, present two important questions for consideration, and these are: Was the broker, at the time of effecting the insurance, acting for himself, independently of any employment by the company; or was he then ostensibly or actually con-

[15] Cheshire Brass Co. v. Wilson, 86 Conn. 551, 86 Atl. 26, 42 Ins. L. J. 677.

[16] *Citing* 1 May on Ins. (4th ed.) sec. 67g; Grace v. American Central Ins. Co. 109 U. S. 278, 283, 27 L. ed. 932, 3 Sup. Ct. 207; Hermann v. Niagara Fire Ins. Co. 100 N. Y. 411, 415, 53 Am. Rep. 197, 3 N. E. 341.

nected with the company and employed by it? The determination of these facts must be of weight in arriving at a conclusion upon the question concerning whose agent he was, and this distinction was made by the court in one of the cases above noted.[17] We believe that the inquiry should, in addition to the distinction just made, resolve itself into these questions: 1. From whom did the broker's express or implied authority to do the act relied on originally proceed? 2. Was the act one which the broker was expressly authorized to do, or did it arise as a usual and necessary means to accomplish the execution of the authority conferred? 3. Was the act done independently of the original employment, and if so, for whom or at whose instance? 4. Which party could the broker hold directly responsible for his remuneration at the time the act in question was done? 5. Was there any limitation upon the broker's ostensible authority of which the person dealing with him was, or ought to have been, cognizant? 6. Was there any ratification by the ostensible principal of the claimed unauthorized act?

§ 415. Partnership as agent: joint agents.—One of a firm of insurance agents has all the powers of the firm in effecting insurances, and one partner may execute the agency for the firm.[18] Where one D. was the ostensible and commissioned agent of the company, and he and one L. were in partnership in the business of soliciting insurances, and L., with the consent of D., acted as the company's agent in procuring an application, which fact the company knew, but did not disapprove, and a joint commission had been promised to these two as the company's agents, which was delayed, but finally issued before the policy was delivered, it was held that L. was the company's agent.[19] But in case of dissolution of the partnership by death or otherwise, and the assured has knowledge thereof, he is obligated at his peril to ascertain the extent of the authority of the surviving partner or partners,[20] although a power given to several to jointly and severally sign policies in their discretion, may, after the death of a part of the number, be executed by a part of the survivors, where such appears to be the intent of the instrument.[1] Under a New York decision an authority conferred by a principal upon two or more agents is presumed to be joint, but

[17] Arff v. Starr Fire Ins. Co. 125 N. Y. 57, 21 Am. St. Rep. 721, 10 L.R.A. 609, 25 N. E. 1073.

[18] Kennebec County v. Augusta Ins. & Banking Co. 6 Gray (72 Mass.) 204.

[19] Van Schoick v. Niagara Fire Ins. Co. 68 N. Y. 434.

[20] Martine v. International Life Assur. Soc. Co. 62 Barb. (N. Y.) 181.

[1] Guthrie v. Armstrong, 1 Dowl. & R. 248.

the rule is not inflexible as it yields to indications to a contrary intent dependent upon the course of dealing, the terms of the power and the surrounding circumstances. If partners are appointed agents either member of the firm can do any act within the scope of the agency the same as in other partnerships and it would be implied from such appointment that the authority was joint and several.[2]

§ 416. Powers of adjuster.—An adjuster may occupy such a relation to the company, either by virtue of a long-continued employment and his long-continued custom in relation to the conduct of certain matters, that his acts will bind the company, as in case of his statement of the insurer's grounds for refusing to adjust a loss whereby a waiver may arise.[3] And although an adjuster may not be a general agent with power to settle losses finally, yet if he is authorized by the corporation to carry blanks to prepare proofs, the jury may be warranted in finding an agency for such purpose, and may extend the time within which such proof could be formally made, and make such time dependent upon his own convenience in preparing the same.[4] But an offer to compromise a loss for half the amount due on a policy of insurance made by a general adjuster, without authority to waive or alter any of the

[2] Unterberg v. Elder, 211 N. Y. 499, 105 N. E. 834, 44 Ins. L. J. 271.

[3] Rockford Ins. Co. v. Williams, 56 Ill. App. 338. The court said in this case: "It is contended that Dolan did not sustain such a relation to the defendant as authorized him to speak for it on that subject, so as to make a refusal to pay on the ground stated a waiver of other grounds. The evidence was that Dolan had been in the employ of the defendant for about twenty years. He was working on a salary as agent of defendants, looking after agents, visiting them, making contracts with them, looking over their accounts, adjusting losses, and making collections, etc. He had adjusted a great many losses covering a good many years. He had cards for use furnished by defendant, on which he was designated as special agent and adjuster for defendant. The method adopted to set him to work as adjuster in any case, was to send him notice of the loss on a printed blank prepared by defendant, and in this case such a notice was sent him on the usual blank, and he went to Watseka in pursuance of it, and investigated the title to the property in question. He found the mortgage which apparently rendered the policy void, and made his report to defendant of that fact, and did nothing further in the matter. It seems that he was an adjuster of defendant, and had been engaged as such in this matter. We think that his statement of defendant's ground for refusal to adjust the loss would bind defendant." Per Cartwright, J. See Anthony v. German-American Ins. Co. 48 Mo. App. 65 (case where after notice of loss by local agent adjuster was wired to give prompt attention, and shortly thereafter appeared and made effort to settle). See also Ætna Ins. Co. v. Shryer, 85 Ind. 362.

As to waiver by acts of adjuster: proofs of loss, see §§ 584–586 herein.

[4] Searle v. Dwelling-House Ins. Co. 152 Mass. 263, 25 N. E. 290.

terms of policies, is not such an exercise of authority as will bind the company, and constitute of itself a waiver of the right to forfeit the policy for breach of condition.[5] A refusal of an adjuster to settle because of his doubts as to the cause of the fire may operate to bind the company as a waiver of proofs.[6] If by the conditions of the policy the assured may be required to submit to an examination under oath, and an adjuster, claiming to represent the company, conducts such examination apparently for them, and subsequently writes to assured in relation thereto upon one of the company's letterheads, wherein he is advertised as adjuster, it may be properly found that he is the insurer's agent.[7] A professional adjuster who, by reason of his technical skill and knowledge is employed generally by any and all companies as they may need him, has a right to follow his business wherever he may deem it necessary, and the fact that he goes to another state to adjust a loss there, at the request and under the employment of an unlicensed foreign company, does not make him its agent, and subject to a penalty under a statute prescribing a penalty on agents of unlicensed foreign companies adjusting losses in the state.[8] An authority to adjust a loss occurring on the British coast cannot be presumed from the fact that the agents in Boston of a British company were authorized to issue policies, receive the premiums, and represent the principal in legal proceedings in Massachusetts.[9]

[5] Richards v. Continental Ins. Co. 83 Mich. 508, 21 Am. St. Rep. 611, 47 N. W. 350.

[6] Mix v. Royal Ins. Co. 169 Pa. St. 639, 32 Atl. 460.

[7] Enos v. St. Paul Fire & Marine Ins. Co. 4 S. Dak. 639, 46 Am. St. Rep. 796, 57 N. W. 919.

[8] French v. People, 6 Colo. App. 311, 24 Ins. L. J. 678, 40 Pac. 463. The court said in this case: "Appellant was not the agent of the Chicago company. By reason of his technical knowledge and ability in his particular department he was employed by any and all companies needing him. The calling with him was his business and profession, being a legal business. He had a right to follow it in any state where his employment called him—a right declared and guaranteed by the Constitution of the United States; and any law abridging or restricting that right would be void," per Reed, P. J., citing numerous cases on the general proposition as to legislative power and limitations, and citing on the point that appellant was not the agent of the Chicago company for any purpose within the statute; Union Mutual Life Ins. Co. v. Wilkinson, 13 Wall. (80 U. S.) 222, 20 L. ed. 617; Weed v. London & Lancashire Fire Ins. Co. 116 N. Y. 106, 22 N. E. 229; Marvin v. Life Ins. Co. 85 N. Y. 278, 283, 39 Am. Rep. 657; Pechner v. The Phenix Ins. Co. 65 N. Y. 195, 207; People v. Gilbert, 44 Hun (N. Y.) 522.

[9] Monroe v. British & Foreign Marine Ins. Co. 3 C. C. A. 280, 5 U. S. App. 179, 52 Fed. 777.

§ 416a. Fidelity bond: when not obligor's agent.—If a fidelity bond for indemnity against an employee's dishonesty is signed by the obligor and it is delivered to the employee he is not thereby constituted the obligor's agent with authority to bind the latter by a waiver of such signature. Such contracts were distinguished from those of insurance.[10]

[10] United States Fidelity & Guaranty Co. v. Ridgely, 70 Neb. 622, 97 N. W. 836.

But fidelity guaranty bonds or contracts constitute insurance, see §§ 339a, 339b herein.

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